



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 634 OF 2010

PACIFIC CONSTRUCTION COMPANY LIMITED PLAINTIFF

VERSUS

CEMENTERS LIMITED DEFENDANT

RULING

1. The application herein is a Notice of Motion dated 21st March 2016. It is brought under Order 17, Rule 2 (3), of the Civil Procedure Rules, 2010 and Section 1A and 1B of the Civil Procedure Act. The application is based on the annexed Supporting Affidavit sworn by DONALD B. KIPRORIR dated 31st March, 2016 and the grounds on the face of it. It is opposed by the Respondent based on the replying affidavit sworn by LUCIA MUTUA, dated 14th April 2016.

2. The Application seeks for orders that:

- ***That the suit herein be dismissed for want of prosecution;***
- ***That the costs of this application and the suit herein be borne by the Claimant/Respondent.***

3. The Applicant's case in a nutshell is that the matter was last in Court for mention on **18th March 2013**. That, the Plaintiff has not taken any material steps to prosecute the claim and Three (3) years have lapsed since the suit was last in court. That it has taken six (6) years since it was filed. The Plaintiff is therefore guilty of inordinate delay in prosecuting the claim and the continued existence and uncertainty of the case is prejudicial to the Defendant/Applicant. The Applicant submitted that, in the circumstances, it is only fair, and just that the suit be dismissed for want of prosecution.

4. The Applicant relied on the following authorities to support their application:

- **Century oil trading company Limited vs Gerald Mwaniki Mbogo & Another Milimani Hccc No. 367 of 2001**
- **Cecilia Wanjiru Njoroge vs National Environmental Management Authority & Another [2013] eKLR**
- **Ivita vs Kyumbu [1984] KLR 441**

5. These cases thus, laid down guiding principles in dismissal Of suits by the court to the effect a suit will be dismissed where the Plaintiff

- cannot give a satisfactory explanation for inaction for a period in excess of one year, or
- has lost interest in the matter by failing to set down the matter for hearing for a period of over Two (2) years and therefore, it is unfair to the Defendants to let the suit continue to tax them, or
- has failed to show sufficient excuse for the delay, and the delay is held to be inordinate and inexcusable.

6. The Respondents filed a Replying Affidavit, opposing the application on the ground that the Plaintiff's counsel made efforts on several occasions to fix the matter for hearing at the Court's Registry and invited the Defendants for the same. The Respondent, gave details of how the case progressed up to **27th May 2014**. On that date when both parties took the **25th July 2014** as date for hearing of the case but none attended. According to the Plaintiff/Respondent that was due to **"some mix up"** and the matter was marked **"stood over generally"**. The Plaintiff said that, subsequently on diverse dates, they made several attempts to take a hearing date in the Registry but the court file could not be traced, again with full knowledge of the Defendant/Applicant. The Plaintiff/Respondent submitted that it has a constitutional right to be heard justly and expeditiously and will suffer prejudice if the suit is dismissed.

7. In their submission the Respondent relied on the authorities of:-

Ivate vs Kyumbu [1984] KLR 441

a) Utalii Transport Company Limited & 3 Others vs Nic Bank Limited & Another [2014]

b) Mwangi S. Kimenyi vs Attorney General & Another [2014] eKLR

The Honourable Court laid down the principles to be followed to determine whether when considering inordinate delay.

- *Whether the delay has been intentional and contumelious;*
- *Whether the delay or the conduct of the Plaintiff amounts to an abuse of the court;*
- *Whether the delay is inordinate and inexcusable;*
- *Whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and*
- *What prejudice will the dismissal cause to the Plaintiff.*

When the delay is prolonged and inexcusable, such that it would cause grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straight away. However it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties – the plaintiff, the defendant and any other third or interested party in the suit; lest justice be placed too far away from the parties.

