



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL CASE NO. 29 OF 2018

(FORMERLY ELC CASE NUMBER 157 OF 2016)

SURJIT SINGH PANDHAL.....1ST PLAINTIFF/RESPONDENT

MALKIT SINGH PANDHAL.....2ND PLAINTIFF/RESPONDENT

VERSUS

BANK OF BARODA KENYA LIMITED.....DEFENDANT/APPLICANT

RULING

Background

1. This case was commenced by way of a plaint filed on 1st July, 2016,
- 2 Simultaneously with the plaint, the plaintiffs/respondents filed an application seeking injunctive orders to restrain the defendant/applicant from dealing with land parcel title number KISUMU/MUNICIPALITY 7/173 in any manner adverse to the plaintiffs/respondents
3. The application was heard and was dismissed by an order dated 12th April, 2017.

Application

4. By a notice of motion dated 29.6.18 brought under Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 7 Rule 2910 and (3) of the Civil Procedure Rules, the defendant/applicant prays for orders that

a. *The plaintiffs'/respondents' case be dismissed for want of prosecution with costs to the defendant*

b. *Costs of this application be provided for*

5. The application is based on the grounds among others that the plaintiffs'/respondents' have not taken any steps to prosecute the main suit since 12.4.17 when their application for injunction was dismissed.
6. The application is supported by an affidavit sworn by Jude Ragot, advocate for the defendant/applicant sworn on 29th June, 2018 in which he reiterates the grounds on the face of the application.
7. The application is opposed on the basis of a replying affidavit sworn by the 2nd plaintiff/respondent on 31.7.18. He avers they did not get in touch with their advocate because he fell sick and the 1st plaintiff/respondent travelled to India and that they are desirous of prosecuting the case to its logical conclusion.
8. I have considered the notice of motion in the light of the affidavits on record. It is not disputed that this matter was last in court on 12.4.17 when the plaintiffs'/respondents' application for injunction was dismissed. This application was brought slightly over 14 months from the date of dismissal.

9. The legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of Civil Suits and can be found in Article 159(2) (b) of the Constitution that justice shall not be delayed. Equally, Section 3A of the Civil Procedure Act gives the courts unlimited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. Under Section 63 (e) of the same Civil Procedure Act, which is the statutory basis for all interlocutory applications, courts are assigned the

unfettered discretion where it is so prescribed, in order to salvage justice from defeat, to make such interlocutory orders as appear to the court to be just and convenient.

10. The courts are also empowered by Sections 1A and 1B of the Civil Procedure Act to ensure that the overriding objectives of the Civil Procedure Act and Rules are attained in the administration of justice in a just, fair and expeditious manner.

11. Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity.

12. The test to be applied when considering an application for dismissal of a suit for want of prosecution can be found in the case of **Ivita V Kyumba [1984] KLR 441** where the court held that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

13. In **Naftali Onyango v National Bank of Kenya [2005] eKLR**, the court reiterated the burden of proof a defendant seeking for dismissal of suit for want of prosecution must meet. Citing Salmon L.J. in **Allan V Sir Alfred MC Alphine and sons Ltd [1968] 1 ALL ER 543**, F. Azangalala J (as he then was) stated as follows: -

“The defendant must show:

i. That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.

ii. That this inordinate delay is inexcusable. As a rule, until a credible excuse is made out the natural inference would be that it is inexcusable.

iii. That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice to the trial of issues between themselves and the plaintiff or between each of other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at trial.”

14. Other than his word that he fell sick and the 1st plaintiff/respondent travelled to India, the 2nd plaintiff/respondent did not annex any medical report or travel documents to support his allegation that he was incapacitated by illness or that his 1st plaintiff/respondent had travelled out of the court’s jurisdiction.

15. The plaintiffs have not given any reasonable excuse for their inaction, to the satisfaction of the court. The court is aware that the act of dismissing a suit is a draconian measure which should be exercised cautiously as it drives the party away from the judgment seat of justice. Nonetheless the court is bound to do justice to both parties without undue delay, since delay occasions injustice to either party to the dispute and delay defeats equity.

16. The defendants’/respondents’ have not been vigilant or at all to have his suit heard and determined. The court shall therefore not hesitate to have the suit dismissed because the continued delay no doubt infringes on the defendants’ rights and legitimate expectations that disputes against them should be resolved expeditiously.

DISPOSITION

17. Consequently, the notice of motion dated 29.6.18 is considered and found to have merit and it is allowed in the following terms: -

a. The plaintiffs’/respondents’ case is dismissed for want of prosecution with costs to the defendant

b. Costs of this application shall be borne by the plaintiffs’/respondents.

DATED AND DATED IN KISUMU THIS 25th DAY OF October, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For plaintiffs'/respondents' - N/A

For Defendant/Applicant - Mr Ragot