



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 73 OF 2001

TRUST BANK LIMITED.....PLAINTIFF

VERSUS

AJAY SHAH.....1ST DEFENDANT

VINOD CHAUNDRY.....2ND DEFENDANT

ARUN JAIN.....3RD DEFENDANT

PRAVIN MALKAN.....4TH DEFENDANT

JAGNESH DESAI.....5TH DEFENDANT

NAYAN MURTHI SABESAN.....6TH DEFENDANT

RENUKA SHAH.....7TH DEFENDANT

PRAFUL SHAH.....8TH DEFENDANT

NITIN CHANDARIA.....9TH DEFENDANT

RULING

1. The 1st Defendant, **AJAY SHAH**, and the 2nd Defendant, **VINOD CHAUNDRY**, have both filed applications seeking the dismissal of the plaintiff's case for want of prosecution.
2. The Plaintiff was filed in court on 22nd January 2001. Therefore, by the time the 2 applications herein were filed, in 2013, the case had already been in court for more than 13 years.
3. Mrs. Ochieng, the learned advocate for the 1st Defendant, pointed out that the plaintiff had not taken any steps in the last 3 years, to prosecute the case.
4. According to the 1st Defendant, the last activity in court was when the plaintiff served the 1st Defendant with a Hearing Notice indicating that the suit would be heard on 1st December 2010. However, the trial did not commence.
5. As the plaintiff thereafter failed to take any steps to prosecute the case, the 1st Defendant felt that he was entitled to seek the dismissal of the case.
6. Mr. Gitonga, the learned advocate for the 8th Defendant, **NITIN CHANDARIA**, supported the 1st

- Defendant's application.
7. Indeed, the 8th Defendant believed that this court could even have acted on its own motion, and proceeded to dismiss the plaintiff's case because there had been a prolonged delay in prosecuting it.
 8. The 8th Defendant pointed out that the defendants were not complicit in the long delay.
 9. Therefore, because it appeared that the plaintiff had lost interest in the suit or because the plaintiff was reluctant to prosecute the case, the 8th Defendant asked the court to dismiss the suit.
 10. Mr. Were, the learned advocate for the 2nd Defendant, **NITIN CHAUNDRY**, submitted that his client's application was un-opposed.
 11. Mr. Were told the court that it was unfair to have the case continue to hang over the head of his client. As far as the 2nd defendant was concerned, the plaintiff had lacked dispatch in handling the case. Therefore, that was sufficient reason to warrant the dismissal of the case.
 12. In answer to the two applications Mr. Oyatsi, the learned advocate for the plaintiff, submitted that the approach given by the courts to applications seeking dismissal of suits for want of prosecution, was to allow such applications only when the plaintiff failed to explain the reasons for the delay in prosecuting the case.
 13. In this case, the plaintiff believed that it had given an explanation for the delay.
 14. The explanation was comprised in the history of the case, as follows;
 - i. *The plaintiff first set down the case for hearing on 2nd May 2006. However, the trial did not commence.*
 - ii. *The plaintiff next fixed the case for hearing on 7th December 2006: But then again, the trial did not commence.*
 - iii. *The other dates when the case was set down for hearing were given as 30th May 2007; 31st July 2007; 15th July 2009; and 1st December 2010.*
 15. According to the plaintiff, the High Court gave priority to Election Petitions in the year 2013. Therefore, during that time, the plaintiff did not take steps to set down the case for trial.
 16. Meanwhile, as for the year 2014 and the early part of 2015, the plaintiff explained that it could not set down the suit for trial when the defendants' applications for the dismissal of the suit were still pending.
 17. Thirdly, the plaintiff explained that this case was one in a series of cases which the plaintiff had filed against the same defendants. Therefore, the plaintiff made a choice, to concentrate on one case, being HCCC No. 71/2001, which was heard in 2012.
 18. The number of cases in the series alluded to by the plaintiff was said to have been eight.
 19. But just because the plaintiff chose to concentrate on the one case is said not to indicate that the plaintiff was reluctant to prosecute this case, or that the plaintiff had lost interest in the case.
 20. If anything, the plaintiff said that it had been frustrated by the failure of the trial to take-off.
 21. The plaintiff also drew the court's attention to the fact that whenever it had invited the defendants to the court registry, to fix hearing dates, the other parties did not turn up.
 22. It was thus submitted by the plaintiff that it was determined to continue seeking for justice.
 23. After the plaintiff's submissions, Mrs. Ochieng, the learned advocate for the 1st defendant, had no reply.
 24. However, Mr. Gitonga, the learned advocate for the 8th Defendant, submitted that the explanations given by the plaintiff did not alter the law. The advocate reminded the plaintiff that the court had not declined to give hearing dates; it was the plaintiff who had chosen to give priority to other cases.
 25. Finally, Mr. Were, the learned advocate for the 2nd defendant, submitted that the plaintiff had given no explanation for its failure to set down the case for hearing after 2010.
 26. Mr. Were suggested that the plaintiff should suffer the consequences of its decision to have a case-management-style which left this case pending whilst the plaintiff prosecuted other cases.
 27. Having heard the submissions from the parties, the court also perused the record of the proceedings.
 28. The record shows that on 2nd May 2006, the case was listed for hearing before Ransley J. On that