Invariably, what should matter to the Court is to serve substantive justice through judicious exercise of discretion. The Respondent submitted that, there has not been any inordinate and inexcusable delay on the part of the Plaintiff to prosecute the claim. Neither will the Defendant suffer prejudice, if the application is dismissed.

8. I have considered the relevant law on dismissal of suit under order 17 Rule 2 (1) of Civil Procedure Rule 2010 which provides

"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".

Order 17 Rule 2 (3) provides that

“Any party to a suit may apply for its dismissal as provided as provided in sub-rule1”.

9. In relation to the matter herein, the Court record shows that the matter was last in court on **25th July 2014** before the application for dismissal was made. None of the parties were in court on that day, and the matter was marked “stood over generally”. It remained dormant until **23rd March 2016**, when this application was filed. The reason advanced by the Plaintiff Advocates for the delay is that the court file was missing. They have annexed to the Replying Affidavit, three letters dated 16th February, 15th June and 21st October 2015, inviting the Defendant’s advocates to meet them in the registry for the purpose of **“fixing a mention date for directions”**. I noted that on all the three letters, there is a **“High Court of Kenya, Commercial and Admiralty Division, MILIMAN – NAIROBI”** Stamp – indication of that the three letters were “RECEIVED”. I also noted that, the three letters bear notes in a hand written form, to the effect that: **“Court file not traced and court file not available”**. However, there is no name, or signature of the author of these notes, nor the date when the handwritten record was made. Again I note that, there is no evidence that the Plaintiff /Respondents wrote to the Deputy Registrar or in-charge of the relevant Registry, to inform them of the loss of the file or even applied for reconstruction of the same. To that extent, the Plaintiff were less than vigilant.

10. The Applicant’s advocates firm has not disputed service of the said three letters to them. I therefore find that their submissions that the Plaintiff has not taken any steps or any material steps to prosecute the claim since **18th March 2013** is not **TRUE**. To the contrary, the record shows on **24th October 2013**, Florence from the firm of Onsando Ogonji and Tiego Advocates, for the Plaintiff and Peter from the firm of KTK Advocates, met at the Court registry and took the **27th day of November 2013**, for mention for pre-trial. The same parties again met in the same Registry and took a further mention date on **25th July 2014** for Pre-trial conference and then the three letters mentioned above were issued in the year 2015. Therefore it’s less than candid and truthful for the Applicant to allege and submit that the matter last came up in court on **18th March 2013**.

11. The maxims of Equity, state inter alia that **“he who goes to equity, must go with clean hands”**, and a party who seeks for whatever remedy from the court must disclose all the material facts truthfully, and not misled the court.

12. I conclusion find that , as much as the Plaintiff/Respondent may not have given concrete evidence on the alleged loss of the court file, I am satisfied based on the Court record, and the annexures to the replying affidavit prove that at least some effort was made to move the matter. But that does not negate the requirements that matters in court must be heard expeditiously. I therefore find that the Respondent have offered at least some reasonable excuse. I also find that the Defendant will not suffer prejudice if the application is disallowed. But, again, it’s the Defendant/Applicant who has moved this matter through this application, and should be compensated with costs thereof.

13. In that case, I make the following orders:

1. The Parties should comply with pre-Trial requirements pursuant to order 11 of Civil Procedure Rules, within thirty (30) days of the date of this order.

2. The suit should thereafter be set down for hearing within TWO MONTHS, from the date and or period set for pre- trial compliance.

3. If the Plaintiff fails to comply with order (2) above, the suit will stand automatically dismissed for want of prosecution.

4. Costs of the application to the Defendants/Applicants.

Consequently, the Notice of Motion dated **6th May 2016** is dismissed save for the costs ordered under order 4 above.

Orders accordingly

READ, DELIVERED AND DATED, AT NAIROBI

THIS 21st DAY OF JUNE 2016

G. L. NZIOKA

JUDGE

Read in open court in the presence of:

Miss Omolo for Plaintiff/Respondent

Mr. Osando for Defendant/Applicant

Teresia – Court Clerk