



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL CASE NO. 77 OF 2011.

(MULTI-TRACK)

MUNICIPAL COUNCIL OF KAKAMEGA.....PLAINTIFF

VERSUS

THE TRUSTEES NATIONAL SOCIAL SECURITY FUNDDEFENDANT

R U L I N G.

1. Two applications are before me for consideration. The first one has been brought by the defendant by way of Notice of Motion. Although dated 1st June, 2014, it was filed on 27th February, 2015. It seeks orders that:-

1. *The plaintiff's suit be dismissed for want of prosecution as the plaintiff has made no steps to prosecute the suit for an inordinately long period; and*
2. *Costs of the application be provided for.*

2. The application is based on the following grounds:-

- i. *The suit herein was instituted by way of plaint dated 27th June, 2011 to which a defence dated 29th August, 2011 was filed;*
- ii. *It has been more than 1 (one) year since the suit was set down for hearing by the plaintiff;*
- iii. *Despite the suit having been instituted over three (3) years ago, the plaintiff is yet to conclusively set it down for hearing;*
- iv. *Despite the suit having been instituted over three (3) years ago the plaintiff has failed to prosecute and/or take any steps geared towards final determination of the matter;*
- v. *Attempts by the defendant to put in motion steps towards finalizing the suit or an out of court settlement have been futile as the plaintiff has shown no interest in pursuing the same through negotiations or otherwise;*
- vi. *The plaintiff's failure to set down the suit for prosecution within the time herein espoused is a clear demonstration that the plaintiff lacks interest in pursuing his claim;*
- vii. *It is in the interest of justice that the plaintiff's suit as against the defendants herein be dismissed as the continued pendency of the same is onerous on the defendants in terms of legal fees paid by way of retainer; and*
- viii. *The law envisages that litigation has to come to an end.*

3. The application is supported by the affidavit of Helen C. Koech dated 1st June, 2014. She deposes that the plaintiff instituted the suit herein on 27th June, 2011 seeking an injunction to stop the defendant from enforcing payment of Kshs.59,250,940.30 being the NSSF employees'

contributions due and outstanding together with interest.

4. The said affidavit asserts in paragraphs 1-5 that all the necessary pleadings were filed by both parties with the last one being a reply to the defence which was filed on 13th October, 2011.
5. In paragraphs 6 and 7, the deponent states that the defendant's Advocates wrote to the plaintiff's Advocates on two occasions requesting them to fix the matter for hearing.
6. Paragraph 8 of the affidavit indicates that on 13th February, 2012, the plaintiff filed an application for injunction which was fixed for hearing on different occasions but did not proceed to hearing for various reasons. The last hearing date given for the said application was 30th April, 2013.
7. The deponent avers that since then, the plaintiff's Advocate has neither filed any papers in court nor taken any steps to prosecute the matter. The deponent further states that it is clear that the plaintiff has totally lost interest in the matter.
8. In response to the above application, the plaintiff filed its grounds of opposition on 9th November, 2015, raising the following grounds:-
 - i. *The application lacks merit, is premature and amounts to abuse of the court process;*
 - ii. *The parties have been negotiating all along and the defunct Municipal Council of Kakamega made part payments and commitment to settle the amount conceded by themselves;*
 - iii. *The change of the Constitution and the establishment of Devolved Government in the Transition period delayed issuance of instruction to Respondent counsel (sic) on the way forward;*
 - iv. *The Respondent counsel (sic) had to await fresh instructions from the County Government of Kakamega to proceed appropriately hence the delay in prosecution of the matter;*
 - v. *The Respondent's counsel had to withdraw from acting for the defunct Municipal Council of Kakamega prior to being given new instructions by the County Government of Kakamega; and*
 - vi. *In view of the foregoing position it would be fair and just to have the application before the court dismissed with costs to enable parties continue with the prior negotiations to settle the matter out of court once and for all.*
9. The 2nd application was filed by the plaintiff by way of Notice of Motion dated 15th October, 2015. It seeks orders that:-
 - i. *The honourable court be pleased to grant leave to the plaintiff to amend its plaint to incorporate County Government of Kakamega (sic) in its plaint as per annexed (sic) copy of draft amended plaint; and*
 - ii. *The costs of the application be in the cause.*
10. The application was premised on the following grounds:-
 - i. *The plaintiff desires to amend its plaint to incorporate County Government of Kakamega (sic) that will assist in the cause of action for all parties herein;*
 - ii. *The defendant will not be prejudiced if this application is allowed; and*
 - iii. *The parties herein stand to suffer irreparable loss if the application is not allowed.*
11. The above application was supported by the affidavit of Christabell Ashiono, the plaintiff's Principal Legal Officer, dated 15th October, 2015. She deposed that she had instructed the plaintiff's Advocate to amend the plaint to include the County Government of Kakamega in line with the new Constitution and the relevant devolution statutes as the case was instituted in the name of the defunct Municipal Council of Kakamega. A copy of an amended plaint was attached to her supporting affidavit and marked as **CA1**.
12. In paragraph 5 thereof, she avers that the interests of the defendant will not be prejudiced in any