- date, both the plaintiff and the defendants were represented, but the court adjourned the case. The reason for the adjournment was not recorded.
29. On 15th May 2006, the plaintiff was at the registry, where it fixed the case for hearing on 7th December 2006.
 30. But the case was not listed for hearing on 7th December 2006.
 31. On 30th May 2007, all the parties were ready to proceed with the trial. However, Azangalala J. (as he then was) directed that the case be heard by another Judge. The reason given by the learned Judge, and which the parties accepted, was that he was already hearing two other cases in which the parties herein were involved.
 32. On 30th May 2007, the parties consented to the adjournment of the case.
 33. On 1st December 2008, the record shows that the trial commenced before Khaminwa J. However, time ran out before the plaintiff's first witness had finished giving his evidence. The case was adjourned to 11th February 2009.
 34. When the trial was set to resume, Mr. Gitonga advocate informed the court that Mr. Mbugua advocate was deceased. Prior to his demise, Mr. Mbugua advocate was representing the 8th Defendant.
 35. In the light of that development, Mr. Gitonga advocate was given time and opportunity to have himself placed on record, properly. In effect, the case was adjourned at the behest of the 8th Defendant.
 36. When the case was mentioned before Khaminwa J. on 15th July 2009, the learned Judge fixed it for hearing on 26th and 29th October 2009.
 37. Meanwhile, the 6th and 7th Defendants (**NAYAN MURTHI SABESA** and **PENUKA SHAH**, respectively) filed an application seeking to recover costs from the Receiver. That application was made after the said two defendants had obtained orders, requiring the plaintiff to pay their costs after the suit had been withdrawn against them.
 38. On 19th March 2010, Khaminwa J. delivered her Ruling, in which the learned Judge ordered the Deposit Protection Fund Board to pay costs to the 6th and 7th Defendants.
 39. The records show that the plaintiff filed a Notice of Appeal to challenge the Ruling dated 19th March 2010. However, it is not clear, from the record, what has transpired in relation to the intended appeal. However, I hasten to add that the appeal, if it was filed or not, would have no bearing on the current applications which were brought by the 1st and 2nd Defendants.
 40. On 7th July 2014 the case was listed for hearing before me. On that day Mr. Wananda advocate held brief for Mr. Oyatsi; Mr. Were held brief for Mr. Billing; whilst Mr. Gitonga's brief was held by Mr. Were.
 41. Mr. Wananda informed the court that the suits against the 3rd, 4th, 5th and 9th Defendants had been withdrawn.
 42. As the suit had already been withdrawn against the 6th and 7th Defendants, the case that was left was only against the 1st, 2nd and 8th Defendants.
 43. Mr. Wananda sought an adjournment because Mr. Oyatsi was attending a case at the International Crimes Court (ICC), at the Hague.
 44. Secondly, as the case was already part-heard, the parties agreed that there was need for the court to give Directions regarding the manner in which the further hearing would be conducted.
 45. At the request of the parties, the court granted them time to enable the parties give due consideration to the most appropriate method of proceeding with the case.
 46. It is therefore evident that the plaintiff did take steps to have the case set down for hearing. I can state that fact with certainty because on the court file, there is a minute signed by the learned Deputy Registrar on 7th March 2014, when the case was fixed for Hearing on 7th July 2014.
 47. In the circumstances, the plaintiff has taken steps to set down the case for hearing before the applications for the dismissal of the suit for want of prosecution were prosecuted.
 48. And the applicants did not protest about that action. If anything, the defendants agreed with the plaintiff that there was a need for the court to give Directions as to the further hearing of the case.
 49. But having agreed on the need for Directions as to the hearing of the case, the defendants thereafter sought and obtained Directions as regards the applications for the dismissal of the suit.

50. Had the case not been set down for hearing on 7th July 2014, it would have been almost impossible for the plaintiff to persuade this court that it had a reasonable explanation for the failure to take steps between 2010 and 2013. I say so because for a period of about 3 years, the plaintiff did not prosecute this case.
51. It matters not that the plaintiff made a unilateral decision to pursue other claims against the same persons who are defendants in this case.
52. If the plaintiff wanted to secure the place of this case whilst it was prosecuting those other cases, it should either have obtained an order staying these proceedings in the interim, or it could have obtained the concurrence of the other parties that any one of those other cases was a test case, if the issues in the various cases were largely similar.
53. The year 2013 was an Election year in Kenya. It was the year when elections were conducted for the first time under the Constitution of Kenya, 2010.
54. If the delay was largely during the year 2013, this court would have been prepared to take judicial notice of the unique circumstances in which the Judiciary conducted its affairs. I so find because the Constitution imposed an obligation on Election Courts to hear and determine petitions within six months. As a result, the Judiciary focused its resources on election petitions, thus putting other cases on hold, temporarily. Therefore, during the year 2013 it is well known and appreciated that cases other than election petitions, were largely not listed for hearing.
55. In the result, the two applications fail because as recently as in 2014, the plaintiff took steps to have the case listed for hearing.
56. However, the costs of the applications dated 28th June 2013 and 9th September 2013 are awarded to the 1st and 2nd defendants, in any event. I so hold because they were right to have filed their applications when they did so, as the plaintiff had remained inactive for three years already. The two applications woke up the plaintiff from its slumber. The only way that the plaintiff can repay the applicants is by paying the costs of the two applications.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of March 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Ohenge for the Plaintiff

Mr. Billing for the 1st Defendant

Were for the 2nd Defendant

Gitonga for the 8th Defendant

Collins Odhiambo – Court clerk.