



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 300 OF 2011

JOHN KAMAU KIARIE

STEPHEN NJOROGE MARIGA

WILSON NJENGA MUNENE (Suing as representatives of the shareholders of KENYA

TAXI CAB OWNERS INVESTMENT CO. LTD.....PLAINTIFFS

VERSUS

KENYA TAXI CAB OWNERS INVESTMENTS CO. LIMITED

PETER MBURU WAWERU

PETER KURIA WANJAMA

LAWRENCE MAINA KIMANI (sued as officials of

KENYA TAXI CAB ASSOCIATION)..... DEFENDANTS

RULING

This court served the parties herein with a Notice to Show Cause why the Suit should not be dismissed for want of prosecution. The case was therefore listed for dismissal on 24th March, 2017 when the Court gave directions for the parties to file Affidavits in response to the Notice. The Plaintiffs filed a Replying Affidavit dated 1st December, 2017 sworn by **WILSON NJENGA MUNENE**, one of the Plaintiffs, whereas the Defendants filed a Replying Affidavit dated 19th January, 2018 and sworn by **LAWRENCE MAINA KIMANI**, one of the Defendants.

The Plaintiffs aver that the last time the matter was in court was on 30th March, 2013 for a mention to confirm compliance by the Defendants with the Court's ruling dated 7th June, 2012 which required the Defendants to place before the Court the accounts of Kenya Taxi Cab Owners Investment Co. Ltd. The defendants had not complied. The plaintiffs further deponed that the defendants counsel wrote a letter dated 3rd July, 2013 to their Counsel proposing to settle the matter out of Court. Thereafter the parties exchanged several letters which culminated into some meetings between the Advocates with a view of settling the matter out of court. The negotiations hit a deadlock after which the Plaintiff shareholders requisitioned the Defendants on 15th February, 2017 to call for a Special Annual General Meeting to deliberate on the grievances of the shareholders. The Defendants did not call for the meeting and the Plaintiffs took it upon themselves to call for the meeting on 21st April, 2017. The Plaintiffs were however not able to file the resolutions as it was communicated to them by the Registrar of Companies that the company had not complied with statutory requirements having failed to file the annual returns and audited accounts since incorporation.

The Plaintiffs urged that they be allowed to proceed with the suit as they are desirous of prosecuting the same including enforcing the court order of 7th June, 2012.

The Defendants averred that several attempts were made to have the matter settled out of court but there was no progress and the Plaintiffs did not take any step to prosecute the suit.

I have considered the facts deponed to by the Plaintiffs and the Defendants in their Replying Affidavits.

Order 17 Rule 2 of the Civil Procedure Rules, 2010 Provides that

“(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.”

The last time the matter was in court was on 30th May, 2013 and a period of more than one year had lapsed by the time the matter was listed for dismissal. Among the reasons advanced by the Plaintiffs for the delay are that the parties were still negotiating which claim the Defendants denied. I have perused the correspondences annexed to the Plaintiffs’ Affidavit and it is true that the Parties were negotiating. There are letters exchanged between the two Counsels to that effect. In fact a draft consent was sent to the Defendants’ Counsel.

The test for dismissal of a suit for want of prosecution is stated in the case of **Ivita -v- Kyumba (1984) KLR 441**. The test was expressed as follows:

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the 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 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.”

Justice is justice to both the Plaintiff and the Defendant. I find that the test in the case of **Ivita (supra)** as most suitable in this application. On whether the delay was prolonged and inexcusable and whether justice can still be done despite the delay it is my view that the delay has been explained. The Defendants have not illustrated to this court what prejudice they are likely to suffer if the suit is not dismissed. It is clear from the Plaintiffs Affidavits that the parties were deliberating on the same and it is the Defendants who initiated the process of negotiation via their letter dated 3rd July, 2013.

Therefore, the orders of this court are that the Plaintiffs do fix the suit for hearing within the next 3 months from the date of this Ruling failing which it shall stand dismissed.

Dated, Signed and Delivered at Nairobi this 19th Day of March, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*