



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO 288 OF 2009

PHILIP KISIA.....PLAINTIFF

VERSUS

PAUL ODHIAMBO.....1ST DEFENDANT

LILIAN ODHIAMBO.....2ND DEFENDANT

AJAA OLUBAYA T/A

AJAA OLUBAYI & CO ADVOCATES.....3RD DEFENDANT .

R.M. MABERA.....4TH DEFENDANT

RULING

1. This is a consolidated Ruling in respect of the 4th Defendant's Notice of Motion application dated 3rd June 2012 and filed on 10th June 2012 and the 1st and 2nd Defendants' Notice of Motion application dated 22nd August 2012 and filed on 24th August 2012.
2. The 1st and 2nd Defendants' Notice of Motion application was filed under the provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. The 4th Defendant's Notice of Motion application was brought pursuant to the provisions of Order 51 Rule 1 and 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Both applications primarily sought that the Plaintiff's suit be dismissed for want of prosecution.
3. The Plaintiff did not file any response to the 1st and 2nd Defendants' application as it contended that its Replying Affidavit filed in response to the 4th Defendant's application was sufficient as both applications had sought the same prayer.
4. On 12th March 2015, the 1st and 2nd Defendants' counsel asked the court to determine the matter on the basis of the Plaintiff's response herein, a request that was conceded to by the Plaintiff. Despite being served, both the 3rd and 4th Defendants did not attend court when the said agreement was arrived at.

THE 1ST AND 2ND DEFENDANTS' CASE

5. The 1st and 2nd Defendants' application was supported by the 1st Defendant's Affidavit that was sworn on his own behalf and that of the 2nd Defendant on 24th June 2014. The 1st and 2nd Defendants' Written Submissions were dated 4th November 2014 and filed on 5th November 2014.

6. They averred that the Plaintiff filed suit in 2009 and that since the close of pleadings, he had not taken any steps to prosecute the case, which omission was prejudicial to them. They contended that this matter was last in court on 14th February 2011 when the Plaintiff was directed to comply with Civil Procedure Rules but had failed to do to their detriment.
7. They therefore sought to have the Plaintiff's suit dismissed for want of prosecution with costs to them.

THE 4TH DEFENDANT'S CASE

8. The 4th Defendant's application was supported by the Affidavit of Christopher Siro. It was sworn on 3rd June 2013 and filed on 10th June 2013. Its Written Submissions were dated 17th September 2015 and filed on 23rd September 2015.
9. The 4th Defendant reiterated the 1st Defendant's averments and added that the failure by the Plaintiff to prosecute the case herein for almost four (4) years was highly prejudicial. It was its contention that the Defendants ought not to be burdened with litigation which must come to an end.
10. It similarly prayed that the Plaintiff's suit be dismissed for want of prosecution with costs to it.

THE PLAINTIFFS' CASE

11. In opposing the 4th Defendant's said application, the Plaintiff swore a Replying Affidavit. It was sworn on 3rd March 2014 and filed on even date. His Written Submissions were dated and filed on 16th October 2014.
12. The Plaintiff averred that the court file had been missing from the court registry. He said that on 10th July 2013, the 4th Defendant's application was taken out of the cause list as the court file could not be traced. He pointed out that he had since filed his Witness Statements and all other necessary documents and was ready to proceed with the hearing herein.
13. He stated that he was pursuing a claim in excess of Kshs 1,800,000/= and that his claim would be wrongly dismissed if the applications herein were allowed. It was his contention that he ought not to be punished for the errors of the registry and therefore urged the court to dismiss the said applications to allow him to pursue his legal and lawful right.

LEGAL ANALYSIS

14. Order 17 Rule 2 (3) of the Civil Procedure Rules, 2010 reads as follows:-

“Any party to the suit may apply for its dismissal as provided in sub-rule 1.”

15. The aforementioned sub-rule (3) is read together with sub-rule (1) of Rule 2 in which it is stipulated as follows:-

“In any suit in which no application has been made or step taken by either party for one year, (emphasis court) 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.”

16. The court noted the holding in the case of **Agip (K) Limited vs Highlands Tyres Limited [2001] eKLR** that was relied upon by the Plaintiff that in deciding whether or not a suit should be dismissed for want of prosecution, Visram J (as he then was) stated that the court had to consider whether the delay was inordinate, whether the inordinate delay was inexcusable and whether a defendant was likely to be prejudiced by the delay.
17. It is therefore the duty of any party or an advocate in a suit to take steps in adding the court achieve the overriding objective as provided under Section 1A of the Civil Procedure Act Cap 21 (Laws of Kenya) for the just, expeditious, proportionate and affordable dispensation of matters. In this regard, the Court concurred with the holdings in the cases of **Fitzpatrick vs Batger & Co**

Limited [1967] 2 ALL ER 657 and Century Oil Trading Company Limited vs Gerald Mwaniki Mbogo & Another [2004] eKLR that were relied upon by the Plaintiff.

