



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 175 OF 2009

CASEMENT INDUSTRIES LIMITED..... PLAINTIFF

VERSUS

THE HON ATTORNEY GENERAL.....1ST DEFENDANT

NATIONAL INDUSTRIAL CREDIT BANK LTD ..2ND DEFENDANT

KENYA COMMERCIAL BANK LTD.....3RD DEFENDANT

AZIZ MOHAMMED PIRAK BARUCH.....4TH DEFENDANT

CHARLES BOSIRE.....5TH DEFENDANT

ESTHER MUBOKA BOSIRE.....6TH DEFENDANT

VINCENT JOSEPH KAMBO.....7TH DEFENDANT

TERESIA KAMBO GIKONYO.....8TH DEFENDANT

RULING

INTRODUCTION

1. The 2nd Defendant's Notice Motion application dated and filed on 18th March 2013 was brought under the provisions of Order 17 Rules 2(1) and 2(3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap 21 of the Laws of Kenya) and all other enabling provisions of the law). It sought the following orders:-

1. **THAT the suit against the 2nd Defendant herein be dismissed for want of prosecution.**
2. **THAT the costs of the suit and the application be borne by the Plaintiff.**

2. It was premised on the following grounds:-

- i. **More than 4 years had passed since the 2nd Defendant filed its defence in this matter at the High Court of Kenya Central Registry.**
- ii. **Since the filing of the defence by the 2nd Defendant on 9th October 2008, the Plaintiff had**

- failed to make any applications or take any active steps in prosecuting this matter.**
- iii. **The Plaintiff's delay in prosecuting this suit constituted an abuse of the process of the court and had caused prejudice to the 2nd Defendant/Applicant in the form of costs and time spent in this matter.**

AFFIDAVIT EVIDENCE

3. The said application was supported by the affidavit of Anthony Njogu which was also sworn on 18th March 2013. The deponent stated that the Plaintiff filed its suit on 22nd August 2008 at the Environmental & Land Court Division while the 2nd Defendant filed its Defence on 9th October 2008. He said that the suit was subsequently transferred to the Commercial & Admiralty Division on 25th February 2009 and that since then, the Plaintiff had failed to take any steps to set down the suit for hearing.
4. He stated that the Plaintiff's failure to set down the suit for hearing indicated its lack of interest in pursuing the matter resulting in delay which had caused prejudice to the 2nd Defendant.
5. It was the 2nd Defendant's case that in the circumstances of this case, it was just and proper that the Plaintiff's suit against it be dismissed for want of prosecution.
6. In its affidavit sworn by Maurice Muli Nzavi on 24th September 2013 and filed on the same date, the Plaintiff contended that the court file could not be traced culminating in its letter to the Deputy Registrar asking for assistance to trace the said court file.
7. It annexed a copy of the letter to the Deputy Registrar dated 14th February 2013 and a Request for Judgment dated 30th November 2012 for entry of interlocutory judgment against the 4th Defendant as proof that the court file could not be found. It said that it managed to trace the said court file on 25th March 2013 when it filed the said Request for Judgment against the 4th Defendant.
8. It was its further contention that it was preparing its relevant pleadings for filing in compliance with order 11 of Civil Procedure Rules, 2010 before it could fix the matter for hearing.
9. It argued that it was in the interest of justice and fairness that the matter be heard in full to enable the court give its determination in this matter.

LEGAL SUBMISSIONS BY THE 2ND DEFENDANT

10. The 2nd Defendant filed its written submissions dated 2nd December 2013 on the same date. It submitted that the test for dismissal of suits for want of prosecution under Order 17 of Civil Procedure Rules, 2010 was that in exercising its discretion, the court had to consider the following prerequisite conditions:-
 - a. **Whether there had been inordinate delay;**
 - b. **Whether the delay was explainable; and**
 - c. **Whether the delay was one that would cause prejudice to one or all parties to the suit.**
11. It referred the court to the cases of **Protein & Fruits Processor Ltd vs Credit Bank Ltd & 2 others [2004] eKLR, Allen vs Sir Alfred McAlpine & Sons [1968] All ER 543, Fitzpatrick vs Batger & Co Ltd [1967] 2 All ER** and **HCCC No 1692 of 1998 Joseph Arn Magembe vs Innocent Obri (sic) Momyani (sic)** (unreported) to buttress its argument.
12. It said that the letter to the Deputy Registrar clearly demonstrated that the Plaintiff went to sleep and that there was no plausible explanation why it took no steps to prosecute its case against the 2nd Defendant.
13. It submitted that the continued inordinate and unexplainable delay had occasioned and continued to occasion prejudice to the 2nd Defendant by being kept in a perpetual state of anxiety and therefore urged this court to dismiss the Plaintiff's suit against the 2nd Defendant.

LEGAL SUBMISSIONS BY THE PLAINTIFF

14. On its part, the Plaintiff filed its written submissions dated 16th December 2013 on the same date.

It reiterated the test for dismissal of suits for want of prosecution as had been set out in the 2nd Defendant's written submissions. It relied on the case of **Agip (K) Ltd vs Highlands Tyres Ltd [2001] KLR** where Visram J (as he then was) stated:-

“...Order 16 Rule 5 of the Rules is not automatic and certain factors have to be considered such as (i) whether the delay is inordinate (ii) whether the inordinate delay is inexcusable and (iii) whether the Defendant is likely to be prejudiced by the delay...”

