



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO 455 OF 2010**

**CANUK HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**PRAMOD PATEL T/A PRAMOD PATEL ADVOCATE.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Defendant's Notice of Motion application dated 6<sup>th</sup> March 2019 and filed on 8<sup>th</sup> March 2019 was brought pursuant to the provisions of Articles 48, 50 (1) and 159 (2)(a), (b) and (c) of the Constitution of Kenya, 2010, Section 3A of the Civil Procedure Act, Order 17 Rule 2 (4) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It sought the following orders:-

- 1. THAT this suit herein be dismissed with costs for want of compliance with the orders made on 22<sup>nd</sup> November 2018.**
- 2. THAT the Defendant do have costs of this Application.**

2. The Defendant's Written Submissions were dated and filed on 15<sup>th</sup> April 2019 while those of the Plaintiff were dated 25<sup>th</sup> April 2019 and filed on 26<sup>th</sup> April 2019. The Ruling herein is therefore based on the said Written Submissions which the parties relied upon in their entirety.

**THE DEFENDANT'S CASE**

3. The Defendant swore an Affidavit in support of his present application on 6<sup>th</sup> March 2019.
4. He stated that the present suit was filed nine (9) years ago, on 7<sup>th</sup> October 2010, but that the Plaintiff had failed to comply with Order 11 of the Civil Procedure Rules, 2010 despite having been given ample time to do so.
5. He pointed out that in her Ruling of 15<sup>th</sup> June 2016, Thurairaja J directed the Plaintiff to comply with the said provision within thirty (30) days but it failed to do so. He said that seven (7) months later, in his Ruling of 8<sup>th</sup> March 2017, Justice Mwangi dismissed his application seeking to dismiss the suit herein on account of non-disobedience of the court directions by the Plaintiff but directed that time would not be extended to it as it had been indolent. He added that on 22<sup>nd</sup> November 2018, this court directed the Plaintiff to comply with the provisions of Order 11 of the Civil Procedure Rules but it had still not done so.
6. It was his contention that the court has excused the Plaintiff's disobedience, indolence and slovenliness enough times and that time had come for it to uphold his right in a timely and reasonable manner because the claim weighed heavily on his mind and that the sword of Damocles was hanging over his head.
7. He thus urged this court to allow his application as prayed.

**THE PLAINTIFF'S CASE**

8. In response to the said application, the Plaintiff's counsel, Alan Kosgey swore a Replying Affidavit on 8<sup>th</sup> April 2019. The same was filed on even date.
9. He stated that since the inception of the suit herein, the Plaintiff had always been ready to proceed with the hearing and determination of the suit but that the Defendant had filed multiple applications thus occasioning delays in the prosecution of its case.

10. He stated that he complied with the directions of Justice Mwango and that on 22<sup>nd</sup> November 2018, the matter was listed for hearing but that the same did not proceed because the court was not in a position to hear the same whereas it was directed that parties fix a hearing date at the Registry. He added that the Defendant had also not complied with the Pre-trial directions.

11. He pointed out that he did not fix the matter for hearing because parties commenced negotiations to settle this matter out of court but the same collapsed thus wasting precious judicial time.

12. He averred that the Plaintiff was keen in prosecuting its suit and thus urged this court to dismiss the present application with cost to permit it to continue to full hearing.

### **LEGAL ANALYSIS**

13. The Defendant relied on the provisions of Order 17 Rule 2(4) of the Civil Procedure Rules that provides as follows:-

**“The court may dismiss the suit for non-compliance with any directions given under this order.”**

14. He submitted that Articles 48, 50 (1) and 159 of the Constitution caters for justice for all and that he was entitled to justice as the suit was hanging over his head for over nine (9) years and as a practising advocate, it was a worrying situation. He was categorical that the Plaintiff was vexing him and further pointed out that he did not know whether it had executed the judgment it obtained against the defendants in **CMCC No 822 of 2010**. It relied on the case of **Fulchand V Panachanda J Shah & 6 Others [2009] eKLR** where in striking out a suit against the defendants therein, Koome JA observed that the case was like a sword of Damocles hanging over their heads.

15. On its part, the Plaintiff argued that it had complied with all the directions that had been given by Mwango J. It argued that the direction given by this court was not an order made pursuant to Order 17 Rule 2 of the Civil Procedure Rules and that failure to file pre-trial documents was not the same as lack of prosecution as envisioned under Order 17 Rule 2 of the Civil Procedure Rules. It placed reliance on the provisions of Article 159 (2) (d) of the Constitution of Kenya that the suit ought not to be dismissed for failure to file documents within a prescribed time.

16. Right at the outset, this court wished to point out that the matter did not proceed before it on 22<sup>nd</sup> November 2018 because Mr Alan Kosgey, the Plaintiff's advocate had been taken ill that morning when the matter had been listed for hearing. This court therefore took out the matter from the day's cause list and directed that the Defendant comply with the Pre-trial directions under Order 11 of the Civil Procedure Rules within thirty (30) days from that day. This meant that the last day for compliance was on 14<sup>th</sup> January 2019. This court took judicial notice that time does not run from 21<sup>st</sup> December to 13<sup>th</sup> January both days inclusive as per Order 50 Rule 4 of the Civil Procedure Rules.

17. Notably, the Plaintiff did not take any further action leading to the Defendant filing the present application. A perusal of the proceedings shows that it was not true that it was prevented from prosecuting this matter due to the numerous applications that were being filed by the Defendant herein. In the Ruling of Thurania Jaden J of 15<sup>th</sup> November 2016, she had alluded to the Plaintiff having indicated that it had not prosecuted the matter because it was awaiting the Defendant to prosecute his Appeal.

