



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 1118 OF 1999

FREDRICK KANYIRI WERU.....PLAINTIFF

Versus

EAST AFRICAN BUILDING SOCIETY.....1ST DEFENDANT

ANDREW WANYOIKE.....2ND DEFENDANT

RULING

Dismissal for want of prosecution

[1] The 1st Defendant has applied in a Motion dated 3.07.2014 for two significant orders, namely; that this suit to be dismissed for want of prosecution; and costs of the suit to be awarded to the Applicant. The Motion is supported by the Supporting Affidavit of **JOB MWANGI THIGA, Advocate**. The application is premised on the following grounds;

- a. That the Plaintiff/Respondent is not interested in the suit anymore;
- b. That the Plaintiff/Respondent has not taken any step to have this matter dealt with and disposed of expeditiously since 26th July, 2011;
- c. That it is neither fair nor in the interest of justice for the 1st Defendant/Applicant to be kept in darkness due to the laxity and disinterest in this matter on the part of the Plaintiff;
- d. The Plaintiff/Respondent has slept on his rights and is guilty of laches and it is only fair and just that the same be dismissed with costs.

[2] The Applicant took issue with the Replying Affidavit sworn on 26th September, 2014 in which the 1st Defendant is laying blame for the delay on inefficiency of the Court Registry; that the Court file went missing, and alleged negotiations between the Plaintiff and the 1st Defendant. This suit was filed on 16th August, 1999. The 1st Defendant entered appearance and filed Defence on 17th September, 1999 denying the Plaintiff's claim. The matter was last in Court on 26th July, 2011 on a call over before the Deputy Registrar when it was adjourned indefinitely. Since then, this suit has never been heard and indeed the Plaintiff and or his advocates have taken no steps to set the suit for hearing, or for hearing of the pending application. It is the Plaintiff's primary responsibility of ensuring that the suit is set down for hearing. They relied on the case of **Alice Mumbi Ng'ang'a vs. Damson Chege Ng'ang'a & another** [2006] eKLR where the court observed that:-

'This court has ruled in several cases that a civil case once filed is owned by a litigant and not his advocate. It behooves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client, then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not per se make this court to exercise its discretion in favour of an aggrieved litigant. This court will exercise its discretion in favour of such a litigant after taking into consideration all the factors that are applicable in the case.'

The 1st Defendant also relied on the case of **Hotwax Hotels Limited vs. Nairobi City Council** [2005] eKLR where in refusing to reinstate a suit that had been dismissed for want of prosecution, the Court observed thus:

‘Hardly any cogent account has been given before me which would excuse the failure by the plaintiff to prosecute this suit of 2000. Although the Plaintiff indicates its preparedness to pay reasonable throw-away costs to the defendant, in return for being allowed more time to prosecute the suit, I think such a scheme is unlikely to outweigh the prejudice that must fall upon the defendant occasioned by suit, held on a threat for so long and yet not prosecuted. It would also be improper to commit the courts time-resources for the purpose of a case that won’t be prosecuted to disposal.’

[3] The Applicant is of the view that, continued presence of this case in the courts when the Plaintiff is not willing to speedily prosecute it is prima facie prejudicial to the 1st Defendant. It found support in the words of Mutungi J in **Anthony G. Munene vs. British American Tobacco [2005] eKLR** that:

‘.....a Defendant goes through mental torture and stress when a Plaintiff does not prosecute its/his case speedily and without delay...’

This suit has been in court since 1999 and 15 years down the line the same has not come to an end. Litigation cannot continue *ad infinitum*. The Applicant found the following equitable maxims to be useful guide in arriving at a decision:

a. Equity aids the vigilant not the indolent.

b. Delay defeats Justice.

Therefore, the Applicant urged the Court to dismiss the suit for want of prosecution with costs to the Applicant.

The Plaintiff says the suit should be sustained

[4] The Respondent filed a replying affidavit sworn on the 26th day September 2014. It avers that the suit should be sustained for the following reasons:-

a. The firm previously representing the 1st Defendant was involved in negotiation with the Respondent herein. Despite the negotiation, the Respondent was also vigilant of prosecuting the suit and has always set the suit for hearing all through.

b. In the year 2012, the Respondent invited the Applicant for fixing the suit for hearing in a letter dated the 10th day of December 2012. However on approaching the Court registry the Court file could not be traced.

c. Advocates on record for the Plaintiff wrote to the Deputy Registrar on the missing Court file but the letter was never responded to. As late as last November 2013, the advocates for the Plaintiff attempted to fix the matter for hearing, but again the Court file could not still be traced.

