



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 499 OF 2005

MERLIN MANAGEMENT LIMITED.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES.....DEFENDANT

RULING

1. This Ruling is in respect of the Notice of Motion dated 17th August, 2015, a Notice of Motion filed by the Defendant/Applicant, National Social Security Fund Board of Trustees (hereinafter the Applicant) for orders that the court be pleased to dismiss this suit with costs for want of prosecution. The application was brought pursuant to **Sections 1A and 1B of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 17 Rule 2(1) and (3) as well as Order 51 Rule 1 of the Civil Procedure Rules, 2010** and is based on the following grounds:
 - a. **That the Applicant has failed, neglected and/or otherwise refused to take any necessary steps to prosecute this matter since 31st July 2013, a period of over two years.**
 - b. **That on 31st July, 2013 Honourable Justice Kamau delivered a Ruling dismissing the Plaintiff/Respondent's application dated 12th January 2010 that sought to dismiss the Applicant's Defence on grounds that it disclosed no reasonable and/or tenable Defence. It is now over Two (2) years since the said Ruling was delivered, an indication that the Plaintiff has lost interest in this suit.**
 - c. **That it is in the interests of equity and justice generally, that every litigation comes to an end, as such, the continued lack of prosecution of this matter is an abuse of the court process.**
 - d. **That the Applicant continues to suffer unnecessary anxiety due to the delay in the prosecution of this suit.**
 - e. **That granting the order sought will enable the court to dispense justice efficiently, cheaply and expeditiously.**
2. The Application is supported by the affidavit of **Richard Osamba Otieno** annexed thereto, in which it was deponed that that it is now Ten years since this suit was instituted, and that there is no justifiable ground for such indolence on the part of the Respondent. That, in the circumstances, it is only fair, equitable and expedient that this suit be dismissed with costs.

3. In the written submissions filed herein on 6th November 2015, Learned Counsel for the Defendant/Applicant provided a brief background to the matter pointing out that the suit was filed way back on 9th September 2005, and that the Applicant entered appearance on 29th September, 2005 and filed Defence on 19th October, 2005. He observed too that the last time action was taken in the matter was 31st July 2013 when Honourable Justice Kamau delivered a Ruling in respect of the Respondent's application dated 12th January 2010. On the basis of that background, Counsel's submission was that, in terms of **Order 17 Rules 2(1) and (3) of the Civil Procedure Rules**, the Applicant had demonstrated the two ingredients set out therein, namely that there has been **inordinate delay** in prosecuting the suit; and secondly that **the delay is inexcusable**. It was further urged on the part of the Applicant that the current state of affairs is prejudicial to its interests as the witnesses in this matter are no longer its employees and therefore their attendance in court cannot be procured without great difficulty and cost to the Applicant. In support of these propositions, the Defendant relied on various authorities as are attached to the Applicant's written submissions, which I found very helpful.
4. The Respondent on its part relied on the affidavit sworn by its Counsel, **Mr. S. Gichuki Waigwa** and filed on 16th August 2015. His posturing was that the Respondent has always been keen on prosecuting the matter and progressing it to hearing. He added that the apparent delay was occasioned by circumstances outside control or power of the Respondent, chief among them being the need to comply with the **Case Management Practice Directions vide Gazette Notice No. 6807 of 2014**. He exhibited as annexures to his affidavit copies of some of the documents filed herein to demonstrate the steps that have been taken by the Respondent to progress the matter since the Ruling of 31st July 2013, such as the filing of additional List of Documents and Witness statements; preparation of Draft Issues for approval by Counsel for the Defendant/Respondent; and the filing of Plaintiff's version of the Statement of Issues. Counsel further deposed that the Respondent was in the process of getting ready for Pre-trial Directions by the time the instant Notice of Motion was filed. These are the aspects highlighted in the written submissions filed on 13th November 2015.
5. **Mr. Waigwa** further deposed that it was necessary for stakeholders to hold a consultative meeting convened by the Presiding Judge of the Commercial and Admiralty Division of the High Court, which meeting was informed by an appreciation that there was a problem obtaining the necessary forms to roll out the implementation of the aforesaid Practice Directions; and that once the obstacles were surmounted, there was a rush to fix suits for hearing, with the effect that the diary for 2015 was closed soon thereafter in February 2015. Counsel further placed reliance on a letter from the Defendant's counsel dated 5th December 2014 in which it was acknowledged that it was premature to invite Counsel to take a hearing date when **the** parties herein were yet to comply with the Practice Directions and a compliance certificate issued.
6. He further urged the Court to take note that the Applicant itself is yet to file its List of Documents, Witness Statements or List of Witnesses in compliance with Order 3 Rule 2 of the Civil Procedure Rules. It was therefore the Respondent's prayer that, for the reasons given, the Notice of Motion dated 17th August 2015 be dismissed to pave way for hearing and final determination on the suit on merit as this is not a fit case for dismissal under **Order 17 Rule 2(1) and (3) of the Civil Procedure Rules**.
7. With a view to securing expeditious disposal of court cases, **Order 17 Rule 2(3) of the Civil Procedure Rules** accords any party to the suit the liberty to apply for its dismissal in instances where no application has been made or step taken by either party for one year. The rationale for this requirement was aptly captured by **Lord Denning MR** in the case of **Allen vs. Sir Alfred McAlpine [1968] All E.R 543** at 546, which phrase was quoted with approval in **Ivita vs. Kyumbu 1984 KLR 441** thus:

"The delay of justice is a denial of justice...all through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear...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."

