



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO 927 OF 1996**

**ZEDDY SYONGO.....1<sup>ST</sup> PLAINTIFF**

**GRACE SYONGO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**VITAFOAM PRODUCTS LIMITED.....DEFENDANT**

**KENYAADHESIVE PRODUCT LIMITED.....THIRD PARTY**

**RULING**

**INTRODUCTION**

1. The Defendant's Notice of Motion application dated 18 April 2018 and filed on 18<sup>th</sup> May 2018 was brought pursuant to the provisions of Order 17 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules, Article 159 (2)(d) of the Constitution and Section 3 A of the Civil Procedure Act. It sought the following orders:-

- 1. THAT the Third Party's Chamber Summons application dated 1<sup>st</sup> August 2013 be deemed as withdrawn.**
- 2. THAT this Honourable Court be pleased to dismiss the suit for want of prosecution.**
- 3. THAT the costs of this application borne by the Plaintiffs in any event.**

2. Its written submissions were dated 13<sup>th</sup> May 2019 and filed on 14<sup>th</sup> May 2019 while those of Plaintiff were dated and filed on 29<sup>th</sup> of May 2019.

3. The parties requested the court to deliver its decision based on the respective written submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE DEFENDANT'S CASE**

4. The Defendant's present application was filed on behalf of the Defendant by advocate, Alfred Deya, on 18<sup>th</sup> April 2018.

5. The Defendant stated that the Plaintiffs filed suit on 12<sup>th</sup> April 1996 but had not taken any steps to prosecute the case. It pointed out that on 17<sup>th</sup> April 2003, it filed a Notice of Motion application which had sought to have their suit dismissed for want of prosecution, which application was allowed. It averred that the Plaintiffs filed a Notice of Motion application dated June 2004 seeking to have their suit reinstated, which application was also allowed as prayed. The matter was subsequently fixed for hearing on 23<sup>rd</sup> and 24<sup>th</sup> March 2009.

6. It stated that the matter did not proceed on the two (2) days as the Plaintiffs' advocates, M/S Oraro & Rachier Advocates filed an application to cease acting for them. The firm of M/S S. K. Amani & Associates subsequently took over conduct of the matter on their behalf.

7. It was its averment that the new firm advocates representing the Plaintiffs took out the matter from the cause list on the ground that the 2<sup>nd</sup> Plaintiff was out of the country. It stated that its advocates invited those of the Plaintiffs to fix hearing dates on several occasions but every time the matter was fixed for hearing, the same never took off as it was taken out from the cause list for different reasons.

8. It pointed out that since 10<sup>th</sup> July 2012 when the matter was taken out from the cause list and the Plaintiffs directed to fix a hearing date at the court registry, they had failed to do so. In addition, it stated that the Third Party's advocates had failed to prosecute its application seeking leave to cease acting on behalf of the Third Party herein.

9. It was emphatic that since the Plaintiffs had failed to take any steps or actions to prosecute, it was evident that they had lost interest in the case. It was also its contention that the Plaintiffs had abused the court process by failing to expeditiously have the suit heard and determined by the court as was ordered on 26<sup>th</sup> September 2008. It stated that the pendency of the suit was causing it a lot of anxiety making it incur unnecessary costs and prejudicing it.

10. It therefore urged this court to dismiss the Plaintiffs' suit against its costs.

### **THE PLAINTIFF'S CASE**

11. In response to the Plaintiffs' application, on 27<sup>th</sup> June 2018, their advocate, Amani K. Sheila, swore a Replying Affidavit on their behalf. It was filed on even date.

12. They contended that they had not managed to fix the matter for hearing as the Third Party's application touching on the issues of representation was pending hearing and determination. It was their assertion that they were ready and willing to have their suit heard and determined. They stated that they would be prejudiced if the Defendant's application was allowed.

13. They asked this court to dismiss the Defendant's present application as it lacked merit.

### **LEGAL ANALYSIS**

14. The Defendant submitted that there was inordinate delay by the Plaintiffs in prosecution of their case. It stated that the Article 159 (2)(b) of Constitution of Kenya stipulates that justice shall not be delayed. It also pointed out that Section 3A of the Civil Procedure Act gives courts unlimited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. It also pointed out that Sections 1A and 1B of the Civil Procedure Act empowers the court to administer justice in a just, fair and expeditious manner. In this regard, it relied on the case of **ET monks & Co Ltd vs Evans [1985] 584** where the court held that it was clear that public policy interests demand that the business of the court be conducted with expedition.

