



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 849 OF 2009

HOSWELL MBUGUA NJUGUNA.....PLAINTIFF

VERSUS

CELTEL KENYA LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated 25th July 2013 and filed on 29th July 2013 was brought under the provisions of Order 17 Rule 2(1) and (3) and Order 51 Rule 1 of Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 laws of Kenya. It sought the following orders:-

(1) THAT the suit herein filed on 19th November 2009 be dismissed.

(2) THAT the costs of the costs of the suit and this application be awarded to the Defendant.

The grounds on which the said application was premised were generally as follows:-

a. THAT the suit was filed on 19th November 2009 and pleadings closed on 5th February 2010.

b. THAT it was now over a year since the Plaintiff made the last steps to prosecute this suit and that his prolonged inaction was a demonstration that he had lost interest in the suit.

c. THAT the Plaintiff was culpable of inexcusable and inordinate delay in prosecuting the suit and that it was in the interest of justice that the suit herein be dismissed.

AFFIDAVIT EVIDENCE

3. The said application was supported by the affidavit of Linda Kaai Kiriko who was the 1st Defendant's Legal Affairs Manager. The said affidavit was sworn on 23rd July 2013. She set out the grounds on the face of the application in *extenso* and added that the delay in prosecuting the suit herein would occasion

the Defendant a miscarriage of justice as it would be difficult to trace witnesses. She deponed that the Defendant's witnesses with technical knowledge in matters relating to the suit has since left the Defendant's employ.

4. In response thereto, the Plaintiff swore a Replying Affidavit on 11th November 2013. The same was filed on 15th November 2013. He stated that his advocates had invited the Defendant's advocates to fix a hearing date at the registry severally but it was not possible to fix a date for the reasons that:-

a. The court diary was closed;

b. When the matter was actually fixed for hearing, the same did not proceed as the matter was taken out of the cause list; and

c. It was not possible to trace the court file.

5. He annexed copies of letters to the Defendant's advocates inviting them to fix a mutually convenient date and to the Deputy Registrar seeking his assistance to trace the file.

6. It was therefore his case that it was in the interest of justice that the suit be set down for hearing and the matter be determined on the strength of the evidence presented before the court.

LEGAL SUBMISSIONS BY THE DEFENDANT

7. In its written submissions dated 29th January 2014 and filed on 30th January 2014, the Defendant submitted that the Plaintiff had not taken any steps to prosecute this case for a period of over one (1) year as was contemplated by Order 17 Rule 2 of Civil Procedure Rules, 2010 which provided as follows:-

“(1) in any suit which no application has been made or step taken by either party for one year, 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;

(3) any party to the suit may apply for its dismissal as provided in sub-rule 1.”

8. The Defendant relied on several cases whose common thread was that the Plaintiff's case should be dismissed for want of prosecution. It emphasised the case of **Ivita vs Kyumbu [1984] KLR** where the court found that the Plaintiff therein had not shown sufficient excuse for the delay in prosecution of his suit and that the delay therein was inordinate.

9. It referred this court to the cases of **Abdul & Another vs Home & Overseas Insc Co Limited [1971] EA 564** and **Justione Gitonga Mate vs Mwoni Housing Co-operative Society Limited & Another [2004] eKLR** where the concern was the likely prejudice that was to be suffered by a Defendant due to inavailability of witnesses through death, leaving of employment, traceability, loss of memory, document and increase of costs.

10. It therefore urge this court to find that the Plaintiff was guilty of inordinate and excusable delay as a result of which the suit herein should be dismissed.

LEGAL SUBMISSIONS BY THE PLAINTIFF

11. The Plaintiff filed his written submissions dated 22nd January 2014 on 23rd January 2014. He argued that Order 17 Rule 2 of the Civil Procedure Rules, 2010 was clear that certain conditions had to be met before a suit could be dismissed. He relied on the cases of **Richmond vs Mwangi & 259 others vs Lee Mwathi Kimani [2013] eKLR** and **Ivita vs Kyumbu** (Supra) also relied on by the Defendant where the court set down the test for dismissal of suit for want of prosecution which were whether there was delay

in prosecuting the suit and whether the delay was inexcusable.

12. It was his case that the numerous letters attached to his affidavit were sufficient proof that there had been no inordinate or inexcusable delay on his part and that he was keen to prosecute the matter herein.

LEGAL ANALYSIS

13. It is evident that it is over four (4) years since the Plaintiff filed the suit herein. Exhibits “HMN 1 – HMN 4” attached to the Plaintiff’s Replying Affidavit show various letters by the Plaintiff’s advocates to the Defendant’s advocates to fix a mutually convenient date for the hearing of the suit.

14. From Exhibit “HMN 3”, it is apparent that there was a lull between 4th November 2010 to 1st February 2012. The hand written note in Exhibit “HMN 4” shows that the court file could not be traced leading to the Plaintiff’s advocates writing two (2) letters to the Deputy Registrar marked Exhibits “HMN 5 and HMN 6” indicating that the court file could not be traced.

15. It is instructive to note that the letters to the Deputy Registrar were written before the Defendant filed its present application. What comes out clearly is that it was not the Defendant’s application that jolted the Plaintiff to try and fix a hearing date. The court also notes that the Defendant did not rebut the Plaintiff’s evidence that his advocates had invited its advocates to fix the said date.

16. The court appreciates and wholly concurs with the Defendant’s submission that the suit herein should be prosecuted expeditiously more so because its technical witness might not be available during trial due to the delay herein. However, the court must also be alive to the fact that delays could also be caused by factors beyond a plaintiff’s control.

17. In this instant case, the date was never fixed, for one reason or the other. The court diary was closed and at one time the court file went missing. The Deputy Registrar does not appear to have responded to the Plaintiff’s advocates letters of 5th March 2012 and 22nd May 2013.

18. Having carefully considered the pleadings herein, the written submissions and the case law, this court has come to the conclusion that the delay in prosecuting the case herein was excusable despite the same being inordinate. These two (2) tests must be present at the same time failing which an application for dismissal of a suit for want of prosecution would not succeed. An applicant must also show the prejudice that it has suffered due to the delay. The Defendant was not also able to demonstrate what prejudice it had since suffered as the leaving of the witnesses from its employ was an assertion that was not supported by any evidence.

19. In arriving at the importance of a party proving prejudice, this court has also had due regard to the case of **Agip (K) Limited vs Highlands Tyres Limited [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...”

20. However, in view of the fact that the Sword of Damocles cannot continue hanging over the head of the Defendant and the very likely possibility of it not being able to trace its witnesses, it is imperative that this matter be heard expeditiously.

21. 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.

22. Bearing in mind that the Plaintiff is entitled to a right to fair hearing as enshrined in Article 50 of the Constitution of Kenya, 2010, this court finds that in the interests of justice that the Plaintiff be given an opportunity to ventilate his case in a full trial and his case not be dismissed for want of prosecution.

DISPOSITION

23. For the reason that this court found that the delay in prosecuting the Plaintiff's case was inordinate but excusable, and the fact that the Defendant was not able to demonstrate, by way of documentation the fact that its witnesses had left its employ, it did not find the Defendant's Notice of Motion application dated 25th July 2013 and filed on 29th July 2013 to have been merited.

24. In the circumstances foregoing, the said application is hereby dismissed. However, each party will bear its costs as it is not just and equitable that the Plaintiff should benefit from the Defendant's frustrations following the slow pace that the prosecution of this matter has taken.

25. To keep the momentum going and to safeguard the Defendant's interest, this court hereby directs as follows:-

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 Defendant 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.

26. 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.

27. It is so ordered.

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

J. KAMAU

JUDGE