



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 270 OF 2003**

**MAGRO BRUNO ..... 1<sup>ST</sup> PLAINTIFF**  
**TIOZZO ANGELO BASTIANELLO ..... 2<sup>ND</sup> PLAINTIFF**  
**GIORGIO DE FILIPPO ..... 3<sup>RD</sup> PLAINTIFF**

**V E R S U S**

**STEPHEN CALEB MAINA ..... 1<sup>ST</sup> DEFENDANT**  
**INDUSTRIAL AND COMMERCIAL DEVELOPMENT**  
**CORPORATION ..... 2<sup>ND</sup> DEFENDANT**  
**EAST AFRICAN COAST FISHERIES LTD ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Plaintiffs filed this case against Defendants on 31<sup>st</sup> October 2003 seeking judgment for Kshs. 7,801,491.15. The Defendants although they filed individual defences, they were all represented by the same firm of Advocates. The 1<sup>st</sup> Defendant filed a counter claim seeking judgment for Kshs. 368,691/- against the Plaintiffs.
2. It is not denied by the parties that the last time this case was before Court was on 8<sup>th</sup> November 2010. On that day the record of the Court file show that parties consented to the adjournment, however in affidavit evidence parties are in agreement that that adjournment was caused by the absence of the Plaintiffs' witness.
3. I note that thereafter the case was fixed for hearing on 23<sup>rd</sup> May 2013 and 29<sup>th</sup> September 2014 but the same was not listed for hearing by the Court.
4. The Defendants have by their Notice of Motion dated 28<sup>th</sup> August 2014 sought dismissal of the Plaintiffs' case for want of prosecution.
5. The Defendants relying on the affidavit in support of that application raise the following grounds as the basis of the dismissal-

- **The Plaintiff has not taken any step to prosecute this matter since 8<sup>th</sup> November, 2010 when the matter had been set for hearing of the Plaintiffs' case.**
- **The Defendants have always been able ready and willing to proceed with the hearing of the case as an evidence from the record indicating that the Defendants vehemently opposed the application for adjournment and asked for the matter to proceed for hearing.**
- **The Plaintiffs' advocates have irregularly sent invitation letters to the Defendants' advocates creating the impression that the Plaintiffs' advocates are in the process of fixing the matter for hearing but they have never done so.**
- **There has been a flagrant and culpable inactivity on the part of the Plaintiff as it is almost four (4) years since the matter was adjourned at the Plaintiff's own insistence.**
- **The Plaintiff has a duty to expeditiously prosecute its case to assist the Court further the overriding objective under Sections 1A and 1B of the Civil Procedure Act.**
- **The delay of close to four (4) years is inordinate, unreasonable and inexcusable in the circumstances and it may be impossible or unnecessarily onerous for the Court to dispense justice in the instance.**
- **The Defendants are greatly prejudiced by this inordinate and inexcusable delay on the part of the Plaintiff.**
- **It is in the interest of justice and in furtherance of the overriding objective of the Civil Procedure Act that the orders sought herein be granted.**

6. It was submitted on behalf of the Defendants that Plaintiffs had through their Learned Counsel written several letters of invitation to fix this case for hearing but had actually failed to fix a date. The Learned Counsel also submitted thus-

- **The instant suit was instituted some 11 years ago. As we have noted, the legibility of some of the documents in this suit are now questionable due to the long time. The 2<sup>nd</sup> Defendant's witnesses, if it will be lucky to still find any, cannot be expected to vividly remember transactions that took place 11 years ago.**
- **It would be asking too much of the 2<sup>nd</sup> Defendant to require it to produce documents about transactions that may have happened 11 years ago. The 2<sup>nd</sup> Defendant has specifically stated at paragraph 11 and 12 of the Supporting Affidavit that it will be greatly prejudiced by the present suit being sustained.**

7. Those submissions are not supported by affidavit evidence and are statements from the bar. The only thing the Defendants' deponed in the affidavit was-

**“THAT the Defendants are greatly prejudiced by this inordinate and inexcusable delay on the part of the Plaintiff and in any event it is unjust and unfair for the Plaintiffs to be allowed to drag the Defendant's in endless and expensive litigation without taking any step to prosecute their claim.”**

8. In that deposition there is no mention of memory loss of witnesses or difficulty in tracing document for this case. It follows that the Learned Counsel's submission is rejected.

