

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 426 OF 2015

In the matter of Articles 3, 19, 20, 21, 22 and 23 of the Constitution of Kenya

and

In the matter of Alleged contravention of Fundamental Rights and Freedoms under Articles 2,3,19, 20, 40 and 50 (1) of the Constitution of Kenya

and

In the matter of Blueshield Insurance Co. Limited (Under Statutory Management)

and

In the matter of th Insurance (Motor Vehicle Third Party Risks) Act Cap 405, Laws of Kenya

and

In the matter of the Insurance Act Cap 487, Laws of Kenya

and

In the matter of the companies Act

BETWEEN

MASH BUS EAST AFRICA LIMITED.....1ST PETITIONER

MASH BUS SERVICES.....2ND PETITIONER

VERSUS

INSURANCE REGULATORY AUTHORITY.....1ST RESPONDENT

BLUESHIELD INSURANCE COMPANY

(UNDER STATUTORY MANAGEMENT).....2ND RESPONDENT

SHAREHOLDERS, BLUESHIELD INSURANCE COMPANY.....3RD RESPONDENT

POLICYHOLDERS COMPENSATION FUND.....4TH RESPONDENT

RULING

1. Before me for determination is an application dated 23rd January 2017 filed by the second and fourth Respondents herein (hereinafter referred to as the applicants) seeking orders that that this petition be dismissed for want of prosecution on grounds that the petitioners have failed to set the petition for hearing since 12th October 2014.

2. In a Replying affidavit filed on 30th March 2017 sworn by a director of the first Respondent, the first Respondent avers that the petitioner is interested in prosecuting the petition and attributes the delay in fixing the case for hearing to the petitioners hopes on a revival plan in respect of the second Respondent which has not taken place and avers that the petitioner will suffer heavy financial loss if they are denied the opportunity to prosecute this case and that the petitioner will suffer prejudice since it had paid premiums and held valid insurance covers.

Applicants' Advocates submissions

3. Counsel for the applicants submitted that there has been inordinate delay^[1] in prosecuting this case, and argued that the delay is intentional and therefore inexcusable, and that the delay is an abuse of court process and that the delay will prejudice a fair trial; that the delay has not been explained and that equity does not aid the indolent.

Respondents Advocates submissions

4. Counsel for the petitioners/Respondents submitted that the reasons for the delay is premised on the hope for the revival plan for the second Respondent, that the delay does not constitute an abuse of court process, that the delay in this case is one year and four months and has not given rise to substantial risk to a fair trial, and insisted that the petitioner will suffer prejudice if the suit is dismissed and urged the court to exercise its discretion in favour of the petitioners.

Factual background of the petition

5. In order to fully appreciate the application under consideration, I find it appropriate to examine here below the facts of this petition.

6. The first petitioner avers that its sister company, the second petitioner was duly licensed to carry on business of Commercial Public Service transport in Kenya. Pursuant to the provisions of the Insurance (Motor Vehicle Third Party Risk) Act^[2] the second petitioner was required to have in force, and did have in force numerous insurance policies covering third party risk which were issued under the Insurance Act^[3] and that it paid all the premiums to the second Respondent as and when it fell due ensuring continuity of the cover against the risks covered.

7. The first petitioner avers that upon being incorporated in 2011, it acquired all the buses owned by the sister company which was on the brink of collapse courtesy of many claims filed against it because the second Respondent now under statutory management was not in a position to settle the numerous claims against the second petitioner.

8. The first petitioner further avers that sometimes in 2004, motor vehicle registration number KAR 780 B was involved in a accident along the Nairobi/Mombasa Highway. Arising from the said accident, a civil suit^[4] was filed in which judgement was entered on 18th December 2010 against the second petitioner and pursuant to the decree, motor vehicle KAW 020 B was attached by auctioneers and was scheduled for auction on 6th October 2015.

9. Subsequently, on 28th October 2011, the second Respondent was placed under statutory Management in NBI HCC No 465 of 2011 and a moratorium declared according the second Respondent a temporary reprieve. However, the decree holder in the above case^[5] obtained a stay on grounds that it was not either a creditor nor a policy holder paving way for execution to proceed in the said case. Numerous other cases listed in paragraph 16 (i) to (x) of the petition arose from the same accident.

10. The petitioners averred that they are apprehensive that they face imminent execution in the said suits and others which they claim is a violation of their fundamental rights under the constitution, which defeats public interest in protecting investors, sanctity of property rights, economic rights of policy holders and the country's interest of attracting investors.

