



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 1 OF 2016

RELIABLE ELECTRICAL ENGINEERING LTD1ST PLAINTIFF

THEMIS PHARMACEUTICAL (KENYA)LTD2ND PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

1. The last time this file was substantively in court was on the 10/7/2017 when the court was to consider the selecting a test suit or consolidation of this suit with HCC NO. 67 of 2016 as well as 120 and 121 of 2016.
2. On that day although the date had been taken with the consent of all counsel on record, the defendants counsel in all the matter did not attend court and thus the task could not be undertaken it being ordered that the matter be stood over to the 26/9/2017 and that the defendants counsel Mr. Oyuke be notified.
3. There is filed in this file a mention notice by Ms Oloo and Chatur advocates with an affidavit of service sworn by one JOHN OCHIENG Ouma to the effect that the firm of JAMES OYUKE advocates was served for the mention on the 26/9/2017 in compliance with the court orders of 10/7/2017. However, there is no evidence that the file ever went to court on the date set. Thereafter there seems to have set in a long lull till the defendant filed the motion dated 19/8/2020 on the 24/8/2020 and seeking to have the suit dismissed for want of prosecution.
4. The reason advanced to ground the application is that there had been inertia for a period in excess of three months and therefore the suit had become a suitable candidate for dismissal for want of prosecution as the plaintiff had shown no interest to prosecute the suit while the defendant was subjected to prejudice. The prejudice was identified as the continued escalation of legal costs to keep an advocate on record to defend an inactive suit.
5. The application was opposed by the plaintiff by a preliminary objection dated 01/10/2020 and the Replying Affidavit of one Manoj Shah whose gist was that the application was an intrusion by an advocate not on record because all along the advocate on record for the defendant was one James Oyuke advocate and not the firm which had filed the application. On that technical basis it was urged that the application be expunged from the record for having been brought by a stranger with no locus standing and contrary to Order 9 Civil Procedure Rules.
6. On the merits, it was denied that there had been no steps taken to progress the suit it being asserted that on the date the consent was recorded, the plaintiffs filed a joint list of agreed issues then there was an approach by the defendants' counsel for an out of court settlement pursuant to which discussions the plaintiff did pay a sum of 1,000,000 to cover installments in arrears. Thereafter and pursuant to a letter by the defendants dated 22/5/2018, there was an agreed settlement pursuant to which the plaintiff paid to the defendant various sums as evidenced by cheques and deposit slips exhibited in the replying affidavit. Upon payment the plaintiff asserts it waited for the defendant to compute the balance outstanding but no such communication ever came forth and for the sake of intended settlement the plaintiff instructed its lawyers not to fix the case for hearing. The deponent then contends that he has since learnt that Mr. Oyuke advocates, who was the advocate on record and the legal manager with the defendant, left employment before the negotiations were concluded and that the departure could have been the reason for delay in concluding the negotiations. He then said that he had hitherto been beset by health issues demanding that he travels to India as evidenced by the medical documents exhibited. The deponent underscored the point that the plaintiff had not lost interest in prosecuting the matter while pointing out that even the defendant had made no attempt at listing the matter for hearing. It was urged that the application lacks merit and deserve being dismissed with costs.
7. I have had the benefit of reading and understanding the respective positions taken by both parties in the matter. I understand and appreciate the rationale of the requirements of law under order 17 Rule 2 as a derivative of the constitutional and fair administration of justice principle that justice be dispensed with expeditiously and without undue delay. However, expeditious disposal must also remain just and fair with the aim of bringing litigation to a speedy but just and fair conclusion and finality. In doing all that, parties are not bound to

have the matter heard at all costs. They are in law and under the constitution enjoined and encouraged to explore other mode of disputes resolution including negotiations.

8. In this matter it has been posited, without rebuttal, that after the 10/7/2017 there were negotiations towards settlement and indeed payments were made for 6 months as the defendant was to work on interest and rebate to be given to the plaintiff.

9. That to this court connotes substantive attempts at moving the matter towards conclusion which if I was to regard as nothing would go affront the compelling provisions of article 159 (2) c of the constitution. I do find that there was a valid reason not to fix the matter for hearing as parties were in negotiations.

10. It is also a basic requirement of our justice system that justice be administered with an eye on the need to keep costs of litigation at minimum so that access to justice is not hindered by prohibitive costs. That consideration is indeed aptly applicable to this matter when regard is given to the fact that it had been disclosed by the defendant and admitted by the plaintiff that there be other 3 related files which the court needed to, with the participation of the parties, consider whether to consolidate or select a lead file.

11. If consolidated or a lead file is established and decision thereon made to bind the other files, then valuable Judicial time would have been saved and efficiently employed. To the contrary, singling out this suit and dismiss it at this juncture would be to undo the order of 25.4.2017 which I consider to take the nature of a case management orders and thereby scatter the four files to individual destinations. That would to be an inefficient way to expend judicial time.

12. However, even if there had been evident lethargy upon the plaintiff toward prosecuting the case the current jurisprudence stands out that a court of law would be hesitant to dismiss a legal dispute before the parties are accorded ample and due opportunity to present their dispute for determination, it being said that a default to take a step should not be the only reason to shut out a party from the seat of justice. The test is whether, even where the delay is glaring, it is still possible to do justice between the parties. In **Ivita Vs Kyombo (1984) KLR 441**, the court made these remarks as the test applicant, and I hold the view that the test has stood the test of times. The court, Chesoni J said -;

“so the test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is not easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus even if 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 notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in Allen Vs McAlpine, at P 561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all-time saying, which will never wear out, however often said, that justice delayed is justice denied” (Emphasis added)

13. I am not satisfied that what has happened in the matter during the period between July 2017 and August 2020 has given rise to a situation where justice cannot be done between the parties. Instead, I am satisfied that there has been offered a plausible and satisfactory explanation for failure to fix the matter for hearing for the period in question. For those reasons, I decline to dismiss the suit so as to drive the plaintiff from the seat of justice. I am minded to let the suit get its day in court.

14. I give to the parties a period of four months to conclude their negotiations in term of the defendant’s letter dated 22/5/2018. If there shall not have been a settlement by the end of May 2021, the plaintiff will be obligated to move the court within the month of June 2021 to fix the suits for direction in terms of the court orders of 25/4/2017 recorded in HCC No. 67 of 2016.

15. I award the costs of the application to the plaintiff on the basis that in making the application for dismissal, the counsel for the defendant appears to have been in haste, did not give regard to candor on the negotiations which had taken place and even failed to file his notice of appointment as demanded by the rules.

Dated, signed and delivered this 29th day of January 2021

Patrick J.O. Otieno

Judge