



**REUBLIC OF KENYA**

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

**CIVIL SUIT NO. 2977 OF 1993**

**KURIA N. MBUGUA & OTHERS T/A**

**GAITH CONSULTING ENGINEERS.....PLAINTIFF**

**VERSUS**

**THE CENTRAL BANK OF KENYA.....1<sup>ST</sup> DEFENDANT**

**HOWARD HUMPHREYS**

**(K) LIMITED.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

This is a very old case filed on 18<sup>th</sup> June, 1993. Regrettably, it remains undetermined to date. There is before me an application by the 2<sup>nd</sup> defendant dated 16<sup>th</sup> July, 2018 seeking the dismissal of the suit for want of prosecution. The application is dated 16<sup>th</sup> July, 2018 and brought under Order 17 Rule 2 of the Civil Procedure Rules. It is supported by an affidavit of one Robert Kelly sworn on 16<sup>th</sup> July, 2018. The plaintiff has filed a replying affidavit sworn by Kuria Njogu Mbugua on 28<sup>th</sup> August, 2018 in opposition to their application. Both counsel have filed submissions and also had an opportunity to highlight the same before the court.

I note at this stage that the advocate for the plaintiff came onto record by way of Notice of Change of Advocates filed on 17<sup>th</sup> May, 2018 while the advocate for the 2<sup>nd</sup> defendant came onto record also by way of Notice of Change of Advocate on 9<sup>th</sup> April, 2018.

The thrust of the application is that, there has been inordinate delay on the part of the plaintiff in the prosecution of this case which is inexcusable, and no explanation has been offered for that delay. In highlighting the submissions before the court, the advocate for the 2<sup>nd</sup> defendant gave a chronology of the progress of the case, resting with the present application and submitted that this is a proper case for dismissal. The 2<sup>nd</sup> defendant is now in a position of prejudice if the matter goes on for hearing.

He submitted that all the persons then employed by the 2<sup>nd</sup> defendant, and involved in the matters subject to the dispute, left employment and the 2<sup>nd</sup> defendant does not know their whereabouts nor their contacts, hence would not be in a position to present their evidence. Those witnesses prepared no affidavits that may be used in evidence and therefore the long delay has changed the circumstances, therefore there cannot be a fair hearing.

Although the advocate for the plaintiff is said to have written to the court to complain that the file was missing, the 2<sup>nd</sup> defendant submits that those letters bare no court stamp and in any case, that was six years ago and the plaintiff never did anything thereafter. No efforts were made to look for the file and no reconstruction was sought.

Although the advocate who last handled the matter on behalf of the plaintiff was appointed to the Court of Appeal, no efforts were made to engage an alternative counsel. The trial Judge was also elevated to the Court of Appeal but no efforts were made to move the case forward.

On the other hand, the plaintiff submitted that a plausible explanation had been given why the suit should not be dismissed. Counsel now on record has undertaken to prosecute the suit and in fact, prior to the filing of this application the plaintiffs' counsel wrote to the court asking for a mention date for directions and also applied for proceedings.

Prior to that, the 2<sup>nd</sup> defendant had not taken any steps and it was prompted to file this application by the action taken by the plaintiff. On the question of prejudice, the plaintiff has submitted that the 2<sup>nd</sup> defendant is a corporation which has successors. Documents have been filed and no prejudice can be caused that may not be compensated by way of costs if need be.

There is no intentional delay and no injustice will be caused to the 2<sup>nd</sup> defendant if the suit is sustained. On the contrary, it is the plaintiff who will suffer substantial injustice if the suit is dismissed.

The plaintiff further submits that, it has not been contested there was a contract between the parties and services offered to the 2<sup>nd</sup> defendant to the tune of Kshs. 13,235,195/=, and that the 2<sup>nd</sup> defendant benefited from those services. Substantial breach of contract having been pleaded, the 2<sup>nd</sup> defendant should not be allowed to benefit from the said breach.

The court has been referred to Articles 50 (1) and 159 (2) of the Constitution and several authorities by both parties. I have considered all the material presented by the parties herein. There is no doubt whatsoever that delay has been established. The question is whether or not it has been explained and therefore excusable. The authorities cited by both parties agree that is the test in addition to whether any prejudice may be occasioned to either party.

The question of prejudice like justice, must look at both sides. Whereas the 2<sup>nd</sup> defendant submits it would be prejudicial if the suit is sustained the court must also consider what prejudice may befall the plaintiff if the suit is dismissed. The effect of dismissal of any pleading, be it the plaint or defence, has the effect of driving a party from the seat of justice without a hearing. What is being sought by both parties is the exercise of discretion by the court. Each case depends on its own peculiar circumstances. – see **Mwangi S. Kimenyi vs. Attorney General & Another 2014 e KLR. Ivita vs. Kyumbu (1984) KLR 441 and Richard Nchapi Leiyugu vs. IEBC & 2 others, Unga Limited vs. Magina Limited (2014) e KLR and Deposit Protection Board vs. Panachad Jivraj Shah & Others(2001) e KLR.**

Soon after the advocate for the plaintiff came onto record and before this application was filed, he wrote to the Deputy Registrar of the court to allow his representative to take a mention date so that parties can take directions on the hearing of the suit. That letter is dated 12<sup>th</sup> July, 2018 and bears the court stamp of 20<sup>th</sup> June, 2018.

In yet another letter addressed to the Deputy Registrar and received by the Court registry on 20<sup>th</sup> July, 2018 the advocate requested for typed proceedings to enable him prepare for the next court session. There is no contest that the Judge who last heard this matter was promoted to the Court of Appeal and that is where these proceedings stopped. There is also no contest that the previous advocate for the plaintiff was also appointed as Judge of appeal.

The last entry by Justice Aganyanya on 7<sup>th</sup> July, 2007 was when he was in the Court of Appeal. The Judge made an order that the proceedings that far be typed, and the file be allocated to another Judge of the High Court to continue with the hearing.

That order was made in the absence of the advocates and although there is no indication that it was complied with, it was necessary for the advocates to follow up the progress of the typing of the proceedings. A perusal of the court file does not indicate whether or not this order was served upon the advocates.

While this application was pending for hearing, the plaintiff filed a list of documents and witness statements for use in the trial. The plaintiff's list of documents date back from the late 80's to early 90's before the suit was filed. I mention this because my assessment of the record is that, most of the evidence is documentary. This can be confirmed from the pleadings of the parties herein. The availability of the documents reduces the concern of prejudice feared by the 2<sup>nd</sup> defendant.

The plaintiff has explained to the satisfaction of the court, the reasons for delay and applying the discretion of this court, that delay is and excusable. I make that observation going by the pleadings, the nature of the cause of action and the fact that, immediately the present advocate took over, he demonstrated the plaintiff's interest to have this matter prosecuted. I see no prejudice that may be occasioned to the 2<sup>nd</sup> defendant if the suit is sustained, while prejudice may be visited upon the plaintiff if the suit is dismissed. I therefore hold that the application should be, and is hereby dismissed.

It is the plaintiff that instituted the suit and should have been at the forefront in the prosecution thereof. The plaintiff therefore shall pay the costs of this application to the 2<sup>nd</sup> defendant. Considering the age of this matter I direct that it shall be prosecuted within 120 days from the date of this ruling.

***Dated, signed and delivered at Nairobi this 10<sup>th</sup> Day of April, 2019.***

**A. MBOGHOLI MSAGHA**

**JUDGE**