11. Further, the petitioners aver that owing to threats of execution in judgements rendered by courts of competent jurisdiction, the petitioners aver that they are unable to enjoy the benefits under the provisions of section 10 (2) of the Insurance (Motor Vehicles Third Party Risks) Act[6] in view of the status of the second Respondent.

12. Further, the petitioners aver that the third Respondent is setting up a revival plan[7] in respect of the second Respondent, hence to preserve the first petitioners property, all processes initiated by third parties ought to be stayed pending the aforesaid revival plan.

13. The first petitioner avers that its constitutional rights to liberty and peaceful ownership of its property have been violated by third parties seeking to execute court processes in which Blueshield Insurance Company (Under Statutory Management) had assumed responsibility under section 10 (2) of the Insurance (Motor Vehicles Third Party Risks Act.[8]

14. The second to fourth Respondents filed a response on 25th January 2016 describing the petition as devoid of merits, misconceived, baseless, unfounded and called for its dismissal, and further that the petition does not raise constitutional issues.[9]

15. They also averred that the Respondents have not breached any constitutional rights of the petitioners and that the challenged attachment is a legal process undertaken lawfully, and that the attachment which triggered this petition arose from a lawful court decree. It is also averred that similar issues were raised and dismissed in Civil Appeal No 123 of 2007 by Mbogholi J. hence the issue before the court is *res judicata*.

Determination of the application

16. As stated above, the petitioners did not take steps to prosecute this petition for one year and four months, hence the application now under consideration. An inordinate or unreasonable delay in prosecuting any action may constitute an abuse of court process and, in certain narrowly defined circumstances, may justify dismissal of the action.[10]

17. Guidance can be obtained from the decision in the South African case of *Cassimjee vs Minister of Finance*[11] the court held that:-

*'There are no hard-and-fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognised. **First**, there should be a delay in the prosecution of the action; **second**, the delay must be inexcusable; and, **third**, the defendant must be seriously prejudiced thereby. Ultimately the inquiry will involve a close and careful examination of all the relevant circumstances, including the period of the delay, the reasons therefore and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendant's inactivity and failure to avail itself of remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial.'*

18. Regarding the laxity on the part of the Respondent, I find it fit to recall the words expressed by the court in *Utalii Transporters Co. Ltd & Others vs NIC Bank & Another*[12] where it was stated *inter alia* that:-

"the first intuitive feeling one gets is that the offending proceeding should quickly be removed out

of the way of the innocent party. But, the law prohibits a court from such impulsive inclination, and requires it to make further inquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgement seat.

It is, therefore, a matter of discretion by the court.....Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by the court in an application for dismissal of suit for want of prosecution.

These principles are:-

- a. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;*
- b. Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- c. whether the delay is an abuse of the court process;*
- d. whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;*
- e. what prejudice will the dismissal occasion the plaintiff?;*
- f. whether the plaintiff has offered a reasonable explanation for the delay;*
- g. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?*

19. It is the primary duty of the plaintiff/petitioner to take steps to move his case forward. I am persuaded by the principles laid down in the case of *Utalii Transporters Co. Ltd & Others vs NIC Bank & Another*^[13] cited above. True, there has been a delay of one year and four months. The explanation offered by the petitioners is that they were waiting for a revival plan for the second Respondent which failed to take off.

20. Court rules are designed to ensure a fair hearing and should thus be construed in such a manner as to advance, and not reduce, the scope of the right to a fair trial entrenched in the Bill of Rights.^[14] The purpose of these rules is to promote access to the courts and to ensure that the right to have disputes that can be resolved by the application of law by a fair public hearing before a court is given effect to. These rules are to be applied so as to facilitate the expeditious handling of disputes and the minimization of costs involved.^[15]

21. To my mind, considering the facts of this case as enumerated above, and the reasons offered for the delay is not in my view sufficient to warrant this court excuse the petitioners. There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth.^[16]

22. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable.^[17] Caution is, however, advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but to apply it in the sense of excessive as compared to normality.^[18] Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.^[19]

23. In *Allen vs Alfred Mcalphine & Sons*^[20] a delay of fourteen (14) years was considered inordinate and inexcusable. In the case of *Abdulraham Adam Hassan vs National Bank of Kenya Ltd*,^[21] an

unexplained delay of three months was found to be unreasonable. Similarly, in the case of *Kenfreight (E.A.) Limited vs Star East Africa Company Limited*[22] **Onyango Otieno J** (as he then was) found a delay of three months to be unreasonable and disallowed an application for review.

