



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 1088 OF 2002

MOHAMED MUNIR CHAUDHRI.....PLAINTIFF

VERSUS

CAPTAIN MUSA HASSAN BULHAN.....1ST DEFENDANT

EQUATOR AIRLINES LIMITED2ND DEFENDANT

AFRICAN EXPRESS AIRWAYS(K) LIMITED.....3RD DEFENDANT

RULING

1. The Defendants have applied for the suit against them to be dismissed for want of prosecution with costs. The application is dated 5th August 2014 and is anchored on Order 51 Rule (1) and Order 2 Rule 15 (1) (b) and (d)) of the Civil Procedure Rules and section 1A and 1B of the Civil Procedure Act.
2. The grounds on which the application is premised is that as at the date of making the instant application, it had been over 12 years since the Plaintiff filed the current suit and therefore the Defendants continue to suffer unnecessary anxiety due to the delay in the hearing of the suit.
3. In the affidavit in support of the application sworn by the 1st Defendant on 5th August, 2015, it was contended that the Plaintiff has refused and/or neglected to comply with Pretrial directions as contained in Order 11 of the Civil Procedure Rules, 2010. That due to this it is apparent that the Plaintiff herein has lost interest in the prosecution of this suit.
4. The deponent further stated that the pendency of this suit is prejudicial and is causing them unnecessary anxiety and expense. The Defendants therefore urged the court to dismiss the suit as prayed in the application.
5. In a rebuttal to the application, the Plaintiff filed grounds of opposition dated 23rd October, 2015 and the Replying Affidavit of Mohamed MunirChaudhri sworn on the same date. It was contended that the application was brought in bad faith since the Applicants have concealed some material facts from the court. The deponent stated that failure to prosecute this suit has not been of the Plaintiff's making but has been occasioned by the "mysterious" disappearance of the court Registry file on two occasions.
6. Reconstruction of the file after the registry file disappeared was allowed after an application by the Plaintiff on 4th June, 2002. Soon after reconstruction of the file, it was averred that the Plaintiff's advocate invited the Defendant's then advocates to fix the matter for hearing. Unfortunately, a hearing date was not granted and the Plaintiff was advised that the matter should be transferred to

- the commercial division, whereupon an order of the said transfer was given on 19th September, 2002.
7. Hearing of the matter was then slated for 15th and 16th January, 2003 and a hearing notice served to the Defendants. However, the hearing did not take place again, as the matter had not been listed for hearing prompting the Plaintiff to again take another ex-parte hearing date of 3rd June, 2004 after the court diary was opened on the 13th November, 2003.
 8. Upon hearing, the court stood over generally the case to allow discovery to be done. It was also the Plaintiff's averment that unfortunately his advocate at the time was suspended from practice necessitating the Plaintiff to change his advocate to the current one on record on 28th October, 2008. According to the Plaintiff, his then advocate had failed to notify him of the said suspension hence the delay in prosecuting the matter.
 9. However, the Plaintiff stated that his current advocate moved swiftly and fixed the matter for hearing on 19th May, 2009. Upon the aforesaid date the court directed that the parties should file statements of agreed issues and their respective bundle of documents, of which the Plaintiff to file on 27th January, 2010. The Defendants however failed to file any documents to date. The matter then came up for hearing on 4th October, 2012 but the file could not be traced.
 10. The Plaintiff's Advocate upon the advice of the Deputy Registrar then filed an application dated 31st May, 2013 applying for reconstruction of the file, a prayer that was allowed on 14th June, 2013. It was contended that subsequently the matter was fixed for hearing on 13th February, 2014 where the court directed the parties to comply with Order 11 of the Civil Procedure Rules before fixing the same for hearing.
 11. That in compliance with this order the Plaintiff had already filed the Plaintiff's list of documents and statement of agreed issues, while the Defendants have failed to do so. The Plaintiff however admitted that he is yet to file witness statements. That therefore in the totality of the facts of the case, it is clear that the Defendants are seeking the orders with unclean hands and therefore the application should be dismissed with costs.
 12. On 2nd March, 2016 directions were granted to determine the motion by written submissions. The Plaintiff did not file his submissions as directed while the Defendants filed their submissions on 16th February, 2016. I have considered the pleadings, depositions and the Defendants' submissions including the various cases cited.
 13. The instant application is brought under Order 2 Rule 15(1) (b) and (d) of the Civil Procedure Rules. The substantive law governing striking out of pleadings is founded in the provisions of Order 2 Rule 15 of the Civil Procedure Rules. Sub-rule 15 (1) of the aforementioned Order, enacts that:

“(1) at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that -

- a) It discloses no reasonable cause of action or defence in law; or***
- b) It is scandalous, frivolous or vexatious; or***
- c) It may prejudice, embarrass or delay the fair trial of the action; or***
- d) It is otherwise an abuse of the process of the court;***

And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

14. The above provision thus gives the court power to strike out pleadings. In the case of **DevSurinder Kumar Bij v Agility Logistics Limited CIVIL SUIT NO. 311 OF 2013[2014] eKLR** it was held by the court that for a pleading to be dismissed pursuant to the provisions of Order 2 rule 15(1), it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action as against the Defendant.