way whatsoever should the amendment be made.

13. In paragraph 8 of her affidavit, she deposes that the orders sought should be allowed to enable the County and NSSF negotiate and resolve the issue once and for all.
14. The defendant did not file a replying affidavit to the application dated 15th October, 2015 or grounds of opposition. The averments in the affidavit of Christabell Ashiono are therefore uncontroverted.
15. Although the hearing date was taken before the Deputy Registrar by consent of both parties, the Plaintiff's counsel did not attend court on 27th April, 2016 for the hearing of the applications herein.

Defendant's submissions.

16. Mr. Nyikuli who held brief for Mr. Omogeni for the defendant submitted that the suit was filed on 27th June, 2011 with the plaintiff seeking an order for injunction to stop the defendant from effecting payments to it for NSSF dues to the tune of Kshs.59,250,940.30. He informed the Court that although the defendant made attempts to settle the suit out of court, the plaintiff had not shown any interest.
17. It was submitted for the defendant that since the court directed that the parties file documents on 30th April, 2013, the plaintiff has taken no action and that the plaintiff's lawyer has been in and out of the case whereas the defendant has been desirous in having the matter heard.
18. It was further submitted that the plaintiff's application dated 15th October, 2015, was an afterthought as it was filed after the defendant had filed its application to have the suit dismissed hence it was a delaying tactic.
19. The defendant prayed for its application to be allowed and that of the plaintiff to be dismissed.

Determination of the applications.

The issues for determination are:-

1. *If there has been inordinate delay in prosecuting this case; and*
 2. *If the plaintiff should be given an opportunity to salvage its case by amending its plaint.*
20. The application dated 1st June, 2014 has been brought under the provisions of order 17 rule 2 (3) of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya.
- Order 17 rule 2 of the Civil Procedure Rules provides that:-
1. *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 shown to its satisfaction, may dismiss the suit;*
 2. *If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit;*
 3. *Any party to the suit may apply for its dismissal as provided in sub-rule 1.*
21. Order 51 Rule 14 of the Civil Procedure Rules gives a respondent the option to file a notice of preliminary objection or a replying affidavit or a statement of grounds of opposition or a combination of the aforementioned documents. The plaintiff opted to file its grounds of opposition.
22. The plaintiff's Advocate in his grounds of opposition filed on 9th November, 2015 indicates that

the parties hereto have been negotiating all along and that defunct Municipal Council of Kakamega made part payments and committed to settle the amount they conceded to.

23. The application for dismissal of the suit was also opposed on the ground that the establishment of the devolved government in the transition period delayed issuance of instructions to the plaintiff/respondent's counsel.
24. The grounds of opposition indicate that the plaintiff's counsel had to await fresh instructions from the County Government of Kakamega hence the delay in prosecuting the suit. Further, the plaintiff's counsel had to withdraw from acting for the defunct Municipal Council of Kakamega prior to being given instructions by the County Government of Kakamega.
25. It is in the light of the foregoing circumstances that this court has the task of determining if the plaintiff's inertia has been inordinate, deliberate and inexcusable.
26. In the case of **Jimmy Wafula Simiyu vs. Fidelity Commercial Bank Ltd [2014] eKLR**, the court had this to say:-

“No doubt the court has discretion to excuse a delay as long as it has been explained to the satisfaction of the Court. The satisfaction will come from the explanation given and the fact that the delay causes no substantial prejudice to fair trial to one of the parties or other or both. Therefore, the fact of delay per se does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay 1) is inordinate and inexcusable; and 2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. The Court will be interested in the nature and importance of the case, the right of the Plaintiff to be heard and the fact that summary dismissal of a suit drives away the Plaintiff from the seat of judgment; an arbitrary and draconian act comparable only to the proverbial ‘sword of the Damocles’. And, for the Defendant, in order to complete the balancing, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice and Articles 48, 50 and 159 of the Constitution are the relevant guide here. Ultimately, as Chesoni J (as he then was) stated in the case of Ivita Vs Kyumbu, the Court should ask itself, whether, despite the delay, it is still possible to do justice for all the parties.”