Nevertheless, the court is enjoined, in exercising its discretion, to always bear in mind the need to

balance due dispatch in the disposal of court business with the overriding objective of the Rules as set out in **Sections 1A and 1B** of the Civil Procedure Act, which is a derivative of the **Article 159(2) of the Constitution of Kenya**. To this end, the approach adopted by **Chesoni J** (as he then was) in the **Ivita Case** (*supra*) was thus:

"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 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 however 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

8. It cannot be gainsaid that this is a suit that has been pending in court for about ten years now, having been filed in September 2005. It is further not in dispute that not much has been done by the Respondent to ensure its expeditious disposal, more so since the Court delivered the Ruling of 31st July 2013. However, granted the Respondent's contention that there were intervening circumstances outside the control of the Respondent, the Ruling of 31st July 2013 should not be reckoned as the starting point in counting the one year provided for in **Rule 2(1) of Order 17** of the Civil Procedure Rules, the first issue for consideration is whether there has indeed been inordinate delay in the prosecution of this suit.
9. Since **Order 17 Rule 2(1) of the Civil Procedure Rules** disjunctively provides for "**last application**" or "**step taken by either party**" it is pertinent to confirm from the record, whether any steps were taken by either party after the last application and the Ruling thereof dated **31st July 2013**. As pointed out by the Respondent, there were indeed supervening circumstances that occurred within the year from 31st July 2013. The first one was the gazettelement of the **Practice Directions Relating to Case Management in the Commercial and Admiralty Division of the High Court on 28th July 2014 vide Gazette Notice No. 5179**. The annexures to the Replying Affidavit sworn by **Mr. Waigwa** confirm that there were procedural hitches relative to the Practice Directions aforementioned that necessitated re-gazettelement on 5th September 2014. The letter dated 20th November 2014 from the Presiding Judge to all the Advocates practicing in the Commercial and Admiralty Division is particularly instructive as it confirms that there were indeed operational challenges that necessitated a stakeholders meeting on 27th November 2014.
10. Secondly, there is an uncontroverted averment in the Replying Affidavit in connection with the letter dated 5th December 2014 (marked **Annex. GW-3**) by which the Applicant's Counsel acknowledged that they had been invited by the Respondent through a letter dated 3rd December 2014 to attend the court registry for fixing a hearing date. In that letter, Counsel for the Applicant was quick to remind the Respondent's Counsel thus:

"...the parties herein are yet to comply with the Commercial and Admiralty Division Practice Directions relating to Case Management...Practice direction No. 16 in particular states that 'no case may be set down for hearing until the certificate has been signed'. It is our firm view that fixing this matter for hearing of the main suit before complying with the said directions would be an exercise in futility and would only serve to deny other deserving litigants a day in court."

11. Thirdly, it is borne out of the court record that the Respondent did file a set of documents on 17th November 2014 in part compliance with the Practice Directions. The documents included the Plaintiff's List of Witnesses, a Witness Statement of Anwar Hussein and an Additional List of Documents.
12. It is therefore evident that a range of steps had been taken by the Plaintiff/Respondent with a view of progressing the matter, and that it was less than one year from the date of the last such action, (namely the move in December 2014 to have the case fixed for hearing leading up to the date that

the instant application was filed. It is apparent then that this case is not mature for dismissal pursuant to **Order 17 Rule 2(1) and (3) of the Civil Procedure Rules**, there being no demonstration that there was delay in the first place. That being the case, there can be no question of prolonged or inordinate delay. In the premises, I would dismiss the application dated 17th August 2015 for the reason that it was prematurely brought.

13.Regarding the argument by Counsel for the Defendant/Applicant that the Plaintiff is also to blame for countenancing the delay, and that it has neither complied with the Practice Directions nor taken any steps to progress the case; it must be reiterated that it is the responsibility of the Plaintiff to prosecute its case, having opted to drag the Defendant to court in the first place. Whereas a plain construction of **Rule 2(1) of Order 17 of the Civil Procedure Rules** would permit the conclusion that a Defendant, as a party has a fundamental role to play in the management of a court case including the responsibility to take the initiative in setting the case down for hearing, it does not relieve a Plaintiff of the primary duty to expeditiously prosecute the suit. This point was made in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** thus:

"It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty by saying that the defendant consented to the position..." (per Newbold, P)

14.In the result, it is hereby directed that the Respondent proceeds to finalize the pre-trial procedures, and to thereafter fix the case for Case Management Conference for appropriate directions to be made, notwithstanding any perceived non-compliance on the part of the Applicant.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS DAY OF JANUARY 2016

OLGA SEWE

JUDGE

DELIVERED AT NAIROBI THIS 15th DAY OF JANUARY 2016

FRED OCHIENG

JUDGE