Benvick Warehouse Limited v DCI Regional Coordinator Coast & 4 others (Civil Suit 11 of 2019) [2022] KEHC 14673 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14673 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 11 OF 2019

OA SEWE, J

OCTOBER 31, 2022

BETWEEN

BENVICK WAREHOUSE LIMITED ..... PLAINTIFF

AND

DCI REGIONAL COORDINATOR COAST ..... 1ST DEFENDANT

KENYA BUREAU OF STANDARDS ..... 2ND DEFENDANT

KENYA REVENUE AUTHORITY ..... 3RD DEFENDANT

ATTORNEY GENERAL ..... 4TH DEFENDANT

REITY COMPANY LIMITED ..... 5TH DEFENDANT

RULING

1. The notice of motion dated February 23, 2022 was filed herein by the 2nd defendant, Kenya Bureau of Standards, under article 159(2)(d) of the *Constitution of Kenya*, sections 1A, 1B and 3A of the *Civil Procedure Act*, chapter 21 of the Laws of Kenya, section 72 of the *Interpretation and General Provisions Act*, chapter 1 of the Laws of Kenya as well as order 17 rule 2 and order 51 rule 1 of the *Civil Procedure Rules*, 2010. The 2nd defendant thereby sought the following orders:

   (a) That this suit be dismissed for want of prosecution;

   (b) That the court be pleased to make such other order as the interest of justice may demand; and,

   (c) That the plaintiff bears the costs of the application.

2. The application was predicated on the grounds that more than one year has lapsed since July 15, 2020 when the court (Hon Chepkwony) delivered its ruling and directed the plaintiff to fix the matter for pre-trial conference; which the plaintiff is yet to do. It was therefore the contention of the 2nd defendant that the plaintiff has lost interest in the suit; and that its continued pendency is highly prejudicial to

the interests of the 2nd defendant. It was further the assertion of the 2nd defendant that the delay in prosecuting this suit is not only inordinate and unreasonable, but also inexcusable; and that it is in the interest of justice and fairness that the application be granted.

3. The aforementioned grounds were explicated in the supporting affidavit sworn by the Managing Director of the 2nd defendant, Lt Col (Rtd) Bernard Njiraini on February 23, 2022 to which was annexed a copy of the ruling dated July 15, 2020. The 2nd defendant basically reiterated its stance that continued pendency of the suit herein is highly prejudicial as it continues to hang on its neck like the sword of Damocles; and therefore that it is in the interest of justice and fairness that the instant application be granted.

4. A replying affidavit to the subject application, sworn by Eusilah Ngeny on behalf of the 5th defendant, was filed herein on May 26, 2022. Ms Ngeny averred that, after delivery of the ruling dated July 15, 2020 wherein it was directed that speedy investigations be undertaken by the 1st defendant, the sugar that is the subject matter of the suit was stolen from the plaintiff's warehouse, resulting in losses exceeding Kshs 31,000,000/= in circumstances that are currently under investigation by the 1st defendant. It was therefore the averment of the 5th defendant that, in the circumstances, it may be useful to hear the 5th defendant's claim against the plaintiff before dismissing the suit.

5. The application was heard on May 26, 2022; and in support thereof, Mr Kisaka relied on his written submissions dated May 18, 2022. He urged the court to find that the plaintiff has lost interest in this suit, since more than one year has elapsed since the ruling of July 15, 2020 by which the plaintiff was directed to fix the matter for pre-trial directions. Counsel relied on order 17 rule 2 of the *Civil Procedure Rules* and the case of *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v MS Potal and Others & Another [2016] eKLR* to underscore the constitutional imperative that justice shall not be delayed.

6. Mr Kisaka further submitted that the continued delay of the hearing of this suit to its logical conclusion for over 20 months now is a violation of the 2nd defendant's constitutional right to fair hearing as the delay is grossly inordinate and ought not to be tolerated. He relied on *Dickson Miriti Kamonde v Kenya Commercial Bank Ltd [2006] eKLR* and *Fran Investments Limited v G4S Security Services Limited [2015] eKLR* for the proposition that an indolent party must reckon with the consequences of his/her inaction.