18. The Plaintiff annexed copies of letters to the Deputy Registrar High Court of Kenya Milimani Commercial Courts and Chief Registrar of the Judiciary dated 15th July 2013 and 17th July 2013 seeking their assistance as the court file could not be traced at the Registry. In letters dated 13th September 2012, 19th November 2012 and 25th January 2013, the 1st and 2nd Defendants' advocates also wrote to the said Deputy Registrar advising that the court file could not be traced despite their trying to locate the same. They even suggested about reconstructing the said file.
19. The file appears to have been traced subsequently as both the Plaintiff's and 1st and 2nd Defendants' advocates sent letters to each other inviting the parties to fix mutually convenient hearing dates herein. The letters of invitation were dated 14th November 2013 and 25th November 2013 respectively.
20. It was not in dispute that the court file could not be traced for a while. This court took the initiative to peruse the court file and noted that the Deputy Registrar on 28th February 2013 wrote to the 1st and 2nd Defendants' advocates informing them that the court file which had been misfiled had now been traced.
21. The explanation by the 1st and 2nd Defendants' that the court file disappeared after the applications for dismissal of the suit were filed was at most, speculative and unsupported. Additionally, the court was unable to accept the 4th Defendant's arguments that the suit herein ought to be dismissed as there was no indication that any hearing date was ever fixed.
22. Evidence of the letters inviting parties to fix hearing dates was sufficient proof to this court that the Plaintiff had at least endeavoured to prosecute its case. In any event, the hearing of the main suit could not proceed until such time the applications for dismissal of the suit had been dispensed with.
23. It was therefore the view of the court that the Plaintiff's failure to fix the hearing of this matter was not intentional and/or deliberate and was excusable as the Deputy Registrar did apologise for the misfiling of the court file.
24. Once the court has found that the delay in prosecuting a case was excusable, despite it being inordinate, the question of whether such delay had caused prejudice to the defendants would not arise. For that reason, the question of whether such delay had caused prejudice to the 1st, 2nd and 4th Defendants had thus been rendered moot.
25. Even if the court would have found that there was inordinate delay that was inexcusable, the said Defendants failed to demonstrate what prejudice or injustice they had suffered in the period the Plaintiff failed to take active steps to prosecute this matter.
26. This is because, while they may have suffered anxiety due to the non-prosecution of the matter herein, they had themselves not filed their List of Witnesses, Witness Statements, List and Bundle of Documents. None of the parties had also filed their Statement of Agreed Issues to date. The matter cannot therefore be said to be ready for hearing.
27. Accordingly, having considered the pleadings, the affidavit evidence and the written submissions and the cases that were relied upon by the parties, the court came to the conclusion that this was not a suitable case where the suit should be dismissed for want of prosecution. Appreciably, it is the duty of the court to sustain rather than terminate suits. Denying a party an opportunity to be heard, which is a right that is enshrined in Article 50 of the Constitution of Kenya, 2010, is a draconian step and must be exercised cautiously and only as a last resort.
28. Be that as it may, a court should balance the scales of justice between denying a party a right to having his case heard on merit and not allowing the Sword of Damocles from hanging precariously over the heads of defendants. Where a court has decided to sustain a suit, it ought to award costs to compensate defendants who have been burdened by litigation that has no prospect of ending within a reasonable period.
29. As the Plaintiff did not offer any plausible explanation why the matter had not been fixed the hearing between the time he filed suit on 27th April 2009 and in 2012 which he had indicated in Paragraph 3 of his Replying Affidavit as being the first time the file disappeared, he shall therefore not be allowed to go scot-free and must pay the 1st, 2nd and 4th Defendants costs for such inconvenience.

DISPOSITION

30. For the foregoing reasons, the upshot of this court's ruling is that the 4th Defendant's Notice of Motion application dated 3rd June 2012 and filed on 10th June 2012 and the 1st and 2nd Defendants' Notice of Motion application dated 22nd August 2012 and filed on 24th August 2012 were not merited and the same are hereby dismissed.
31. The court hereby directs that the parties to comply with the Practice Directions High Court of Kenya Commercial & Admiralty Division Kenya Gazette Notice No 5179 of 28th July 2014 within ninety (90) days of the date of this ruling. The Case Management Conference will be held on 18th September 2015.
32. The Plaintiff is hereby ordered to pay the 1st and 2nd Defendants' and the 4th Defendants' advocates thrown away costs in the sum of Kshs 5,000/= each within fourteen (14) days from the date of this ruling. In default thereof, the suit will stand dismissed for failure to comply with the court's directions and/or orders.
33. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of May, 2015

J. KAMAU

JUDGE