



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 80 OF 2013

**THE REGISTERED TRUSTEES OF MICRO ENTERPRISES SUPPORT
PROGRAMME TRUST (MESPT)PLAINTIFF**

VERSUS

KYOME FRESH CO. LTD.....1ST DEFENDANT

PETER GATHIRWA WAWERU.....2ND DEFENDANT

PATRICK NGUGI MWAI.....3RD DEFENDANT

GRACE MUENI NYAA.....4TH DEFENDANT

RULING

1. This case was dismissed for want of prosecution on 4th October 2018. On that day in attendance there was only 2nd and 3rd defendants who were represented by learned counsel Miss Weru and the 4th defendant represented by learned counsel Mr Mwangi. Those defendants supported the dismissal of the suit for want of prosecution.
2. The plaintiff has moved this court by Notice of Motion dated 15th October 2019 seeking the reinstatement of the suit.
3. Although the plaintiff by that application contend it was not served with the notice to show cause why this suit should not be dismissed for want of prosecution now that the plaintiff is before court, seeking reinstatement of this suit, it is necessary for the plaintiff to show cause why it was inactive with suit which led to the eventual dismissal for want of prosecution.
4. The record of the court file shows that the plaint was filed on 8th March 2013. It would seem that pleadings were closed by December 2015 because on 4th December 2015 the matter was listed before a judge for Case Management Conference (CMC). The plaintiff did not attend court for the case management on that day.
5. The matter came up before court on 20th June 2016, for directions, and the plaintiff's counsel requested for a further mention dated before Justice Tuiyott. The matter was fixed before Justice Tuiyott on 22nd September 2016. On that day the learned judge granted orders sought in Notice of Motion dated 21st July 2016 for leave for 2nd and 3rd defendants to issue third party notice on Joseph Njogu Njuguna. After that date, 22nd September 2016, the plaintiff did not prosecute this suit.
6. What does the plaintiff say of the period of Lull in this matter? This can best be appreciated by reproducing the affidavit of Eliud Wachira the plaintiff's Credit and Business Development Manager as follows:

“3. On 22nd September 2016, the Court was informed that the 1st Defendant had been placed under receivership and the receiver manager was yet to issue notices to take up the Defence in the matter. With that in mind, the mater was stood over generally. Taking the receivership into account, and the fact that the plaintiff had been unsuccessful in attempts to trace the Receiver Manager, attempts at an out of court settlement were made.

4. After numerous informal discussions between the Plaintiff and the Defendants signalling willingness to settle the matter out of Court, on 1st February 2018, the plaintiff wrote to the Defendants making a proposal for an out of court settlement further

correspondence and discussions took place during the months on April and May 2018.

5. On 18th January 2019, and again on 22nd August, 2019, the plaintiff wrote further to the Defendants.”

7. The 3rd defendant through his replying affidavit deponed that after the court attendance on 22nd September 2016 the plaintiff did not fix this matter for hearing nor contact the defendants until 1st February 2018. The 3rd defendant further stated that he was unaware that the 1st defendant had been put under Receivership.

8. There has been inordinate and unexplained delay in prosecuting this case, more particularly from September 2016 up to the date of dismissal of the suit for want of prosecution on 4th October 2018. And to prove the plaintiffs disinterest in this case it took the defendants, by letter of 3rd September 2019, for the plaintiff to be informed of the dismissal of this case for want of prosecution on 4th October 2018.

9. Why should the defendants who were aware that this suit was dismissed on 4th October 2018, and perhaps adjusted their lives accordingly be saddled with the case once again. The plaintiff's conduct is not deserving in the order sought, for reinstatement of the suit. I place reliance on the case **Thika Coffee Mills Ltd v Gakuyu Farmers Co-operative Society & 2 Others (2019) eKLR** where it was stated:

“16. The delay occasioned in the prosecution of this case is similar to that which was considered in the case **BEVERAGE BOTTLERS (SA) LTD (IN LIQUIDATION) & ARVO – V- ABODE ENTERPRISES PTY LET (2009) SASC 272** a case of South Australia, which case I find persuasive, where the judges stated:

“There must come a time when the party has so conducted the litigation that it would be appropriate to shut that party out of that party's litigation even if the point is arguable. Justice delayed can be justice denied. Both the Plaintiff and the Defendant are entitled to justice.

If the Plaintiff has conducted his or her case so that the Defendant has suffered prejudice or will suffer injustice in defending the case then the Defendant is entitled to justice, and justice can only be achieved by shutting the Plaintiff out of his or her case.”

There comes a time when (the Defendant) is entitled to have some piece of mind and to regard the incident as closed.

The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.”

10. For the reasons set above the Notice of Motion dated 15th October 2019 is dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **29th** day of **April, 2020.**

MARY KASANGO

JUDGE