



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 470 OF 2011

MOHAMED HASSIM PONDOR

(suing on behalf of International Air Transport Association –IATA).....1ST PLAINTIFF/RESPONDENT

MERCANTILE INSURANCE COMPANY LIMITED.....2ND PLAINTIFF/RESPONDENT

VERSUS

FURAHA TRAVELS LIMITED.....1ST DEFENDANT/APPLICANT

ASGARALIA KASSAM.....2ND DEFENDANT/APPLICANT

MUSHTAQALI A. KASSAM.....3RD DEFENDANT/APPLICANT

RULING

1. This ruling is in respect to the application dated 3rd February 2020 wherein the Defendants/Applicants seek the dismissal of the Plaintiff's suit for want of prosecution.
2. The application is supported by the 3rd defendant's affidavit and is based on the grounds that the Respondents have since May 2016 failed, refused and/or neglected to take requisite steps to prosecute the suit and that a period of 3 years has lapsed since the matter was last in court.
3. The Respondents/Plaintiffs opposed the application through the replying affidavit of **Thomas Kimani** who avers that he wrote to court on 31st October 2018 requesting for a mention date for directions to transfer the suit to the lower court. He states that the court file could not however be traced so as to enable the plaintiffs take any further steps on it.
4. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the defendants have made out a case for the granting orders to dismiss the suit for want of prosecution.
5. The application is premised on the provisions of Order 17 Rule (2) (1) of the Civil Procedure Rules(CPR) which stipulates as follows:

“Notice to show cause why suit should not be dismissed.

2. (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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

6. In *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M. D. Popat & Others* [2016] eKLR, it was held:

*“Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita vs Kyumba* [1984] KLR 441 espoused that:*

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

7. Similarly, in *Argan Wekesa Okumu v Dima College Ltd & 2 Others* [2015] eKLR, the court stated as follows on the principles governing dismissal for want of prosecution as follows: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay.”

8. I have anxiously considered this application and that reasons advanced by the plaintiffs for their failure to list the suit for hearing. I note that the last time that the matter was before the court prior to the filing of this application was on 11th May 2016 when Justice Amin delivered a ruling.

9. It is apparent that even though the said ruling was delivered in open court in the presence of counsel for both parties, the plaintiff did not take any steps to fix the case for hearing and that the plaintiff went into a deep slumber thereafter only to be woken up by the instant application.

10. I further note that even though the plaintiffs claim that they wrote a letter to the court on 31st October 2018 seeking directions to transfer the case to the lower court, it is still apparent that the plaintiff did not follow up on the said letter or copy the letter to the defence counsel for their record.

11. My finding is that the plaintiffs’ claim that the court file went missing was not supported by any tangible proof. The plaintiffs did not place any material before this court to show that they took any action to follow up on the alleged missing file. I find that the reasons advanced by the plaintiffs for their failure to prosecute the case are not very convincing.

12. Be that as it may, this court notes that it has the discretion to determine whether or not to issue an order to dismiss the suit for want of prosecution. I note that prior to the ruling of 11th May 2016, the plaintiffs had already secured a default judgment against the defendant which judgment they were on the verge of executing before the default judgment was set aside by the said ruling.

13. I am of the view that in the circumstances of this case and plaintiffs’ apparent indolence notwithstanding, it will be in the interest of justice to grant the plaintiffs an opportunity to prosecute their case. I am of the humble view that the inconvenience caused to the defendants by the delay in the prosecution of the case can be cured by an award of costs.

14. For the above reasons, I decline to grant the orders sought in the application dated 3rd February 2020. I however grant the costs of the application to the applicants who are also awarded thrown away costs.

15. Before I pen off on this ruling, I wish to state that a perusal of the prayers sought in the plaint dated 19th October 2011 shows that the plaintiffs claim is for the payment of Kshs 419,526.40 and USD 116,978.15 which claim falls within the pecuniary jurisdiction of the lower court. Guided by the provisions of Sections 11 and 18 of the Civil Procedure Act, I hereby direct that this matter be placed before the Chief Magistrates Court at Nairobi – Milimani for hearing and determination. I direct that the matter be mentioned before the Chief Magistrates Court on 25th January 2021 for further directions.

Dated, signed and delivered via Microsoft Teams at Nairobi this 19th day of November 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Omamo for the Plaintiffs.

Miss Mbirwe for the Defendants.

Court Assistant: Sylvia