



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 73 OF 2014

[PARTICULARS WITHHELD] Limited.....PLAINTIFF/RESPONDENT

-VERSUS-

EMN.....1ST DEFENDANT/APPLICANT

CHASE BANK KENYA LIMITED.....2ND DEFENDANT

RULING

1. This ruling relates to the application dated 4th June 2018 in which the defendant/applicant herein seeks orders that:

- a) The suit herein be dismissed for want of prosecution.***
- b) The costs of the application and the suit be awarded to the applicant.***

2. The application is supported by the applicant's affidavit and is premised on the grounds that there has been an inordinate delay in prosecuting the suit. It is the applicant's case that as at the time of filing the application, two years had lapsed since the last step was taken by the respondent towards prosecuting the suit.

3. At the hearing of the application, Miss Muhalya, learned counsel for the applicant, submitted that the matter meets the two tests criteria to be fulfilled before a suit can be dismissed for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules. For this argument counsel relied on the decision in the case of **Richmond Mwangi and 259 Others Vs Lee Mwachhi Kimani [2013]eKLR** wherein it was held:

“There are two tests to be satisfied under Order 17 Rule 2 of the Civil Procedure Rules for the dismissal of a suit for want of prosecution. The first one is whether the threshold of one year's delay in prosecuting a suit has been met. The second test is that the delay must be inexcusable.”

4. Counsel submitted that the first test had been fulfilled as the case has been pending since 26th April 2016 while on the second test, it was argued that the respondents' reasons for the delay were inexcusable as the reasons advanced in the replying affidavit sworn on 11th February 2019 do not hold any water since there is a clear distinction between the plaintiff/respondent and the deponent which is a duly registered concern and thus a distinct entity from its directors. For this argument, counsel cited the case of **Salomon vs Salomon[1897] AC 78** cited with approval in the case of **Joseph Kobia Ngurathi vs Kiegoi Tea Factory Company Limited & 2 Others[2016] e KLR** wherein it was held:

“The company is at law a different person altogether from the subscribersthe company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.”

5. Counsel argued that the explanation offered by the respondent, for the delay, was inexcusable as the children's case that the deponent stated that he had against the applicant was separate and distinct from the instant case, which is self-sustaining. It was the applicant's case that the continued existence of the instant case had caused her great agony, torture and anxiety thereby derailing her productivity.

Plaintiff/respondents case

6. The respondent opposed the application through the replying affidavit of one of its directors one **JS** who avers that the applicant herein is his wife and the mother of his children against whom he had another case involving their children which case took a toll on him in respect to time and finances thereby contributing to the delay in prosecuting this case.

7. He further states that the advocate, who was then handling the instant case on behalf of the respondent, went away on maternity leave thereby also contributing to the delay in prosecuting the case. He further avers that there are other shareholders of the plaintiff company who will equally suffer losses should the suit be dismissed for want of prosecution.

8. At the hearing of the application, Miss Osore, learned counsel for the respondent, submitted that the justice of the case requires that it be listed for hearing in view of the substantial sum of kshs 5 million that is the subject matter of the suit. She further submitted that the applicant has also contributed to the delay in the finalization of the case by filing the instant application in June 2018 only to serve the same on the respondent 6 months later in November 2018 during which time the respondent could not fix the suit for hearing. It was the respondent's case that the plaintiff will be greatly prejudiced by the dismissal of the suit as opposed to the defendant who had not shown that she would suffer any loss should the suit be heard on its merits.

9. On the delay caused by the respondents advocates absence for reasons that she was on maternity leave, counsel relied on the decision in the case of **Edney Adaka Ismail vs Equity Bank Limited [2014] eKLR** wherein it was held that:

“Mistakes of an advocate, even if they are blunders, should not be visited on the client when the situation can be remedied by costs.”

10. I have considered the instant application, the respondents response and the submissions of their respective counsel together with the authorities that they cited. I find that the only issue for determination is whether the defendant/applicant has made out a case for the granting of orders for dismissal of suit for want of prosecution. **Order 17 Rule 2 of the Civil Procedure Rules**, under which the instant application was brought, stipulates thus:

(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.”

11. Under the above provision, in any suit where no step has been taken by either party for one year, the court may give notice to the parties to show cause why the suit should not be dismissed. In addition to the above, any party to a suit may move the Court for dismissal in situations where no application has been made or step taken by either party for one year. In the instant case, the applicant contended that the last action taken prior to the filing of this application was on 22nd April 2016 July 2015 when draft agreed issues were adopted. It is therefore abundantly clear that for purposes of **Order 17 Rule 1(1) and (3) of the Civil Procedure Rules**, the suit is ripe for dismissal for want of prosecution as sought by the Defendants. It is also worthy to note that on 18th October 2018, Makau J. allowed a similar application dated 7th June 2018 seeking the dismissal of the plaintiff's suit against the 2nd defendant herein.

12. It is however trite that each case must be determined on its own merit and that even where delay is proved, the Court can still excuse the same if the interest of justice so dictates. Apart from satisfying the one year delay threshold, an applicant for dismissal for want of prosecution must also show that there was inordinate and inexcusable delay in the circumstances of the case. He must also satisfy the court that he will be prejudiced by the delay if the suit were to be allowed to proceed to trial and that owing to the delay, a fair trial cannot be achieved. This was the position taken by the Court of Appeal in **Ivita vs. Kyumbu [1975] eKLR** wherein it was held thus:

“ Justice is justice to both the Plaintiff and 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 however 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

13. It is not in dispute that the delay by the plaintiff in prosecuting this case has been long but the question that then arises is whether there is a reasonable justification for the delay. A perusal of the plaintiff's Replying Affidavit, reveals that its deponent, a director in the plaintiff company, has explained a series of events that led to the delay in prosecuting the case including the existence of a husband and wife relationship between the said deponent and the 1st defendant and the fact that the couple had another case before the Children's Court that derailed or distracted the deponent from pursuing this case. The plaintiff also explained that their lawyer on record went away on maternity leave thereby also contributing to the delay.

14. From the explanation offered by the Plaintiff, which is to be found in Paragraphs 4, 5, 6, 7, 8 and 9 of the Replying Affidavit, it is apparent that even though the plaintiff herein is a company, the husband and wife relationship between the plaintiff's deponent and the 1st defendant has not been disputed. The plaintiff has also expressed its readiness to prosecute the case without any further delay. In the

premises, I am satisfied that a plausible explanation has been given by the Plaintiff for the delay, which was largely uncontroverted by the Defendants. Moreover, there was no indication that such prejudice would be visited on the Defendants as would not be compensable by an award of costs. I am guided by the decision of **Visram, J.** (as he then was) in **Agip (Kenya) Limited-v-Highlands Tyres Limited [2001] KLR 630**, wherein he held that:

"Where a reason for the 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."

15. In the result, I would exercise my discretion in the Plaintiffs favour and afford them a chance to prosecute this case to conclusion for a determination on the merits but on condition that the plaintiff takes steps towards listing the matter for hearing within the next 3 months from today's date failure of which the suit shall stand dismissed for want of prosecution. The costs of this application shall abide the outcome to the main suit.

It is so ordered.

Dated, signed and delivered in open court at Nairobi this 29th day of May 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Okumu for Osore for plaintiff/respondent

Mr. Wambua for Simiyu for defendant/applicant

Court Assistant - Margaret