18. The time between the said Ruling and the application that was filed by the Defendant and heard by Mwango J was about seven (7) months. The time between the order of this court that was issued on 22<sup>nd</sup> November 2018 and time of filing of the present application on 8<sup>th</sup> March 2019 was about four (4) months.

19. The Plaintiff did not demonstrate what caused it not to prosecute its suit between the times when Rulings and/or orders were delivered and/or issued by different courts and the filing of the several applications by the Defendant. It did not also attach any proof in its present Replying Affidavit to show that it was negotiating the matter out of court.

20. It appeared to this court that the Plaintiff was not candid and that it was being economical with the truth. It was seeking to heap blame on any other party other than on itself.

21. It is the primary duty of a plaintiff to take steps to progress his matter since they are the ones who drag a defendant to court, a position that was held in the case of **Utalii Transport Co Ltd & 3 Others vs NIC Bank & Another [2014] eKLR**. Whereas a party should not be denied access to justice or fair hearing as is contemplated in Articles 48 and 50 of the Constitution of Kenya 2010, Article 159 (2) (b) of the Constitution of Kenya abhors delayed justice and demands that justice must be done without undue delay.

22. Appreciably, a case belongs to a plaintiff. It is his responsibility to progress his matter to ensure that the same is concluded expeditiously as is contemplated in Section 1A, 1B and 3A of the Civil Procedure Rules and Article 159 (2) (b) of the Constitution of Kenya. A plaintiff cannot move at the pace of a defendant. Indeed, a defendant is not obligated to file any witness statements or file any list and bundle of documents. In other words, a defendant can opt not to call any evidence. The onus therefore lies with a plaintiff to comply with courts' directions in respect of progressing a matter for hearing. A plaintiff who takes advantage of the failure of a defendant to comply with a court order does himself great disservice and risks his matter being dismissed for failure to prosecute his case.

23. In the case of **Agip (K) Ltd vs Highlands Tyres Ltd [2001] KLR 630**, Visram J (as he then was) stated that:-

**“Where a reason for delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay”.**

24. Notably, a suit will be dismissed if there has been inordinate and inexcusable delay in prosecution of the same and if such delay causes a defendant prejudice. The suit herein was filed in 2010. Ten (10) years have since passed. There were high chances of witnesses forgetting what exactly transpired more than ten (10) years ago. The Plaintiff had failed to comply with the court directions relating to the preparation of the suit for trial.

25. This court therefore determined that there had been inordinate delay on the Plaintiff's part in prosecuting their matter. This court also agreed with the Defendant that the delay had great potential to prejudice him. The Sword of Damocles had and has continued to hang over his head for over nine (9) years without knowing when the case against him would come to an end.

26. Having said so, this court agreed with the Plaintiff that the suit could not be dismissed under the provision of law that the Defendant had relied upon because the directions had not been given pursuant to Order 17 Rule (2) of the Civil Procedure Rules that provides as follows:-

**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.**

**3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

**4. The court may dismiss the suit for non-compliance with any direction given under this Order.**

27. It was therefore clear to this court that it could not dismiss the Plaintiff's suit on this ground as had been sought by the Defendant herein. The above notwithstanding, this court determined that its hands were not entirely tied from taking action against the Plaintiff who had been indolent in this matter.

28. Section 1A of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that:-

**1. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

**2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**

**3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.**

29. Section 1B of the Civil Procedure Act provides that:-

**1. For the purpose of furthering the overriding objective specified in [section 1A](#), the Court shall handle all matters presented before it for the purpose of attaining the following aims—**

**a. the just determination of the proceedings;**

**b. the efficient disposal of the business of the Court;**

**c. the efficient use of the available judicial and administrative resources;**

**d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and the use of suitable technology.**

30. Section 3A of the Civil Procedure Act further provides that:-

**“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”**

31. Notably, a court should only dismiss a matter where all the three (3) ingredients to wit, inordinate and inexcusable delay and prejudice to an opposing party exist. If one (1) ingredient is absent, a court should lean towards saving a suit for determination on merit. In the case herein, all the ingredients were present.

32. Accordingly, having considered the parties' Written Submissions and the case law they each relied upon, this court found and held that the delay by the Plaintiffs in prosecuting this case had been inordinate and it had the potential of prejudicing the Defendant. The delay was also inexcusable.

33. Whereas, this court determined that it could not dismiss the suit pursuant to the provisions of Order 17 Rule 2 (2) of the Civil Procedure

Rules as had been sought by the Defendant, it could not sit back like a lame duck and watch as the Plaintiff abused the court process. It had inherent jurisdiction to ensure efficient disposal of court business and timely disposal of proceedings at an affordable cost.

34. Litigation has to come to a close to prevent the abuse of court process and this was a suitable case where the court was called upon to exercise its inherent jurisdiction under Section 3A of the Civil Procedure Act to do justice in the circumstances of the case herein.

**DISPOSITION**

35. For the foregoing reasons, the upshot of this court's decision was that although the Defendant's Notice of Motion application dated 6<sup>th</sup> March 2019 and filed on 8<sup>th</sup> March 2019 not merited as he had relied on the wrong provisions of the law, this court nonetheless hereby dismisses the Plaintiff's suit against him with costs to him as it had continued to cause him grave injustice and prejudice.

36. It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this **25<sup>th</sup>** day of **February** 2020

**J. KAMAU**

**JUDGE**