



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 80 OF 2013**

**EUTYCHUS MWANGI KARANJA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**JAMES KAMAU KARUTHUI.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**DAVID MUIGAI MWANGI.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**JANE WAMBUI MICHUNGU.....4<sup>TH</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**KENYA TEA DEVELOPMENT AGENCY.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**MAKOMBOKI TEA FACTORY LIMITED.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The Application dated 26/10/2020 seeks orders that:

**This suit be dismissed for want of prosecution.**

2. The Defendant's position is set out in the grounds stated on the application and the supporting affidavit. It is stated that since the delivery of the ruling of this court on 26/11/2014 the Plaintiffs who are the Respondents herein have not taken any steps to prosecute this case. It is deposed that the Respondents have lost interest in the case while in the meantime they are enjoying interlocutory orders. It is contented that the Applicants continue to suffer legal expenses of retaining Advocates to keep vigil over this suit. It is further stated that there is a possibility of loss of memories by witnesses as well as unavailability of witnesses.

3. The application is opposed. It is stated in the replying affidavit that upon the delivery of the ruling of this court on 26/11/2014, the Defendants filed a Notice of Appeal and illegally continued deducting the Plaintiffs' money the subject of this suit then later stopped. That the Plaintiffs having been considering the possibility of suing to recover all their money and have been trying to gather all evidence including documents.

4. It is further stated that despite filing a Notice of Appeal, the Defendants never lodged their Appeal. That the Defendants have not demonstrated what prejudice they will suffer if the suit herein is not dismissed. That the Defendants have not complied with Order 11 Civil Procedure Code Rules nor shown any interest as to having this suit move forward. That if the instant application is allowed the Defendants will continue to deduct their money from the sale of their tea leaves.

5. The principles governing dismissal of a suit for want of prosecution are that; delay must be inordinate, the inordinate delay is inexcusable and the Defendant is likely to be prejudiced. These principles in the case of **Ivita v. Kyumbu [1984] KLR, 441**. He stated as follows in the said case:-

**“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 no easy task for the documents, and, or witnesses may be missing and evidence is weak due to 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 the action will**

**not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”**

6. A perusal of the court record reflects that on 26/11/2014, the court delivered a ruling allowing the Plaintiffs’ application which sought orders that the Defendant be restrained from deducting the proceeds of the Plaintiff’s tea delivery. There is no other step taken in the file since the issuance of the said orders. It appears the Plaintiffs were woken up by the filing of the instant application. Although a Notice of Appeal is said to have been filed by the Defendants, no reference is made to any stay orders having been issued by the Court of Appeal or that indeed any Appeal is pending there. The Plaintiffs were therefore at liberty to pursue their case herein to conclusion. As the prime movers of their case, the Plaintiffs cannot blame the Defendants for not taking steps to get the case moving.

7. The Plaintiffs have been enjoying injunctive orders herein for about 7 years. It would not take that long for the Plaintiffs to decide the way forward for their case or locate their documents that they require for their case. No pre-trial directions have been carried out in this case. The delay is inordinate and not explained to the satisfaction of this court. I would agree with the Defendants that the Plaintiffs’ attitude in this case reflect lack of interest in prosecuting the same. I also agree that the delay is also prejudicial to the Defendants.

8. With the foregoing, the upshot is that I allow the application with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2021**

**B.THURANIRA JADEN**

**JUDGE**