15. In relying on the cases **of Ivita vs Kyumbu [1984] KLR 441** and **Graham Veteh vs Calvin Burgess & Another [2012] eKLR**, the Plaintiff submitted that the delay was excusable as the court file went missing and this was beyond its control. It added that the 2nd Defendant had not shown what prejudice it had suffered as a result of the delay.

LEGAL ANALYSIS

16. This court has carefully considered this matter and finds that there has been inordinate delay on the part of the Plaintiff in prosecuting its case against the 2nd Defendant. Its explanation that the court file went missing may have been plausible but the Plaintiff did not appear to have taken active steps in looking for the court file, if indeed it was missing from the registry.

17. If it actively sought the same, there is no evidence to support this claim as the letter dated 14th February 2013 merely states that **“we wish to notify you that the file has gone missing”**. The said letter does not state when the file went missing and as was rightly pointed out by the 2nd Defendant, it was clear that the last action was on 8th July 2010.

18. The court finds the delay fell short of a plausible explanation of why there had been inordinate delay in the Plaintiff prosecuting its case against the 2nd Defendant.

19. Having found that there was inordinate delay on the part of the Plaintiff on its failure to prosecute its case against the 2nd Defendant and that the delay was not explainable, the court is still nonetheless obliged to consider the third test, which is, whether or not the said delay had caused any prejudice to one or all the parties. This is because the three (3) prerequisite conditions are not exclusive but rather, each is dependent on the other.

20. The court has noted the ground in the face of the application that the delay continued to prejudice the 2nd Defendant in the form of costs and time spent in this matter.

21. In the 2nd Defendant's own admission, there has been no activity in this matter since the file was transferred to the Commercial & Admiralty Division in 2009. It would therefore be farfetched for the 2nd Defendant to aver that it was being prejudiced in the form of costs and time spent. However, if that was the case as different firms of advocates compute their costs and time differently, this court would not be satisfied that accrual of costs, without any supporting proof, would amount to prejudice. In the absence of any other ground, this court finds that the 2nd Defendant has not been able to demonstrate the prejudice it has suffered as a result of the delay by the Plaintiff.

22. Be that as it may, as was rightly pointed out in the 2nd Defendant's written submissions, a Plaintiff cannot keep a suit on a party like a Sword of Damocles. A Plaintiff must choose whether it wants to pursue its case against the other party (ies) in an expeditious manner.

23. Section 1A (3) of the Civil Procedure Act Cap 21 (laws of Kenya) imposes a duty on parties to ensure that they prosecute their cases expeditiously and to facilitate the affordable resolution of the dispute.

24. It is time that the Plaintiff prosecuted its case and avoided keeping the 2nd Defendant in a perpetual state of anxiety. This court has considered that the Plaintiff wrote to the Deputy Registrar informing him about the missing file on 14th February 2013 which was about a month before the 2nd Defendant filed the present application. Whilst the court finds that Plaintiff was not jolted from its sleep by the said application, the Plaintiff is being called upon to act diligently and swiftly. The inference drawn by this court would have been different had the Plaintiff written to the Deputy Registrar after the filing of the present application by the 2nd Defendant.

DISPOSITION

25. Accordingly, for the reason that the 2nd Defendant was not able to demonstrate what prejudice it had suffered as a result of the Plaintiff's inordinate delay and the fact that each party has a right to fair hearing under Article 50 of the Constitution of Kenya, 2010, this court does not find the 2nd Defendant's Notice of Motion application dated and filed on 2nd May 2013 to be merited.
26. The said application is therefore hereby dismissed. However, each party will bear its own costs. The court does not find it to be just and equitable for the Plaintiff, who is the author of the 2nd Defendant's frustrations, to benefit from costs being awarded to it despite the said application having been dismissed.
27. To keep the momentum going and to safeguard the 2nd Defendant's interests, this court hereby directs that:-
- a. **The Plaintiff complies with Order 11 of Civil Procedure Rules, 2010 within thirty (30) days from the date of this ruling i.e. by 30th April 2014.**
 - b. **The Defendants comply with Order 11 of the Civil Procedure Rules, 2010 within thirty (30) days from the date of service by the Plaintiff i.e. by 30th May 2014.**
 - c. **Parties agree on a Joint Statement of Agreed Issues within fourteen (14) days from the date of service of the Defendants' documentation i.e. by 13th June 2014.**
 - d. **In the event parties are unable to agree on a Joint Statement of Agreed Issues, each party will be at liberty to file its version of Statement of Agreed Issues by 20th June 2014.**
28. Matter to be listed for pre-trial on 20th June 2014 to confirm compliance and/or for further orders and/or directions by the court.
29. It is so ordered.

DATED SIGNED and DELIVERED at NAIROBI this 31st day of March 2014

J. KAMAU

JUDGE