



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO. 1 OF 2015**

**WILLIAM NJIRAINI NGURU.....PETITIONER**

**VERSUS**

**MUNUNGA TEA FACTORY LTD.....1<sup>ST</sup> RESPONDENT**

**RETURNING OFFICER MUNUNGA TEA FACTORY...2<sup>ND</sup> RESPONDENT**

**KENYA TEA DEVELOPMENT AGENCY (MS) LTD.....3<sup>RD</sup> RESPONDENT**

**PATRICK KARIMI MUTHIL..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents vide an application dated 6/2/2019 seek orders that this petition be dismissed for want of prosecution. That costs be provided for.

2. The application is based on four grounds which can be summarized as follows:-

That the petition was filed on 21/1/2015, the respondents entered appearance on 26/1/2015 and filed affidavits in reply on 10/2/2015. This court delivered a ruling on 16/3/15 and since then the petitioner has not taken any steps to prosecute the main suit. That the petitioner is not interested in prosecuting the suit.

The application is supported by the affidavit of Margaret Nyangati.

3. The respondent who is the petitioner in this case filed a replying affidavit sworn on 28/5/2019 and he depones that the application is premature as no pre-trial directions have been done. That he had been waiting for the respondent to supply him with documents which he had requested. There has been no reply to the substantive petition by the respondent. He pleads with the court not to dismiss the petition but to order the respondent to supply him with the documents, he is ready to negotiate outside court and he be allowed to finalise the case outside court.

4. The 4<sup>th</sup> respondent did not oppose the application.

5. The application was canvassed by way of written submissions. For the applicants, it is submitted that the ruling of this court dated 16/3/15 the court held inter alia that the petitioner had failed to meet the threshold for the grant of injunctive orders and that the petitioner had erroneously invoked **The Elections Act 2011** whereas the matters fell under the jurisdiction of the companies Act. That the petition was defective ab initio. That the petitioner never took steps to amend the petition or to prosecute it.

6. The applicant relies on **Order 17 Rule 2 Civil Procedure Rules** and the case of **Ivita -v- Kyumbu (1984) KLR** where the court held that the delay was prolonged and inexcusable.

7. The applicant submits that there has been a delay of over four years which is not only prolonged but also in excusable. That they have been prejudiced by the delay and their constitutional right to fair trial has been denied.

8. The petitioner submits that the application is premature. The petitioners have never responded to the petition. He interested in the case and urges the court not to dismiss the petition. That in the alternative if the court dismisses the petition, he urges the court not to award as they failed to supply him with the documents which he required to prosecute the suit.

9. I have considered the application, the averments in the affidavits and the submissions. The issue which arise for determination is dismissal

of petition for want of prosecution.

The law on dismissal of suits for want of prosecution is under **Order 17 Rule -2- of the Civil Procedure Rules Cap 21 Law of Kenya**. It provides:-

***(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.***

This rule is buttressed under the Constitution which gives courts judicial authority. It is provided under **Article 159(1)(2)(b):-**

***(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.***

***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

***(b) justice shall not be delayed;***

It mandates the court to do justice without unnecessary delays. This court has a duty to ensure that parties who bring disputes before it prosecute this disputes timeously and without unreasonable delay. The court has jurisdiction to dismiss the suit where the party has failed to take steps to prosecute the case. The burden is on the party who has filed a case in court to take the necessary steps to prosecute the case and in application for dismissal, the party must show cause why the suit should not be dismissed. Where no cause is shown or a valid explanation given the court will dismiss the suit.

The Court of Appeal in **Rajesh Rughani –v- Fify Investments Limited & Another (2016) eKLR** address the issue of prolonged and in excusable delay and stated as follows:-

***“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 the 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 the disappearance of human memory resulting from lapse of time; the defendant must 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”.***

10. The petitioner has a duty to show sufficient or credible reason to counter the application for dismissal of the petition. This burden cannot be shifted to the respondent as it is the petitioner who has a duty to move the court step by step in prosecuting the case. If he fails on this duty the dire consequences are that the court will not hesitate to order its dismissal.

***In Fitzpatrick Case (1969) 2 All ER 657 Lord Denning held:***

***“It is the duty of the plaintiff’s adviser to get on with the case: Public policy demands that the business of the Courts should be conducted with expedition.”***

In *Nilani –v- Patel & Others (1969) EA Page 341*, Dickson J held:

***“It is only too trite to say that as in every civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim.***

***He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the court towards that end as soon as it is convenient by either applying for its dismissal or settling down the suit for hearing -----.***

***Delay in these cases is much to be deplored. It is the duty of the plaintiff’s advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died where a period of over nine years have elapsed. ----- documents may have been mislaid, lost or destroyed and the memory tends to fade.”***

11. In this case, after this court delivered a ruling on 16/3/2015, the petitioner retreated to a slumber only to be awakened by the respondents when they filed this application. This is a fact not in dispute as it is clearly borne out by the record. This is a good four years. No letters were written to the respondents to demand the documents which he alleges were not supplied nor did he move the court to compel the respondent. The delay of four years has not been explained and the delay is in-excusable.