15. It was categorical that the Plaintiffs' advocate had not given a plausible explanation why the suit had not been prosecuted. It argued that a diligent plaintiff would take all steps to fix the case for hearing so as not to be removed from the seat of justice. It placed reliance on the case of **Utalii Transport Company & 3 others vs NIC Bank & Another [2014] eKLR** where it was held that it was the primary duty of a plaintiff to take steps to progress his case since he is the one who dragged the defendant to court.

16. To support its argument that it was prejudiced and that it would not have a fair hearing because of challenges of memory loss of business due to the inordinate delay in prosecution of the case, it relied on the case of **Abdul & Another vs Home and Overseas Insurance Company Ltd [1971] EA 564 (CAK)** where the suit was dismissed for want of prosecution.

17. It submitted that whereas the act of dismissing an application is a draconian measure and should be exercised cautiously as it drives away party from the seat of justice, such party must prosecute its case without undue delay because delay occasions injustice to the other party to the dispute. It asserted that delay defeats equity, which was the position in the case herein.

18. On their part, the Plaintiffs asked this court not to drive them from the seat of justice. It was their contention that they would suffer prejudice because their health was affected by the Defendant. It was their argument that the delay in the prosecution of the case was caused by unforeseen circumstances and added that while parties could file interlocutory applications, the same should not be for abusing the court process.

19. They placed reliance on the cases of **John Harun Mwau vs Standard Limited & 2 Others [2017] eKLR** and **Eurobank Limited vs Shah Munge & Partners [2016] eKLR** where the holdings were that it was better for a matter not to be dismissed and heard on merit even where there had been intolerable delay because that delay could be compensated by way of costs.

20. Notably, the suit herein was filed in 1996. There has been inordinate delay on the part of the Plaintiffs in having the matter heard and determined. There was no plausible explanation why they did not fix the Third Party's application seeking leave to cease acting for the Third Party to pave way for the hearing and determination of their case. There was no incentive for other parties in the suit herein to proceed expeditiously if the owners of the case were indolent.

21. 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.

22. This court agreed with the Defendant that the delay herein had the potential of greatly prejudicing it. The Sword of Damocles had continued to hang over their heads for over twenty three (23) years without them knowing when the case against them would come to an end.

23. If the number of invitations by the Defendant were anything to go by, it did appear to this court that it was the Defendant who was driving the case as the Plaintiffs watched at the sidelines. On several occasions, they were not ready to proceed with their case. They also took no step and /or action to fix the Third party's application for hearing yet there was nothing that prevented them from doing so as to get the said application out of the way to pave way for them to fix the matter for hearing. The delay in the prosecution of the case herein was inordinate and inexcusable.

24. The Defendant did not, however, indicate to this court whether its witnesses were still available. That notwithstanding, this was one of the cases where the court took judicial notice that witnesses' memory tends to fade with time. In this case, that would be detrimental to the Defendant.

25. Accordingly, having considered the affidavit evidence and the parties respective written submissions, this court came to the firm conclusion that whereas dismissal of suit for want of prosecution is a draconian step that should be taken as a last resort, this was a clear case of parties who had lost interest in their matter.

26. Indeed, weighing the Plaintiff's fundamental right to have its dispute heard and determined in a court as stipulated in Article 50(1) of the Constitution of Kenya, 2010 and the equally important fundamental right of the Defendant that justice shall not be delayed as provided in Article 159(2)(b) of the Constitution of Kenya, this court was of the considered view that the Defendant's right would have to triumph over that of the Plaintiffs. It had to be set free from the shackles of this suit herein.

#### **DISPOSITION**

27. For the foregoing reasons, the upshot of this court's decision was that the Defendant's Notice of Motion application dated 18<sup>th</sup> April 2018 and filed on 18<sup>th</sup> May 2018 was merited and the same is hereby allowed as prayed.

28. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of November 2019**

**J. KAMAU**

**JUDGE**