



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 386 OF 2006

JOHN MURUTI THUMI.....1ST PLAINTIFF
BEATRICE WAMBUI MUTURI.....2ND PLAINTIFF
JARINABAI NURALI JAHER KASSAM.....3RD PLAINTIFF
NARMINM JAFFER KASSAM.....4TH PLAINTIFF
JAM RESQUE RESTAURANT LTD.....5TH PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LTD.....1ST DEFENDANT
FRANCIS KARIMI MUGO.....2ND DEFENDANT
COMMISIONER FOR LAND.....3RD DEFENDANT
REGISTRAR OF TITLES.....4TH DEFENDANT
CITY COUNCIL OF NAIROBI.....5TH DEFENDANT

RULING

1. For the determination of the Court is the application by the 1st Defendant dated 13th August 2014 and filed on 28th August 2014. The application was brought pursuant to the provisions of Order 17 Rule 2(3) and Order 51 Rule 1 of the Civil Procedure Rules, as well as Sections 1A, 1B, 3 & 3A of the Civil Procedure Act and Article 159(2) (b) of the Constitution. The Applicant sought the following orders inter alia;
 1. **THAT this suit be dismissed for want of prosecution.**
 2. **THAT the Plaintiffs/Respondents do pay the 1st Defendant costs of this suit.**
2. The application was predicated upon the grounds that the Respondents had not set down the suit for hearing since it was taken out on 15th December 2011 and that the inaction and failure to prosecute the suit was an abuse of the process of the Court.

3. This was similarly reiterated in the affidavit in support of the application, sworn by one Stella Mbuli, the Applicant's Legal Officer, deposed to on 13th August 2014. Further, it was averred therein that there had been inordinate, prolonged and inexcusable delay in proceeding with the suit.
4. In response to, and in objecting the application, the Respondents' advocate in his replying affidavit deposed to on 14th October 2014, contended that the Respondents had never lost interest in the matter, and were keen to have it heard and determined. Further, it was urged that the matter was taken out on the instance of the 1st Defendant, and not the Plaintiff as contended, and that, the last time the matter was in Court, the lower Court case file RMCC No 7656 of 2006 was not placed before the Superior Court.
5. The pleadings in this aforementioned file, as well as ELC No 406 of 2009, it was contended, had not been availed to the Plaintiffs, thereby making it difficult to draw up the issues.
6. In an action seeking to dismiss a suit for want of prosecution, the provisions of the Civil Procedure Act, and the rules therein, and more particularly Order 17 Rule 2(3), set the background on which such action shall be determined. The proviso reads;

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

Under the said sub-rule (1) it is provided that;

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.

7. The 1st Defendant had contended that no action had been taken by the Plaintiffs to execute the suit, which when it was last in Court, had been taken out of the list on 15th December 2011. Even though the matter was listed for hearing, the same was not heard, and no steps had been taken by either of the parties in the suit to have it set down for hearing.
8. It was the Plaintiffs' averments that the suit had been taken out on the 1st Defendant insistence. However, from the records, it was shown that the Court had intimated that it would not be sitting on that day (15th December 2011) and that as such, parties were directed to take further dates. It was directed thus by Mabeya, J on 13th December 2011;

'As the Court will not be sitting on 15/11/2011 the parties do take a fresh hearing date in the registry in the new term'.

No action or steps, were taken by either of the parties as directed by the Court on 12th December 2011. The matter was only revived on 28th August 2014 when the instant application for dismissal was filed by the 1st Defendant.

9. In an application such as the instant one, the Court has to carefully consider the circumstances prevailing. The dismissal of a suit denies a litigant the opportunity to be heard; and as such, his or her rights under the provisions of Article 50 of the Constitution are put in jeopardy.
10. Conversely, the Court would not allow an indolent and sluggard litigant to fritter away judicial time. It is when considering this balance that the Court would exercise its discretion in a manner that would not violate the rights of the litigants to fair trial, and would in turn, not leave such indolent parties to walk without reprimand. In ***Ivita v Kyumbu (1984) KLR 441***, Chesoni, J (as he then was) reiterated that;

"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."

Lesiit, J in ***Communications Courier & Another v Telkom (K) Ltd [1999] eKLR*** applied the

reasoning of enunciated on **Ivita v Kyumba** (supra) and announced herself as follows;

“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.”

Further in **Utalii Transport Company Limited & 3 others v NIC Bank Limited & Another [2014] eKLR** it was held *inter alia*;

“But, the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries 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 judgment-seat. It is, therefore, a matter of discretion by the court.”

11. The Plaintiffs have not presented before the Court any cogent or plausible reasons as to why they had not taken any action to prosecute their case. It has not been shown how the issue of the subordinate Court file missing or failing to be placed before the Superior Court was of relevance to the instant matter.
12. Further, it has not been shown what steps they had employed since the matter was last in Court on 13th December 2011. The delay too is prolonged, lasting a period of close to over four (4) years. No action had been taken to sustain the action.
13. However, as was cited in the case of **Waljee’s (Uganda) Ltd v Ranji Punjabhai Bugerere Tea Estates Ltd (1971) EA 188**, no prejudice would be so great that would not be adequately compensated for an award in costs. The 1st Defendant, although claims that they would be prejudiced by the delay in the prosecution of the matter by the Plaintiffs, they have not shown how the same would be so great a prejudice that an award for costs may insufficient compensation.
14. The Defendant has also not established that the delay in prosecuting the suit has given rise to substantial risk to fair trial or has resulted into grave injustice (**see Njuki Gachugu v Githii (1977) KLR 108**). In as much as it was not the duty of the Defendants to set the matter down for hearing as was announced by Odunga, J in **Civil Suit No 223 of 2002 Trust Bank (In Liquidation) v Kiprono Kitony & 2 Others**, it was nonetheless encumbered upon them to adhere to and abide by the provisions of Sections 1A and 1B of the Civil Procedure Act, and opt for a more pro-active role in ensuring and employing the more expedient and cost effective measure for disposition of the suit. No prejudice, in this instance, would be so great upon them that an award in costs would not sufficiently ameliorate.
15. In the circumstances therefore, the application by the 1st Defendant is dismissed. However, the Plaintiffs will pay the costs of the 1st Defendants for application dated 13th August 2014, Kshs. 10,000/= within 14 days and in default suit stands dismissed. Further, the parties are to comply with Order 11 of the CPR within 60 days from today.
16. They should also file a statement of agreed issues within 30 days from today which failing, each part to file own issues within 7 day immediately after the expiration of the 30 days assigned for filing of agreed issues. Thereafter, the registry shall assign an appropriate mention date immediately after expiration of 60 days from today to confirm compliance of these directions.

Dated, signed and delivered in court at Nairobi this 11th day of March, 2016.

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C. KARIUKI

JUDGE