7. On behalf of the 1st and 4th defendants, Ms Njau supported the application dated February 23, 2022 and prayed for the dismissal of the suit with orders as to costs. She pointed out that, although counsel for the plaintiff had indicated the intention to cease acting, it was imperative for the said advocate to attend court until released by the court. On her part, Ms Mambo for the 3rd defendant also supported the application and urged for the dismissal of the suit for want of prosecution. She submitted that, in so far as the 5th defendant is yet to file a counterclaim in this suit, the allegations of theft and loss of the sugar are extraneous to the plaintiff's claim and ought to form a separate cause of action.

8. Mr Munene, learned counsel for the 5th defendant reiterated the 5th defendant's stance that the suit is not ripe for dismissal; and that the plaintiff should be given an opportunity to put its house in order, particularly with regard to legal representation.

9. I have perused the record and noted that the plaintiff has all along been represented by M/s Bosire & Partners Advocates. There is indeed an application on the file dated June 16, 2021 filed by M/s Bosire & Partners seeking leave of the court to cease acting for the plaintiff in this matter. Since that application is yet to be prosecuted to conclusion, it goes without saying that the said firm is still on record for the

plaintiff for all intents and purposes unless and until granted leave to cease acting. This is the essence of order 9 rule 13 of the *Civil Procedure Rules*, which provides as follows in part: -

(1) Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last- known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:

Provided that, unless and until the advocate has—

(a) Served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and

(b) Procured the order to be entered in the appropriate court; and

(c) Left at the said court a certificate signed by him that the order has been duly served as aforesaid,

He shall (subject to this order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal.

(2) From and after the time when the order has been entered in the appropriate court, any document may be served on the party to whom the order relates by being filed in the appropriate court, unless and until that party either appoints another advocate or else gives such an address for service as is required of a party acting in person, and also complies with this order relating to notice of appointment of an advocate or notice of intention to act in person.

10. It was on this account that the court relied on the affidavit of service sworn by Leonard Manyonge Matwali in proof of service on the firm of Bosire & Partners on behalf of the plaintiff.

11. That said, the key issue for consideration in the instant application is whether this suit ought to be dismissed for want of prosecution. In this regard, order 17 rule 2 of the *Civil Procedure Rules* states as follows: -

1. In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.

4. The court may dismiss the suit for non-compliance with any direction given under this order.

5. A suit stands dismissed after two years where no step has been undertaken.

6. A party may apply to court after dismissal of a suit under this order.

12. It is plain from the record that the plaintiff commenced this suit on the February 27, 2019 *vide* a plaint that was accompanied by a notice of motion. The pleadings herein were amended on various dates and thus the further amended plaint was filed herein by the plaintiff dated May 24, 2019 as well as an amended notice of motion dated April 2, 2019. The amended notice of motion dated April 2, 2019 was heard and a ruling delivered on the July 15, 2020 whereby the said application was dismissed. The

court thereupon directed the plaintiff to immediately cause the matter to be mentioned before the deputy registrar for the purposes of confirming compliance with order 11 of the *Civil Procedure Rules*, with a view fixing a hearing date.

13. There is no denying that no action has been taken by the plaintiff since then towards prosecuting this suit. Hence, a period of over 1 year and 9 months had elapsed between the order dated July 15, 2020 and the March 9, 2022 when the instant application was filed. No justification having been given by the plaintiff for the delay, it follows that the same is not only inordinate, but is also unexplained.

14. Consequently, I agree entirely with what was stated by Hon Aburili, J in *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v MD Popat and Others & Another [2016] eKLR*, that:

> 11. ... Article 159 of the *Constitution* and order 17 rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice, regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita v Kyumba [1984], KLR 441* espoused that:
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> "*The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court...*"

15. In the light of the foregoing, I am convinced that there is merit in the 2nd defendant's application dated February 23, 2022. The same is hereby allowed and orders granted as hereunder:

    (a) That the suit commenced through the plaint dated February 27, 2019 and amended *vide* the further amended plaint filed on May 24, 2019 be and is hereby dismissed with costs for want of prosecution.

    (b) Costs of the application be borne by the plaintiff.

16. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF OCTOBER 2022

OLGA SEWE

JUDGE