24. By way of comparison, in *AGIP (Kenya) Limited vs Highlands Tyres Limited*[23] and *Sagoo vs Bhari*,[24] a delay of eight (8) months and five (5) months respectively was considered not to be inordinate. Also **NBI HC ELC CASE NO 2058 OF 2007** where delay of about 1 ½ years was considered not to be inordinate. At this point, it is important to mention that each case must depend on its fact and circumstances to determine whether it is inordinate and inexcusable?

25. In the present case, the delay in prosecuting this case adversely affects parties who hold valid court decrees thereby denying them the fruits of properly obtained judgements. It is important to point out that under cap 405, the Insurer is not a party in third party claims. It is the insured who is sued and the decree is validly issued against the insured and it remains legally enforceable against the insured.

26. I am therefore not persuaded that the petitioners have offered a sufficient explanation for the delay nor have they shown sufficient cause as to why the suit should not be dismissed for want of prosecution. The Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others*[25] discussing what constitutes sufficient cause had this to say:-

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant” (Emphasis added)

27. In the present case, I find that there is inaction on the part of the petitioners. In *Daphene Parry vs Murray Alexander Carson*[26] the court had the following to say:-

“Though the court should no ‘doubt’ give a liberal interpretation to the words ‘sufficient cause,’ its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time barred, even at the risk of injustice and hardship to the appellant”(Emphasis added)

28. Thus, the petitioners argument that they risk being called upon to settle decrees arising from accidents caused by the vehicles they had insured calls for the court to guard itself against the danger of being led away by sympathy as observed in the above passage. The counter argument is that, by accepting the reasons offered by the petitioners, this court will be allowing a blanket stay of execution of validly obtained court decrees without moving the courts which issued the decrees for appropriate orders in the individual suits in question. Such a scenario will in my view be unacceptable.

29. This court cannot uphold reasons that will be tantamount to the court accepting to be used to delay or defeat validly obtained court decrees. **Justice is to both the Plaintiff and Defendant; both parties to the suit must be considered.**

30. The application under consideration was filed on 25th January 2017. Up to 10th July 2017, when the parties last appeared before me, no attempt had been made to fix this petition for hearing.

31. Upon due consideration of the law, authorities and the facts of this case as enumerated above, I find that the application before me succeeds. Consequently, I allow the application dated 23rd January 2017 and order that this petition be dismissed with costs to the second and fourth Respondents.

Orders accordingly.

Dated at Nairobi this 21st day of **September** 2017

John M. Mativo

Judge

[1] Counsel cited Mwangi S. Kimenyi vs A.G. & Another {2014}eKLR on definition of what constitutes inordinate delay

[2] Cap 405, Laws of Kenya

[3] Cap 487, Laws of Kenya

[4] Being number CMCC No. 918/2007, Elizabeth Wangari Mwangi vs Mash Bus Services Ltd

[5] Ibid

[6] Supra

[7] Reference was made to Milimani HCC No. 547 of 2012, Sammy M. Makove, Commissioner of Insurance vs Blueshield Insurance Company (Under Statutory Management) & Shareholders

[8] Supra

[9] Anarita Njeu Karimi vs Republic cited

[10] See Verkouteren v Savage 1918 AD 143 at 144; Gopaul v Subbamah 2002 (6) SA 551 (D) at 558; Sanford v Haley NO 2004 (3) SA 296 (C) at para 8; Golden International Navigation SA v Zeba Maritime Co Ltd 2008 (3) SA 10 (C); and Zakade v Government of the RSA [2010] JOL 25868 (ECB).

[11] (SCA) (unreported case no 455/11, 1-6-2012) (Boruchowitz AJA) (at para 11)

[12] {2014}eKLR

[13] {2014}eKLR

[14] D. F. Scott (EP) (Pty) Ltd v Golden Valley Supermarket 2002 (6) SA 297 (SCA), at 301G

[15] Metcash Trading Ltd v Commissioner, SARS 2001 (1) SA 1109 (CC)).

[16] Mwangi S. Kimenyi v Attorney General & another [2014] eKLR

[17] Ibid

[18] Ibid

[19] Ibid

[20] {1968} 1 All ER 543

[21] Kisumu High Court Civil Case No. 446 of 2001

[22] {2002} 2 KLR 783

[23] {2001} KLR 630

[\[24\]](#) {1990} KLR 459

[\[25\]](#) Civil Appeal No. 147 of 2006 (Munuo JA, Msoffe JA and Kileo JJA)

[\[26\]](#) {1963} E.A. 546