



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. CIVIL APPLICATION NO. 459 OF 2008**

**CROSSLEY HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**NAGENDRASAXENA.....1<sup>ST</sup> DEFENDANT**

**JOHN GITAU KIMANI T/A JOGI AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**MIWANI SUGAR MILLS LIMITED.....3<sup>RD</sup> DEFENDANT**

**MIWANI SUGAR Co. (1989) LIMITED (IN RECEIVERSHIP.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants have applied for the suit against them to be dismissed for want of prosecution with costs. The application is dated 10<sup>th</sup> September, 2014 and is anchored on Order 17, Rule 2(3) of the Civil Procedure Rules and section 1A and 1B of the Civil Procedure Act. The grounds on which the application is premised is that as at the date of making the instant application, it had been over 6 years since the Plaintiff last took any step in the matter; that the Plaintiff has lost interest in prosecuting the suit which was clearly filed with an ulterior motive; that the pendency of this suit is prejudicial to the Applicants and that the pendency of this suit is causing the Applicants unnecessary anxiety and expense.
2. The application is supported by a deposition of David Otieno, Advocate, filed on the same date as the Application. It was averred that the Plaintiff filed this suit on 13<sup>th</sup> August, 2008, whereby the 3<sup>rd</sup> and 4<sup>th</sup> Defendants entered appearance through its advocates on 5<sup>th</sup> September, 2008. The Plaintiff thereafter filed an Amended Plaintiff. That on 17<sup>th</sup> September, 2008, the court made an order standing over generally on an application dated 28<sup>th</sup> July, 2008 which had been filed by the Plaintiff pending the outcome of the 3<sup>rd</sup> and 4<sup>th</sup> Defendant's application dated 16<sup>th</sup> September, 2008. That at the same time, the court made a status quo order, in which it directed that 3<sup>rd</sup> and 4<sup>th</sup> Defendants should not sell or deal with the suit property until further orders of the court. Thereafter, on 29<sup>th</sup> September, 2008, the application dated 16<sup>th</sup> September, 2008 was determined. The Plaintiff's application dated 28<sup>th</sup> July, 2008 thereafter came up for hearing on 18<sup>th</sup> November 2008, but by consent of the parties was taken out of the cause list for purposes of obtaining a fresh date to be fixed at the registry.
3. However, it was the contention of the Applicants that rather than the Plaintiff, taking out another date of the hearing of the aforesaid application, it filed another application dated 15<sup>th</sup> December,

- 2008 and had it listed for hearing on the 23<sup>rd</sup> December, 2008. The Applicant's complained that the Plaintiff failed to serve them with the said application.
4. However, when the application came up for hearing on the aforesaid date, the same was adjourned and Lesiit J directed the Plaintiff to properly erect service of the said application to the Applicants. On 20<sup>th</sup> January, 2009, the hearing of the said application was again adjourned to 19<sup>th</sup> February, 2009 to allow the 3<sup>rd</sup> and 4<sup>th</sup> Defendant to file a further affidavit, which was served to the Plaintiff's on 16<sup>th</sup> February, 2009.
  5. The hearing of the Plaintiff's application dated 15<sup>th</sup> December, 2008 was thereafter stood over generally on 19<sup>th</sup> February, 2009 because Lesiit J, was not sitting. That ever since 19<sup>th</sup> February, 2009, the Plaintiff herein has not taken any steps to prosecute the instant suit. The Applicant's further claimed that the Plaintiff is leveraging on the orders issued on 17<sup>th</sup> September 2008 to the detriment of the Applicants in **KISUMU HCCC No.225 of 1995**. It was deponed that there was no valid reason why the Plaintiff has for close to 5 years failed to take any step in the instant suit. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants in conclusion prayed that the orders sought in the application be allowed with costs.
  6. In a rebuttal to the application, the Plaintiff filed the Replying Affidavit of Sukhwinder Singh Chatthe sworn on 24<sup>th</sup> October, 2014. It was contended that the application was brought in bad faith and an attempt by the Applicants to clean their acts which violate the status quo orders issued by this court on 17<sup>th</sup> September, 2008. The Applicants were accused of material non-disclosure of facts that are pertinent to this case. According to the deponent, the Applicants were able to obtain ex parte orders in the case of **KISUMU HCCC No.225 of 1995 Nagendra Saxena –vs- Milan Sugar Mills Limited & 3 Others**.
  7. The orders were to the effect that the Registrar of Titles or the Principal Registrar of Titles cancel entry numbers 30, 31 and 32 registered against Title to Land Reference No. 7545/3 (I.R No. 21038) which is also a subject to this suit and to the status quo orders issued on 17<sup>th</sup> September, 2008 by this court. However, the said orders were set aside vide a Ruling delivered on 18<sup>th</sup> June, 2014. It was therefore the Plaintiff's assertion that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are out to muddle the waters by seeking to challenge the status quo orders through the back door.
  8. The Plaintiff further reiterated that it had not lost interest in prosecuting the instant suit but has spent a lot of time opposing various applications by the Applicants in **KISUMU HCCC No.225 of 1995**, applications which ought to have been filed in the instant case in the first place. Further the Plaintiff contended that the 2<sup>nd</sup> Defendant was now deceased and no substitution has ever been effected.
  9. The Plaintiff additionally contended that Counsel to the Applicants' was not properly on record and therefore the application herein was incompetent. In line with this, the Plaintiff purports that the advocates are acting simultaneously for both defendants which is a manifest conflict of interest. The Plaintiff urged this court to give it an opportunity to prosecute its case and have it determined on its merits. The Plaintiff also denied using the instant suit to achieve ulterior motives and contended that there will be no prejudice that will be suffered by the Applicants should this suit be sustained. The Plaintiff therefore prayed that the application be dismissed with costs.
  10. On 12<sup>th</sup> March, 2015 directions were granted to determine the motion by written submissions. The plaintiff filed its submissions on 28<sup>th</sup> May, 2015 while the 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their submissions on 28<sup>th</sup> April, 2015. I have considered the pleadings, depositions and rival submissions including the various cases cited.
  11. The law on dismissal of suits for want of prosecution is well settled. The applicable law is Order 17 Rule 2(1) which provides as follows:

***“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.”*

12. Further Order 17 Rule 2(3) provides as follows:

***“Any party to the suit may apply for its dismissal as provided in sub-rule 1”***

13. It is clearly in exercise of the power conferred by Order 17 Rule 2(3) that the Defendants has brought this application to have this suit dismissed for want of prosecution.
14. The Principles governing applications for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution. Further to this, it is clear that the decision of whether or not to dismiss a suit is discretionary. Such discretion should be exercised judiciously.
15. Each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same. See the case of **Naftali Opondo Onyango Vs National Bank of Kenya [2005] eKLR**. More so, it is essential to add that the purpose Order 17 Rule 2 (3) of the Civil Procedure Rules is derived from the policy that court cases must be heard and disposed of expeditiously. This calls for the vigilance of the parties to the case. See the Case of **Sheikh vs. Gupta and Others Nairobi HCCC No. 916 of 1960 [1969] EA 140** and **Eliud Munyua Mutugi –v- Francis Murerwa (2008) eKLR**. Bearing these principles in mind, have the 3<sup>rd</sup> and 4<sup>th</sup> Defendants met the threshold required in dismissing the Plaintiff’s suit for want of prosecution?
16. On inordinate delay, I have perused the court file. I note that the last step taken before the filing of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants’ Notice of Motion on 10<sup>th</sup> September 2014, was the hearing of the Plaintiff’s application filed on 17<sup>th</sup> September, 2008 which did not take off on 19<sup>th</sup> February 2009. The same was attributed to the fact that the Honourable Judge hearing the matter was not sitting at the time.
17. It is not denied by either party that since then, no action or step has been taken on the matter. Therefore by the time of filing the present application, 5 ½ years had lapsed without the Plaintiff taking any steps. In my assertion, the Applicants have established that there was indeed prolonged delay on the part of the Plaintiff in prosecuting the matter at hand.
18. However, the court must not stop there. It must go a step further and determine whether, even though there was continued delay, the same was excusable due to certain circumstances. My reasoning is fortified by the case of **Ivita vs Kyumbu (1984) KLR 441**, where the court held thus :-

***“The test applied by the courts in 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 in the discretion of the court.”*** (emphasis added)

19. The delay has been explained in the Replying Affidavit by the Plaintiff; according to paragraph 21, the delay has been as a result of the “spurious” and “manifold” applications filed by the applicants in **Kisumu HCCC No. 225 of 1995**. That the said applications ought to have been filed in the instant suit as opposed to the Kisumu matter. In my view, this explanation does not hold any water.
20. I agree with the submissions of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants that the vast majority of the Plaintiff’s deposition were dedicated to criticizing the Applicants for filing applications in another suit. With all due respect, this being an adversarial system of justice, it is expected that the Plaintiff will take every step required of him under the law to set down his suit for hearing.
21. In principle, the suit is the plaintiff’s and it should be the most eager one to take all steps required of it to progress the case, whether or not a related case exists. I agree with the reasoning of

**Warsame J** In the case of **Mobile Kitale Services –v- Mobil Oil Kenya Limited and Anor**, where he cited the case of **Nilani –vs- Patel (1969) EA page 341**, where it was held;

