



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. E586 OF 2014**

**CEVEN LIMITED.....PLAINTIFF**

**-VERSUS-**

**ERASTUS GICHUHL.....1ST DEFENDANT**

**DANIEL THUKU.....2ND DEFENDANT**

**TIDAL SPACE LIMITED.....3RD DEFENDANT**

**EXPRESS PAYMENTS LIMITED..... 4TH DEFENDANT**

**ACCESS KENYA LIMITED..... 5TH DEFENDANT**

**RULING**

1. On 16/11/2020, the Court issued a Notice to Show Cause why this suit should not be dismissed for want of prosecution. In showing cause, the plaintiff filed a Replying Affidavit by **Mr. Awa Muhundi**, advocate for the Plaintiff sworn on 18/01/2021.

2. Counsel explained that the matter was being heard before **Farah Amin J.** The good Judge was then transferred from the Commercial and Tax Division to the Family Division in 2017. Confusion arose as to the whereabouts of the court file.

3. The file was later traced to Voi where the **Amin J** had been transferred to. Indeed, on record is a letter dated 14/1/2020 by the Honourable Judge, forwarding back the court file to the Head of the Division at the time.

4. In view of the foregoing, Counsel urged that Cause had been shown and that the suit should not be dismissed for want of prosecution.

5. **Order 17 Rule 2 of the Civil Procedure Rules** provides: -

*“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.”*

6. In **Argan Wekesa Okumu vs Dima College Limited & 2 others [2015] eKLR**, the court observed: -

*“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay. As such the 3rd defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of Ivita –vs-Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”*

7. From the foregoing, it is clear that there is discretion in deciding whether or not to dismiss a suit that has remained unprosecuted for a period exceeding one year. The court must however, consider the reasons advanced for the delay or failure to prosecute the suit. The delay must be excusable, reasonable and with just cause.

8. In the present case, it was clear that the transfer of the **Amin J** greatly contributed to the delay in the prosecution of this suit. The file was not only sent to her at the Family Division, Nairobi, but it followed her to Voi High Court. The plaintiff's Counsel produced a bundle of documents to show the effort made to trace the file. That was clear evidence of the plaintiff's effort to have the suit prosecuted.

9. In an application or Notice for dismissal of a suit for want of prosecution, the court should be slow to dismiss the suit if the suit can be continued and be finalized without delay. If it is shown that the defendant will not suffer hardship and there has been no flagrant inactivity on the part of the Plaintiff, the suit should not be dismissed.

10. In **Naftali Opondo Onyango vs National Bank of Kenya Ltd [2005] eKLR**, it was held: -

*“However, in deciding whether or not to dismiss a suit under rule 6, it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.”*

11. Further, in **Utalii Transport Company Limited & 3 Others Vs NIC Bank & Another, [2014] eKLR**, the court stated: -

*“The plaintiff's inertia runs contra to the overriding objective of the court stipulated in section 1A, 1B, 3A of the CPA.*

*The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party, but the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution a view which is undergirded by the fact that dismissal of a suit without hearing the merits is a draconian act which drives the plaintiff from the judgment seat. It is, therefore, a matter of discretion by the court.*

12. In **Ivita v Kyumbu [1984] KLR 441**, Chesoni J held: -

*“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay ... Thus, even if delay is prolonged, if the court is satisfied with the plaintiff's excuse for 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.”*

13. In view of the foregoing, it is clear that even where there is delay but is properly explained, the court should lean towards saving the suit. In the present case, I am satisfied that the delay in prosecuting the suit was as a result of the internal re-organization of the court, the transfer **Amin J** from the Commercial to the Family Division and thereafter, to Voi High Court. Her letter dated 14/1/2020 says it all.

14. Accordingly, I am satisfied that the plaintiff has satisfactorily shown cause why the suit should not be dismissed for want of prosecution. The plaintiff to take steps to list the matter for trial within 60 days in default the suit to stand dismissed.

It is so ordered.

**DATED and DELIVERED at Nairobi this 28<sup>th</sup> day of January, 2021.**

**A. MABEYA, FCIArb**

**JUDGE**