15. However, looking at the application before the court, the Defendants' contention is that the Plaintiff's suit is an abuse of court process since the Plaintiff has failed, refused and or otherwise neglected to prosecute this suit for over 12 years. From the affidavit in support of the application and the written submissions, it is clear that the averments therein do not support the application in terms of the threshold to be met in Order 2 rule 15(1).
16. In my view the grounds of the application are in relation to the law of dismissal for want of prosecution. As such, I find that it is integral to decide the application from the view point of Order 17 as opposed to Order 2 rule 15(1) as the court herein is enjoined to do justice with undue regard to technicalities.
17. 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.”

18. 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”

19. It is clearly in exercise of the power conferred by Order 17 Rule 2(3) that the Defendants have brought this application to have this suit dismissed for want of prosecution. 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 Defendants are likely to be prejudiced by such delay.
20. As such the 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.
21. 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.
22. 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**. Bearing these principles in mind, have the Defendants met the threshold required in dismissing the Plaintiff's suit for want of prosecution?
23. On inordinate delay, I have perused the court file. I note that the last step taken before the filing of the Defendants' Notice of Motion on 5th August 2014, was on 13th February, 2014 where the court noted as follows;

“Matter not ready for hearing as parties have not complied with Order 11 of the CPR. Parties to file properly bound bundle of documents within 30 days”

24. No activity took place with regard to the hearing of the matter until Defendants filed the instant application on 16th September, 2014. From the foregoing, it is obvious that delay in this matter has been established. When such delay is established, unless it is well explained, it becomes inexcusable. In **Agip (Kenya) Limited-v-Highlands Tyres Limited [2001] KLR 630, Visram J** stated of inordinate delay as follows: -

“Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether

the Defendant has been prejudiced by the delay."

25. Has the Plaintiff in this case offered any plausible reason for his failure to fix the suit for hearing since 13th February, 2014? In paragraph 8 to 39 of his Replying Affidavit, the Plaintiff goes into the rigors of trying to explain the delay in prosecuting the matter for well over 12 years. According to him, the court file had to be reconstructed twice in a row after its mysterious disappearance. The Defendants did not controvert this fact.
26. The Plaintiff further faults the Defendants by stating that he could not fix the matter for hearing since the parties were yet to comply with Order 11 of the Civil Procedure Rules 2010 as directed by the court on 13th February, 2014. In his defence, the Plaintiff also stated that he had filed a statement of issues and his bundle of documents but was yet to file its witness statements.
27. Indeed I have perused the file and established that the plaintiff's assertions are true. Be that as it may, under order 17 Rule (3) the burden of expeditious prosecution of a suit lies with the Plaintiff and not the Defendant. In the case of **Mobile Kitale Services –v- Mobil Oil Kenya Limited and Anor**, is instructive where **Warsame J** cited the case of **Nilani –vs- Patel (1969) EA page 341**, observing that;

“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)

28. I am in agreement with these observations. The Plaintiff by all means had a duty to prosecute the suit that had been filed in court. Although the Plaintiff in this case accuses the Defendants of contributing to the delay for not complying with order 11 of the Civil Procedure Rules as directed by the court on 13th February, 2014, the burden is always on the Plaintiff to ensure the expeditious conclusion of his case.
29. It was therefore the duty of the Plaintiff to move the court for directions with regard to the Defendants non-compliance of Order 11 of the Civil Procedure Rules 2010. In my view the Plaintiff should not have sat back and waited to be jolted into action by the Defendants application for dismissal of the suit. Further, I note that although the Plaintiff has filed its bundle of documents and statement of issues, the pre-trial procedures are yet to be fully complied with since he is yet to file witness statements.
30. Be that as it may, I find that it is prudent to save a suit if justice will be done to the parties. Though the Plaintiff may have been in part to blame for the delay in the prosecution of its suit, the affidavit in reply to the application and the averments therein do not exhibit a portrait of a lethargic litigant disinterested in the prosecution of the instant suit.
31. Indeed the court file in this case has been reconstructed twice. This issue has not been refuted by the Defendants. The same goes for the fact that the Plaintiff also had to change advocates after his initial advocate was suspended from the bar and never notified him of this fact. I will therefore give the Plaintiff the benefit of doubt to that extent.
32. After all, the court should be focused in doing substantive justice as opposed to concentrating on technicalities that may vitiate the course of justice. And for justice to be seen to be done, I will rule in the favour of the Plaintiff/ Respondent, who shall however meet some conditions within a set timeline. Any prejudice occasioned to the Defendant can well be compensated by an award of costs.
33. In the result, the application is dismissed with costs to the Defendants. The Plaintiff and the Defendants is hereby ordered to ensure compliance with Order 11 of the Civil Procedure Rules within thirty (30) days. Thereafter, he must cause the suit to be listed for hearing within another thirty (30) days. The hearing date shall be fixed on a priority basis but having regard to the

availability of a date in the court diary.

Dated, Signed and Delivered in Court at Nairobi this 27th day of May, 2016.

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C. KARIUKI

JUDGE