**“it is only too trite to say that as in every civil suit, it is the Plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a Defendant ought to invoke the process of the court towards that end as soon as is convenient by either applying for its dismissal or setting down the suit for hearing.....Delay in these cases is much to be deplored. It is the duty of the Plaintiff’s advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died...documents may have been mislaid, lost, destroyed and the memory tends to fade” (emphasis supplied)**

22. From what I have stated earlier, the Plaintiff has failed to offer any plausible reason for its failure to fix the suit for hearing since 19<sup>th</sup> February, 2009. I think it is a red herring to shift blame to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants for making various applications in **Kisumu HCCC No. 225 of 1995**. It was within their rights to do so. In any case, nothing stopped the Plaintiff, from having the two cases consolidated to save on time and expenses.
23. Further, I find that the issue of the 2<sup>nd</sup> Defendant being deceased and their not being any substitution, is neither here nor there. If anything, the prolonged prosecution of the matter presented the very real risk that witnesses and even parties dying during the pendency of the suit. Likewise, the issue raised that the Applicants’ counsel not being properly on record, also serves as a mere afterthought. From the initial stages of the suit, the said law firm has been on record and it is only now, that Plaintiff has sought to bringS up the issue.
24. I also find that the Plaintiff has not shown how these facts have prevented it from prosecuting the suit or otherwise taking steps in the matter! A picture emerges of an indolent litigant completely disinterested in prosecution of its suit. Under such circumstances, the court is well entitled to dismiss the suit under order 17 rule 2 of the Civil Procedure Rules 2010 and the inherent powers of court. See **Mukisa Biscuit Manufacturing Company Vs West End Distributors Limited [1969] E.A. 696**.
25. Further, the Applicants stated they had been prejudiced by the delay in the prosecution of this case as the suit continues to “hang” over it due to the inaction of a Plaintiff. Even if I were to find that it is prudent to save a suit in order to do justice between the parties, it must be noted that justice delayed is justice denied. This court is enjoined by **Article 159 2(c)** of the Constitution of Kenya to determine disputes and render justice without undue delay.
26. Failure to do so will infringe upon the legitimate expectation of a Defendants that the dispute against it will be determined timeously. I am supported in this view by the Ruling of **Ochieng J in Venture Capital and Credit Ltd. v Consolidated Bank of Kenya Ltd (2006) eKLR** when the learned Judge quoted from the case of **Allen v 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”. ”***

27. Additionally, I am inclined to agree with the protestations of the Applicants that the Plaintiff is

using this suit to achieve ulterior motives. I note that there were status quo orders issued by this court on 17<sup>th</sup> September, 2008. It is clear that the Plaintiff by opting not to prosecute the suit it was deliberately and intentionally using the said interim orders for its benefit at the expense of the Applicants. In the case of **Leonard Njogu v Barclays Bank Of Kenya & another [2014] eKLR Gikonyo J** stated that as follows :-

*“ 17..... But I should state that a vigilant Plaintiff who is a staunch observer of the tenets of justice and the overriding objective will always act with speed to have his suit set down for hearing without delay. I say this because; it is not uncommon in our jurisdiction for a plaintiff enjoying an order of stay or injunction to take every advantage in law to temporize a case for as long as possible. In a case such as this where an application for dismissal of the suit for want of prosecution has been made prematurely, and the Plaintiff takes out as a defence the fact that the application is premature; the conduct of the plaintiff to progress the case while the application is pending should be considered. Unscrupulous litigant who stands to gain out of further and prolonged delay of the case will take advantage of the time which will pass by before the ‘premature’ application is heard and finalized. This approach may seem out of the mainstream jurisprudence, but with time, I hope the approach will find favour with those who are intent to seeing the ultimate goal of the overriding objective principle being realized. And the following words of Kimondo J. in the case of **NETPLAN EAST AFRICA LIMITED v INVESTMENT & MORTGAGES BANK LIMITED [2013] eKLR** supports the foregoing postulation that:*

*“The discretion was never intended to be exercised to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”*

*Of course, that will depend on the entire circumstances of each case.” (emphasis added)*

28. In the totality of the evidence presented in this application, I am thus disinclined to exercise my discretion in favour of the Plaintiff. I also find that the Plaintiff still has the opportunity to ventilate its case in **Kisumu HCCC No. 225 of 1995** where the issue of who the rightful owner is in Title Number LR No. 7545/3 (I.R 21038) is a substantial issue.
29. Accordingly, I find the 3<sup>rd</sup> and 4<sup>th</sup> Defendants application is meritorious. I will allow the Application dated 10th September 2014 and order that the suit herein be and is hereby dismissed with costs.
30. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 19<sup>th</sup> day of February, 2016.**

**C. KARIUKI**

**JUDGE**