27. I have considered the contents of the affidavit of Helen C. Koech, the submissions of the defendant, and the authorities cited in its written submissions. I have also considered the affidavit of Christabell Ashiono, the submissions of the plaintiff and the authorities cited thereon.
28. This court takes Judicial Notice of the fact that devolution brought about teething problems with the establishment of County Governments with new Leadership and Management structures. Section 3 of the Transition to Devolved Government Act Cap 265 A, Laws of Kenya provides as follows:-

“The object and purpose of this Act is to—

(a) provide a legal and institutional framework for a co-ordinated transition to the devolved system of government while ensuring continued delivery of services to citizens;

(b) provide, pursuant to section 15 of the Sixth Schedule to the Constitution, for the transfer of powers and functions to the national and county governments;

(c) provide mechanisms to ensure that the Commission for the Implementation of the Constitution performs its role in monitoring and overseeing the effective implementation of the devolved system of government effectively;

(d) provide for policy and operational mechanisms during the transition period for audit, verification and transfer to the national and county governments of—

(i) assets and liabilities; (emphasis mine)

(ii) human resources;

iii. pensions and other staff benefits of employees of the government and local authorities; and (emphasis mine)

(iv) any other connected matters;

(e) provide for closure and transfer of public records; and

(f) provide for the mechanism for capacity building requirements of the national government and the county governments and make proposals for the gaps to be addressed.”

29. Following the above, County Governments had to take stock of their assets and liabilities, not forgetting that the Transition Authority established by the Transition to Devolved Government Act, had a role in determining the assets and liabilities which fell within the National Government and those that were to be accommodated by the County Governments. Refer to section 7(2) (e) of the said Act. It is common knowledge that any monetary claim owed to a third party is treated as a liability by any entity.

30. Under the said Act, the transition period has been defined as the period between the commencement of the Act and three years after the first elections under the Constitution. The commencement date of the above Act was 9th March, 2012. The explanation given by the plaintiff for its inertia is therefore plausible.

31. The court in the case of **Ivita vs. Kyumba (1984) KLR 441** held that:-

“The test applied by the courts in an 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 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.”

32. The plaintiff in this case is the defunct Municipal Council of Kakamega whose assets and liabilities were taken up by the County Government of Kakamega and the defendant is a State Corporation. They are part and parcel of the executive arm of the Government. The survival of the defendant depends on the monies that are paid by employees in different entities, including the plaintiff’s employees, who in turn are entitled to their retirement benefits.

33. It is my considered opinion that the prejudice that the defendant claims that it will suffer by way of payment of retainer fees to its Advocate on record can be compensated by way of costs. I will grant the benefit of the doubt to the plaintiff and sustain the suit.

34. With regard to the plaintiff’s application dated 15th October, 2015, this court is satisfied that the proper plaintiff should now be the County Government of Kakamega in place of the Municipal Council of Kakamega. I will therefore grant leave to the plaintiff to amend its plaint.

35. The upshot of the foregoing is that:-

- i. *The plaintiff is granted 14 days from today's date within which to file and serve its amended plaint;*
- ii. *The parties hereto are granted 45 days within which to comply with the provisions of order 11 of the Civil Procedure Rules;*
- iii. *The plaintiff shall ensure that it sets the suit down for hearing within 60 days of this ruling failing which the suit will stand dismissed without the necessity of the defendant applying for the same;*
- iv. *For the avoidance of doubt, the application dated 1st June, 2014 is dismissed and the application dated 15th October, 2015 is allowed;*
- v. *Each party will bear its own costs.*

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this **26th** day of **MAY**, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Plaintiff.**

..... **for the Defendant.**

.....**Court Assistant**