



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 17 OF 2004

JANE MUTHONI KINYUA & 8 OTHERS.....PLAINTIFF/RESPONDENT

VERSUS

RUKURIRI TEA FACTORY CO. LTD.....DEFENDANT/APPLICANT

RULING

1. This is an application dated 26/8/2014 seeking for orders that the plaintiff's suit against the defendant be dismissed with costs for want of prosecution. The application is supported by the affidavit of Joe Kathungu.
2. In the affidavit, it is stated that the matter was last in court on 3/10/2011 when it came up for hearing but the court was not sitting on that day. The respondents have not set down the suit for hearing and there is inordinate delay of prosecuting the suit on the part of the plaintiff. The applicant had made an earlier application dated 15/6/09 but the court ruled that the matter be fixed for hearing. It is argued that the respondents are not interested in pursuing the case.
3. The respondents in their replying affidavit stated that the applicant had filed a similar application but withdrew it on 26/8/14. The counsel argues that the said application stopped the matter from proceeding for two years. It is not true that the matter was last in court on 3/10/11. After the matter last proceeded in court on 3/10/11, the former advocate on record for him was unable to secure a hearing date. The current advocate took over the matter on 1/1/2013 but has not addressed the issue of prosecuting the suit. The respondent states that they are interested in the prosecution of this matter and prays for a last chance.
4. It is argued by the applicant that on 24/1/2011 the court in its ruling for a similar application directed that the matter be fixed for hearing within 90 days. The matter was fixed for hearing on 3/10/2011. Although the court was not sitting, the respondents should heeded the warning and have fixed the matter for hearing but he failed to do so.
5. This was followed by the application for dismissal dated 30/1/2013. The application was later withdrawn as it was technically defective and the current application was then filed. Every time the applicant files an application for dismissal of suit, the plaintiffs engage the services of a new advocate and blames the former one for not fixing the matter for hearing.
6. The respondent submitted that this application is a replica of the one dated 29/1/2013 which held them hostage for 3 years. The suit delayed due to the applications filed by the applicant. The respondents have explained the reasons for delay in the affidavit sworn on 22/9/2014. it was admitted that there has been frequent change of advocates by the respondents matter was previously handled by another advocate from Nairobi. They however argued that if the matter is dismissed they will be subjected to pain and financial loss.

7. The applicable law is Order 17 Rule 2. (1) which provides 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.

8. Rule 2(3) provides that any party to the suit may apply for its dismissal as provided in sub-rule 1.

9. The principles guiding courts in applications for dismissal for want of prosecution were explained in the following cases;

In the case of **SALKAS CONTRACTORS LIMITED VS KENYA PETROLEUM REFINARIES LIMITED [2014] eKLR** the court of appeal stated that the defendant must show the following:-

- *That there is inordinate delay. What is or is not inordinate delay depends on the facts of a particular case*
- *That the inordinate delay is inexcusable unless a credible excuse is made out a natural inference is that it is inexcusable*
- *The defendant is likely to be seriously prejudiced by the delay. The general rule is that the longer the delay the greater the prejudice*

10. In **UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS VS NIC BANK LIMITED & ANOTHER [2014] eKLR** the court cited the decision of *Danckwerts LJ in NAGLE VS FIELDEN [1992] 2 QBD 633 & LORD DIPLOCK IN BIRKET VS JAMES [1978] A.C 297* where the principles of dismissing a suit for want of prosecution were restated. The applicant must prove that:-

- *There is inordinate delay on the part of the plaintiff in prosecuting the case*
- *That the delay was intentional, contumelious and therefore inexcusable*
- *Whether the delay is an abuse of court process*
- *Whether the delay gives substantial risk to fair trial or cause serious prejudice to the defendant*
- *The court must determine whether the dismissal occasions the plaintiff any prejudice;*
- *Whether the plaintiff has offered reasonable explanation for the delay and the interest of justice to dismiss the suit.*
- *Whether it is in the interest of justice to dismiss the suit.*

11. The suit was filed on 29/03/2004. Documents were exchanged by the parties which took quite some time. The respondents appear to have had problems with their advocates whereas she kept changing from one to another. The record does not favor the respondents as being keen to have her case heard.

12. The applicant filed an application dated 15/06/2009 for dismissal of suit for want of prosecution. The court in its ruling delivered on 24/01/2011 noted that the respondent had left their suit inactive for over two years prompting the applicants to file the said application. The court declined to dismiss the suit and granted the respondents a chance to have their suit fixed for hearing within 90 days.

13. During the next hearing date on 28/03/2011, the case did not proceed due to an issue concerning exchange of documents raised by the applicants advocates who had come on record after the earlier one withdrew. The new counsel requested for other documents by the next date which was on 11/05/2011 and this led to adjournment of the case.

14. The first and only witness who has testified in this case was heard on 25/05/2011 and happens to be the first plaintiff. The case which nine plaintiffs has not been heard for the last 5 years. The respondents blames the applicants filing several applications for dismissal with the one dated 29/01/2013 being withdrawn. The respondents did not learn a lesson and continued with the conduct of indolent litigants which led to the filing of this application another two years later.

15. The record demonstrates that the respondents have not shown the spirit of active litigants. The 3 applications for dismissal were filed after the case stayed inactive for two or more years. The respondents have no basis of blaming the applicant for their problems. Had they shown keen interest to have the suit heard, the applicants would not have filed the said applications.

16. This court has discretion to grant this application but the said discretion must be exercised diligently and fairly to both parties.

17. The respondents delay in this suit is inordinate and inexcusable. The court exercised its discretion on 24/01/2011 which the respondents did not take seriously. The second chance was when the applicant withdrew their application dated 29/01/2003.

18. From the facts of this case, it is highly undesirable to grant a third chance to the respondents given that the suit has been in court for a period of 12 years. The blame lies on the respondents who have kept the applicant in court indefinitely. Litigation must come to an end and justice must be seen to be done to both parties in a suit.

19. I have carefully considered the issues in this application and applied the principles in the foregoing authorities. I reach a conclusion that the application dated 28/01/2013 is merited and it is hereby allowed. Considering that this suit did not go for hearing and determination and that the applicant was the employer of the respondents, I order that each party meets their own cost.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JULY, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

1. Mr Kathungu for Applicants

2. Ms Ndorongo for Respondent