9. The Plaintiffs deny delay in prosecuting this case. Plaintiffs relied on the Replying Affidavit sworn by their Learned Counsel Mr. Kenneth Kibara.

10. That on 10<sup>th</sup> February 2012 when Plaintiffs' Learned Counsel had invited Defence Counsel, the defence representative did not attend, and Plaintiff's representative was informed by the Court registry staff that a date could not be fixed because of non compliance with Pre-Trial Directions. Further that the Defendants had on their part failed to fix for hearing their Counter Claim.

11. Learned Counsels provided the case law which relates to applications for dismissal for want of prosecution. I will refer to just some of them.

**12. DUALE MARYAN GURRE –Vs- AMINAL MOHAMED MAHAMOOD & ANOTHER [2014]eKLR viz-**

**“Any person who initiates a litigation against another has a duty and is under an obligation to ensure that the suit he has brought is expeditiously processed and prosecuted in the court by ensuring the necessary preparation and follow up is done to ensure there are no unnecessary delays. The overriding objective of rendering justice expeditiously as envisaged under Sections 1A and 1B Civil Procedure Act is anchored on the parties and their legal advisors playing their supportive roles in the chain of justice delivery and as the saying goes justice cuts both ways in every matter.”**

**13. ALLEN –Vs- SIR ALFRED McALPHINE & SONS LTD (1968)1 ALL ER 543 where Lord Denning had this to say-**

**“The delay of justice is a denial of justice .... To no one will we deny or delay right or justice. All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3, Sc 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, C1). To put right this wrong, we will in this Court do all in our power to enforce expedition; and, if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it. It is the only effective sanction that they contain.”**

**14. IVITA –Vs- KYUMBU [1984]KLR-**

**“So 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 and that justice can still be done to the parties notwithstanding 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.... Clearly no defendant can successfully apply for an action to be dismissed for want of prosecution if he has waived or acquiesced in the delay. Mere inaction on the part of the defendant cannot in my view amount to waiver or acquiescence.”**

15. There is no doubt there has been delay in prosecuting both the Plaintiff and the Counter Claim. The Defendants in my view, because the Counter Claim is intertwined with the claim in the Plaintiff had an equal obligation to ensure firstly that the case is ready for hearing, on their part, and secondly that a date was fixed. Pre Trial Directions have not been taken in this matter.

16. Accordingly I am of the view that this is not a fit and proper case where the Plaintiffs' claim can be dismissed as sought. An order will be made requiring Pre-Trial Directions be undertaken and requiring this case be fixed for hearing within a fixed period.

17. I would add that Plaintiffs' Counsel did not err in swearing the affidavit in reply. He after all knows better than the Plaintiffs' the attempts taken to fix the case for hearing.

18. I grant orders that-

**(a) The Notice of Motion dated 28<sup>th</sup> August 2014 is dismissed and the cost thereof shall be in the cause. The parties shall file and serve each other within twenty one (21) days from today's date their witness statements and their documents.**

**(b) In default of any one party to file the documents as ordered in (b) above, their claim shall stand as dismissed with costs to the opposite party.**

**(c) This case shall be fixed by any party for hearing within seven (7) months from today's date. In default both the Plaintiffs' claim and 1<sup>st</sup> Defendant's Counter Claim shall stand as dismissed with no orders as to costs.**

**DATED and DELIVERED at MOMBASA this 26<sup>TH</sup> day of FEBRUARY, 2015.**

**MARY KASANGO**

**JUDGE**