



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 852 OF 2001

TRUST BANK LIMITED..... PLAINTIFF

- VERSUS -

FIRST AMERICAN BANK LTD.....1ST DEFENDANT

AJAY SHAH.....2ND DEFENDANT

PRAFUL SHAH.....3RD DEFENDANT

RULING

1. This is a ruling on the 1st defendants application for dismissal of this suit for want of prosecution. The application is dated **22nd June 2017**.
2. When the application came up for hearing before me on **8th May 2018**, even though the plaintiff had been served with that application and a hearing notice was also served for that day, the plaintiff failed to attend the hearing and had not filed any opposition to the application.
3. The record of the court file is clear that there is indeed inordinate delay on the part of the plaintiff in the conclusion of this matter. This case was first scheduled for hearing on **14th March 2006**. The plaintiff's learned counsel on that day sought and obtained an adjournment on the basis that he was engaged in another matter before a different court.
4. The case was next fixed for hearing on **5th February, 2007**. Again at the request of the plaintiff the case was adjourned.
5. On **30th June 2010**, the plaintiff adjourned this case on the basis that it needed two clear days for the hearing. The case was adjourned to **9th** and **11th November 2010**. The court on its own motion adjourned the case when it came up for hearing on **9th November, 2010**.
6. On **13th April 2011** the trial commenced when the court received the evidence of the plaintiff's witness no. 1. The case did not proceed any further and when it came up for hearing again, on **11th February, 2014**, **18th September 2014** and **9th March 2015**, the plaintiff sought and obtained an adjournment.
7. After that adjournment no further hearing dates were taken by the plaintiff. As stated before, the plaintiff failed to file any response to the 1st defendants application for dismissal of this suit. It therefore follows that that application was unopposed.
8. **Order 17 Rule 2(3) of the Civil Procedure Rules** provides that any party to a suit may apply for dismissal of a suit in a case where no application has been made or any step taken for one year. In this case, this suit was filed on **8th June 2001**. Pleadings closed on or about **15th August 2001**.
9. It is important to note that this is not the first time for the plaintiff to face an application for dismissal of this suit for want of prosecution. The 2nd defendant by a notice of motion dated **22nd December 2004** sought the dismissal of this suit for want of prosecution. That application was premised on the ground that the plaintiff had failed to prosecute the case. By a ruling dated **1st June 2005**, the court declined to dismiss the suit. The following is part of what was stated in that ruling:

“a court of justice will not lightly shut out a litigant from the seat of judgment. It will endeavour to determine all the issues in controversy upon a proper hearing of the action. The circumstances of this case disclosed by the main pleadings, the supporting and replying affidavits and the submissions of the learned counsels appearing militate against granting the drastic order sought. I will refuse the application.”

10. Even though the plaintiff by that ruling was given a second chance, it has inordinately delayed the conclusion of this case. The record is clear that it is the plaintiff, time and time again, who has applied for the adjournment of this case when it has come for hearing. The delay in prosecuting this case is inexcusable. The plaintiff is guilty of laches.

11. Justice Mabeya had occasioned to consider a similar application in the case **Argan Wekesa Okumu Vs Dima College Limited & 2 Others [2015]eKLR**. The learned judge had this to say:

“This court is enjoined by Article 159 2(c) of the Constitution of Kenya to determine disputes and render justice without undue delay. Failure to do so will infringe upon the legitimate expectation of a Defendant that the dispute against it will be determined timeously. This is the view taken by Ochieng J in Venture Capital and Credit Ltd Vs Consolidated Bank of Kenya Ltd (2006) eKLR when the quoting from the case of Allen Vs Sir Alfred McAlpine (1968)1 All ER 543 at page 546 as follows:

“Lord Denning MR captured, in the following words, the fundamental reason why courts do dismiss suits for want of prosecution:

“The delay of justice is a denial of justice.....To no one will we deny or delay right or justice. Over the years men have protested at the law’s delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3. Sc.1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, C.1). To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it. It is the only effective sanction that they contain”.

12. In the end because the plaintiff since **June 2001**, when it filed this suit, has failed to take all necessary steps to achieve expeditious disposal of this case, there is but only one order that should be granted. Accordingly the plaintiff suit is hereby dismissed for want of prosecution with the costs of the suits and of the **Notice of Motion** dated **22nd June 2017** being hereby granted to all the defendants. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of May, 2018.

MARY N. KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant

.....for the 3rd Defendant