12. The respondents (applicants) were only required to show that there was a delay of one year or more and that the delay was in excusable. In **Allan –v- Sir Alfred MC Alpine and Sons Ltd (1968) 1 All E.R** which was quoted with approval by Justice Azangalala J (as he then was) it was stated as follows:-

**“The defendant must show:**

**i. That there had been inordinate delay. What is or is not inordinate must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.**

**ii. That this inordinate delay is excusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.**

**iii. That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between themselves and the plaintiff or between each other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule the longer the delay the greater the likelihood of prejudice at trial.”**

13. The defendant has discharged this burden as the delay was not only pro-longed and inexcusable. A delay of four years is no doubt inordinate and as submitted by the applicants there is no plausible and/or reasonable explanation as to why the suit had not been prosecuted for over four years and the petitioner has not demonstrated any steps he has taken towards obtaining the said documents that were crucial to the prosecution of the case. I have stated this above.

14. There is an irresistible assumption that the petitioner realized the blunders of his case after the court gave its ruling on 16/3/2015 and he decided to abandon the case. Let me lift some excerpts from the ruling.

**“But perhaps more importantly the petition is unsupported. There is no affidavit supporting it and for good measure, M/s Thungu admitted that Elections Act was erroneously invoked and that the issue of verifying affidavit can be cured through an amendment and filing of affidavits. The petitioner however never said anything on the statements but assuming that the petition was a normal suit or that the petitioner actually wanted to file a suit on the basis of grievances pointed out, then what would automatically follow is the legal requirement to comply with order 3 Rule 2 and Order 4 Rule 2(2) of the Civil Procedure Rules which is a compulsory requirement.**

**In the absence of this, I am afraid the issue at hand now is not even whether the petition as it stands or presented stands the risk of being struck out in accordance with Order 4 Rule 1(b) of the above rules cited, but perhaps what even bedevils the petition application before me the more is the inapplicability of the Elections Act, 2011 as stated above.**

**There is a body (Dispute Resolution Committee) constituted to address such complaints and it would appear that avenues are provided to those who may be dissatisfied with the decision of the Dispute Resolution Committee which is a court of law. No evidence was presented before me that the applicant did exhaust the internal mechanism before coming to this court. The applicant did not also allude any difficulty or reservations he had or court have had on the avenue provided for by the 3<sup>rd</sup> respondent in dealing with his complaint. Courts of Law are normally reluctant to enter into the arena of disputes that arises from internal management of companies especially where the internal mechanism are proved to deal with such disputes.”**

15. The Judge was stating that the petition was incompetent for failure to comply with mandatory provisions of the Civil Procedure Rules in which case it stands the risk of being struck out. Secondly it was under the wrong provisions of the law and was a matter which had to be presented as provided under the Disputes Resolution mechanisms of the Respondents. In essence the court was stating that the suit was filed in a court without jurisdiction. The court was bold enough to tell the petitioner that the petition stands the risk of being struck out.

16. There was no appeal against that ruling. It is therefore assumed that the petitioner was satisfied with that ruling. He did not move to amend the petition nor did he seek to comply with the mandatory provisions which the Judge pointed out.

17. When considering an application of this nature, each case must be considered on its own individual circumstances. Having considered the circumstances of this case, the delay can only be attributed to the fact that the petitioner realized that the petition as filed could not see the light of the day even with amendments as he jumped the gun by filing the petition in this court instead of following the Dispute Resolution Mechanisms of the respondents. It is not about documents which were not supplied to him, it is about the petition being incompetent. What I am trying to say is that the petitioner has failed to explain the delay in prosecuting the suit or taking any steps to prosecute the case. The court would only exercise discretion in favour of the petitioner if he has valid reasons which are excusable. If there be no valid reasons the court will proceed as mandated by the law. The petitioner must show genuine cause and failure to do he must suffer the consequences.

On the issue of costs, it is trite that firstly, they follow the event and secondly they are in the discretion of the court. **Section 27 of the Civil Procedure Act** provides:-

**(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**

**(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

The petitioner opposed this application and at the end of the day he has not offered any explanation for the delay. The respondents have

strenuously prosecuted this application. There would be no justification to deny them the costs. Parties must be prepared for any eventuality and especially where they drag others to court and take eternity to prosecute the suit. I find that the respondents are entitled to the costs of the petition and the application.

**In Conclusion:-**

The petitioner failed to take any steps to prosecute the suit. The delay of four was inordinate and inexcusable in the circumstances of this case. The law provides such inaction must meet with the consequence of the dismissal of the petition.

I order that:-

- 1. The application has merits and the petition is dismissed for want of prosecution.**
- 2. I award the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> respondents the costs of this application.**
- 3. I award the costs of the petition to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> respondents.**

**Dated at Kerugoya this 30<sup>th</sup> day of January 2020.**

**L. W. GITARI**

**JUDGE**