



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

COMMERCIAL CASE NO 4 OF 2019

MOSES AGUMBA.....1ST PLAINTIFF

BERNARD ONYANGO OMORE.....2ND PLAINTIFF

VERSUS

OGWEDHI PROPERTIES LIMITED.....1ST DEFENDANT

OLLERAI INVESTMENTS LIMITED.....2ND DEFENDANT

RULING

1. In its Notice of Motion dated 9th March 2021 and filed on 12th March 2021, the 2nd Defendant sought for orders for dismissal of the Plaintiffs' suit for want of prosecution.
2. Imtiaz Khan, a Director of the 2nd Defendant herein, swore an affidavit on 9th March 2021 in support of the said application.
3. The 2nd Defendant averred that the Plaintiffs instituted this suit by way of Plaint dated 7th May 2019 and filed on 9th May 2019 and that the said Plaint was accompanied by a Notice of Motion dated 7th May 2019 and filed on 9th May 2019 seeking *inter alia* injunctive orders against the Defendants, which application was dismissed with costs to them on 28th January 2019. It asserted that since 28th January 2019, the Plaintiffs had not taken any step to fix the matter for hearing.
4. It stated that its advocates M/S Coulson Harney LLP entered appearance on 3rd July 2019 and filed a Statement of Defence on 16th July 2019.
5. It was its case that the Plaintiffs were no longer interested in prosecuting this matter and as litigation must come to an end, it is in the interest of justice that this suit be dismissed for want of prosecution.
6. In opposition to the 2nd Defendant's application, the Plaintiffs filed a Replying Affidavit on the 29th June 2021. The same was sworn by their advocate at the time, Walter Amoko on 7th June 2021. He averred that he was previously a partner at Oraro & Company Advocates when he was instructed by the Plaintiffs to institute the proceedings herein and had now opened his law firm.
7. He added that he assigned the matter to a Senior Associate, Daniel Okoth and would only be involved if he required any assistance from him. He contended that he was aware that the application was dismissed on the 28th January 2019.
8. He stated that around July 2019 he gave a six (6) months' notice tendering his resignation from the said firm. He prepared handover notes for the files he was dealing with before leaving the firm rest but the present file was not included in the notes and the final review that had been contemplated was not done as the Covid-19 pandemic hit the country on 15th March 2020 disrupting all activities.
9. He stated that it was only upon service of the present application, the error was uncovered and the file forwarded to him in April 2021. He averred that the delay was not as a result of indolence and/or dilatory conduct on the part of the Plaintiffs but was occasioned by an inadvertent error on his part in failing to identify the file as a matter which he would continue handling after his resignation from Oraro & Company Advocates.
10. He asserted that the Plaintiffs were ready to set down the matter for hearing at the earliest possible date and such a time as the court may direct as it was clear from the court record that parties to the suit had filed their main pleadings.

11. The 2nd Defendant's Written Submissions were dated 21st June 2021 and were filed on 29th June 2021 while those of the Plaintiffs were dated 6th July 2021 and filed on 9th July 2021. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

12. The 2nd Defendant submitted that this court had jurisdiction to grant the orders sought for dismissal of a suit for want of prosecution under Order 17 Rule 2(1) of the Civil Procedure Rules, 2010 and added that the said power was discretionary.

13. It placed reliance on the case of **Salkas Contractors Limited and Kenya Petroleum Refineries Limited [2004] eKLR** where the court citing the case of **Allen vs Sir Alfred McAlphine & Sons Limited [1986] 1 ALL ER 543** held that an application seeking dismissal of suit for want of prosecution would succeed if an applicant demonstrated that there had been inordinate delay, the delay was inexcusable and the applicant was likely to suffer prejudice as a result of the delay. It also placed reliance on the provisions of Article 159 (2)(b) of the Constitution of Kenya, 2010 which provides that justice shall not be delayed.

14. In this regard, it relied on the case of **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M. D Popat and Others & Another [2016] eKLR** where the court held that court has discretion to dismiss a suit where no action has been taken for one year and on application of a party.

15. It added that as at the date of the application the Plaintiffs had taken no steps to prosecute the suit for over one year and therefore the circumstances exhibit that there was clearly inordinate and prolonged delay. It was categorical that the Plaintiffs did not rebut or deny their inaction in prosecuting the suit.

16. It pointed out that the cause of action arose from agreements dating back to 2014 being seven (7) years ago and it would therefore be prejudiced attesting to matters that happened years prior and experience difficulties locating witnesses who were able to accurately testify on the factual issues given the time that has passed.