[5] The Respondent argued that inordinate delay could differ from case to case, depending on the circumstances and facts of each case e.g. the subject matter of the case, explanation of delay, nature of the case etc. The test that the Court ought to employ should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore inexcusable. It should be beyond acceptable limits in the prosecution of cases. They believed that they have shown that on numerous occasions they fixed this matter for hearing even during the negotiation between the parties. In other occasions, they could not fix the suit for hearing because the court file was unavailable. Therefore, the delay in this case is not attributable to the Plaintiff only. These explanations are in line with the principles as set in the case of **Nagle vs. Fielden [1966]2 QBD 633 at p. 648 and Lord Diplock in Birket vs James [1978] AC 297** which are:-

1. Whether there has been inordinate delay on the part of the Plaintiff in prosecuting the case.

2. Whether the delay is intentional, contumelious and therefore inexcusable.

3. Whether the delay is an abuse of the Court process.

4. Whether the delay gives rise to substantial risk to fair trial or cause serious prejudice to the Defendants.

5. What prejudice will the dismissal occasion to the Plaintiff?

6. Whether the Plaintiff has offered a reasonable explanation for the delay.

7. Even if there has been delay what does the interest of justice dictate; lenient exercise of discretion by the Court?

The delay was occasioned by factors beyond the control the Plaintiff who took reasonable and appropriate steps to notify Court of the missing file. The delay was neither intentional and was never intended to abuse Court process. The delay should be excused. The applicant has not shown what prejudice he stands to suffer and the Court should be guided by the provisions of Section 3 & 3A of the Civil Procedure Act into making orders for purposes of arriving at the ends of justice and prevent the

miscarriage of equity. The nature of the claim before Court involves special damages which run into millions of shillings and a property of considerable value is at stake. The rules of natural justice must be let to take its course and parties hereto given an opportunity to present their case. They cited that case of **Professor Mwangi S. Kimenyi vs. The Hon. Attorney General & Anor [2014] eKLR** where although there was no steps taken in the High Court matter, the Appeal which involved the same subject matter was vigorously involved by both parties in the prosecution of the said appeal. It was the Judge's rendition that that was an indication that the Plaintiff was keen in the matter.

DETERMINATION

[6] I have stated before, and I will state again, the test applicable in dismissal of suit for want of prosecution is whether there has been inordinate delay which is inexcusable. However, courts of law should be careful not to gauge "inordinate delay" in its dictionary meaning but by looking at the entire circumstances of the case. Accordingly, any explanation given for the delay should be evaluated thoroughly to see whether the delay is excusable in the interest of justice. This approach inclines heavily towards sustaining rather than dismissing cases in a summary manner as that would be most cruel judicial act comparable only to the proverbial drawing of the sword of the Damocles. Thus I admire the opinion by Chesoni J (as he then was) in the case of **Ivita Vs Kyumbu**: whether, despite the delay, it is still possible to do justice for all the parties in the suit.

[7] I will apply the above test to the facts of the case. I reckon that parties were negotiating at one time although we are not told the exact period or the status of the negotiations. Again, this matter was last in court on 26th July, 2011 and except the allegation that the court file went missing, there is really no other explanation for the prolonged delay herein. But, we are aware that sometimes court registries have not performed in optimum manner and files are misplaced or are not easily traceable in the registry. And for this reason, I am prepared to give the Plaintiff the benefit of the doubt and sustain his suit but on strict conditions which I hereby spell out as follows:-

a) The Plaintiff shall file and serve all the necessary papers and pleadings, including witness statements and documents he intends to rely upon in the case within 21 days of today. The Plaintiff shall also comply with all the practice directions of the division.

b) On such service in (a) above, the Defendant shall file and serve all the necessary papers and pleadings including witness statements and documents in support of their case within 21 days thereof.

c) The Plaintiff shall pay costs of Kshs. 5,000 to the Defendant within 21 days of today.

d) In the event of default by the Plaintiff to take or do any one or more of the steps or acts specified above within the time allowed, the suit shall stand dismissed without the necessity of an application in that behalf. It is so ordered.

Dated, signed and delivered in court this 23rd day of April 2015

F. GIKONYO

JUDGE