17. It placed reliance on the cases of **E.T Monks & Company Limited vs Evans & 3 Others [1974] eKLR**, **Anwar Mahendra Pandya vs Alowiya Mahendra Pandya & Another [2009] eKLR** and **Karaya Mwangi vs John Gitahi Kabue [2017] eKLR** to buttress its case that this was a suitable case for the court to exercise its discretion and dismiss the Plaintiffs' case.

18. On their part the Plaintiffs, argued that according to Order 17 Rule 10 of the Civil Procedure Rules, either upon an application or on its motion, the Court may dismiss a suit where no cause was shown for failure to take a step in the suit for a period of more than a year. However, they argued that for their case, cause had been shown why the suit should not be dismissed as the delay was occasioned by an error on the part of the Advocate which ought not be visited upon a client.

19. In this regard, they placed reliance on the cases of **Belinda Murai & Others vs Amoi Wainaina [1979] eKLR** and **Philip Chemowolo & Another vs Augustine Kubede [1986] eKLR** where the courts held that blunder will continue to be made from time to time and it did not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.

20. To buttress this point, they cited the case of **Agip (Kenya) Limited vs Highlands Tyres Limited [2001] KLR** where the court held that where a reason for the delay was offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit.

21. They also placed reliance on the cases of **George Gikubu Mbutia vs Kenya Commercial Bank Limited [2015] eKLR**, **Mwangi S. Kimenyi vs Attorney General & Another [2014] eKLR** and **Ivita vs Kyumbu (1984) KLR 441** where the common holding was that the test in dismissing a suit was whether there had been inordinate delay, whether the delay was inexcusable and if applicant was likely to suffer prejudice as a result of the delay.

22. They were emphatic that the 2nd Defendant had not demonstrated that it would suffer any prejudice if the court allowed them to prosecute their case on merit. They invited the court to consider the prejudice the dismissal of the suit will occasion them as the cause of action of the suit raises substantial serious questions on a Charge, exercise of statutory power of sale, ownership, possession and disposal of interests in land by the 2nd Defendant.

23. It was their contention that the decision of whether a suit should be allowed to go to trial rather than be summarily dismissed is a matter of justice and it depends on the facts of the case. They submitted that Article 159 of the Constitution of Kenya called upon courts to enforce the principles of justice especially on substantive justice which could only be achieved through just resolution of disputes in a fair and public hearing in accordance with Article 50 (1) of the Constitution.

24. They further relied on the case of **Commercial Bank of Africa Ltd vs Martin Fares Miyesa, Milimani [2004] eKLR** and **Utalii Transport Company Limited & 3 Others vs NIC Bank Ltd & Another [2014] eKLR** where the courts were emphatic that dismissal of a suit without hearing the merits was a draconian act.

25. Both parties were agreed on the circumstances under which a suit could be dismissed for want of prosecution. These were that there had to have been inordinate delay, the delay was inexcusable and that the delay was likely to cause prejudice to a respondent. Notably, they were not agreed on whether this was a suitable case for the said dismissal.

26. 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.”

27. From the foregoing, it is clear that the court has discretion to decide 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.

28. In the present case, it was clear that the error on the part of the Plaintiffs' Advocate greatly contributed to the delay in the prosecution of this suit. The delay in prosecuting the matter herein was caused by the blunders of their advocates. As was seen in the cases of **Belinda Murai & Others vs Amoi Wainaina** (Supra) and **Philip Chemowolo & Another vs Augustine Kubede** (Supra), no party should be penalised for the blunders of its advocate. The court should be slow to dismiss a suit which can be continued and be finalised without delay. Indeed, no party should be condemned unheard by any court for the reason that dismissal of a suit is a draconian step. 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.

29. It was evident that there had been inordinate delay in the prosecution of this matter. However, the cause of the delay was plausible and thus excusable. Although the Agreements between the parties were made in 2014, the parties were still operating and the evidence appeared to have been documentary in nature. This court was thus persuaded to find and hold that the Defendants had not suffered prejudice yet. If they had, they had not demonstrated the same. Accordingly, this court was satisfied that the plaintiffs had satisfactorily showed cause why the suit should not be dismissed for want of prosecution.

DISPOSITION

30. For the foregoing reasons the upshot of this court's decision was that the 2nd Defendant's Notice of Motion dated 9th March 2021 and filed on 12th March 2021 was not merited and the same be and is hereby dismissed. Costs will be in the cause.

31. However, as the Sword of Damocles cannot continue hanging over the Defendants indefinitely, the Plaintiffs be and are hereby directed to take steps to list the matter for Pre-trial directions within sixty (60) days from the date of this Ruling failing which the suit herein will stand as automatically dismissed.

32. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF NOVEMBER 2021.

J. KAMAU

JUDGE