



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. 94 OF 2008

EASTERN PRODUCE KENYA LIMITED.....PLAINTIFF

VERSUS

RONGAI WORKSHOP & TRANSPORTERS LIMITED.....1ST DEFENDANT

JUBILEE JUMBO HARDWARE LIMITED.....2ND DEFENDANT

RULING

1. This Ruling concerns two applications which were consolidated by the order of this court made on 27th April 2013. The first application is the **notice of motion dated 23rd March 2012 and filed on 28th March 2012** by the First Defendant by which it sought dismissal of the suit for want of prosecution. The second application is one dated **17th September 2012** and filed on **20th September 2012** by the Second Defendant by which it sought for a notice to be issued to the Plaintiff to show cause why this suit should not be dismissed.

2. The grounds upon which the above prayers were sought appearing on the face of the applications include –

- i. *that the Plaintiff has not taken any step or action since 12th May, 2010 when the suit was adjourned generally,*
- ii. *that the delay of one and a half years in prosecuting this suit is intentional, inordinate and inexcusable on the part of the Plaintiff and no valid reason has been given for this long protracted inaction by the Plaintiff,*
- iii. *that the Defendants have been greatly prejudiced by the continued pendency of the suit, and*
- iv. *that it is in the interest of justice that the suit be dismissed for want of prosecution.*

3. The First Defendant's application is supported by **the affidavit of George Kirumba Mbiyu sworn on 23rd March 2012 while that of the Second Defendant is supported by the affidavit of Dilipsinh Prabhatsinh Mahida sworn on 17th September 2012. The second Defendant also filed a further affidavit sworn on 16th October 2012 in response to the Plaintiff's Replying Affidavit.**

4. **In opposition to the applications, the Plaintiff filed a Replying Affidavit by Mildred Eseri Munyasa sworn on 8th June 2012. Parties filed written submissions which were highlighted on 24/03/2014. The The Second Defendant filed its submissions on 19th August 2011, while those of the First Defendant were filed on 13th December 2011. The Plaintiff filed its submissions on 2nd November 2011. I have considered the submissions, including the cases cited. I have also**

perused the court record.

5. The principles to be applied in an application for dismissal of a suit for want of prosecution were laid out in the case of **LEE WAIGWA WARUINGI VS. HOUSING FINANCE CO. OF KENYA LIMITED [2005] eKLR** as follows-

“For the Defendant to succeed in an application for dismissal for want of prosecution, he must show-

- i. *that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.*
- ii. *that this inordinate delay is inexcusable. As a rule until a credible excuse is made out, the natural inference is that it would be inexcusable*
- iii. *that the Defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the Plaintiff or between themselves and third parties or between each other. In addition to any inference that may be drawn from the delay itself, prejudice, can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of serious prejudice at the trial.”*

5. The Plaintiff instituted this suit on 3rd June 2008 against the Defendants seeking a sum of Kshs. 3,244,479.90/= together with interest for breach of contract and negligence. From the court record, this matter was first set down for hearing on 12th May 2010, when the same was adjourned at the behest of the Defendants to enable them exchange documents. It appears that there was an issue of representation of the Defendants, but the same was resolved on the same day when Counsel agreed that that the firm of Jones & Jones Advocates would cease acting for the First Defendant but remain on record for the Second Defendant while that of M/s Mutonyi, Mbiyu & Company Advocates would continue acting for the First Defendant. The Plaintiff's counsel indicated that he had been ready to proceed with three witness and was directed to take a hearing date at the registry on priority basis.

6. No step was taken in the matter until 23rd March 2012 when the First Defendant filed an application to dismiss the suit for want of prosecution. The Plaintiff however alleges that it had tried to fix the matter for hearing severally and has annexed letters inviting the Defendants to the registry for purposes of taking a hearing date, but it was informed that there were no dates available in the year 2012 as the diary was already full. Counsel for the Plaintiff argued that in the circumstances the delay could not be said to be inordinate and he relied on the holding **NAKURU INDUSTRIES LIMITED VS. SOLOMON WANJALA MABONGA [2010] eKLR** where the court declined to dismiss the suit for want of prosecution as the delay in that case was partly contributed by the the fact that the court diary was full.

7. However as argued by the Counsel for the Defendants, the Plaintiff has not proffered any reason as to why the Plaintiff did not take any step between May 2010 and April 2012 during which there were hearing dates available. Although the Plaintiff accuses the Defendants of contributing to the delay by firstly adjourning the hearing of the suit on 12th May 2010 and failing to file the documents they intended to rely on during the hearing other than the defence, it is my view that the burden is always on the Plaintiff to ensure the expeditious conclusion of his case. It was his duty to move the court for directions upon non-compliance by the Defendants with the order of the court on discovery and proceed with the hearing of the suit.

8. I am guided by the holding in **CENTURY OIL TRADING COMPANY LTD VS. MWANIKI MBOGO & ANOTHER (MILIMANI Commercial Courts H.C.C.C NO. 367 OF 2001)**, cited with approval in **DIPAK PREMCHAND SHAH & OTHERS VS. AKIBA BANK LIMITED Nairobi H.C.C.C No. 34 of 2003**, where Mutungi, J held that -

“I do not prescribe to the motion that Order XVI, rule 5 (d) (now Order 17 Rule (3) shifts the burden of expeditious prosecution of a suit from the Plaintiff to the Defendant.”

9. It is therefore my view that the delay of one and a half months before any attempt was made to take a hearing date for the suit is quite inordinate. However the courts have held that this is not on its own sufficient to warrant the dismissal of a suit for want of prosecution. In the case of IVITA VS. KYUMBU [1984] KLR 441, Chesoni, J held-

“The test to be applied in an application for dismissal is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.”

10. In the instant case, it is my view that justice will be done if the matter is heard and determined on its merit. The Plaintiff has complied with the pre-trial procedures and is ready to prosecute its case. It has shown willingness to have the suit heard, albeit after the applications for dismissal had been filed. It has not been demonstrated by the Defendants that they have been prejudiced by the delay and as a result justice has been compromised. The argument that the Plaintiff has not given reasons for its inaction by filing an affidavit and instead chose to rely on one sworn by its Counsel is not meritorious. The averments in the Replying Affidavit by Counsel for the Plaintiff are matters within her personal knowledge having had the conduct of the matter and the one instructed to prosecute the same for the Plaintiff.

11. For the above reasons, the applications dated 23rd March 2012 and 17th September 2012 are dismissed, and I make the following orders-

- (a) the plaintiff shall file and serve its witness statements within 14 days from the date of this ruling,
- (b) Upon being served, the First and Second Defendants shall file and serve their list of documents and witness statements within 14 days,
- c. the Plaintiff shall set down the suit for hearing within 90 days from the date of expiry of the 14 days within which the First and Second Defendants are to comply with order (b) hereinabove, whether or not they have complied,
- (d) Upon failure to comply with order (a) and (c) above, the suit shall stand dismissed with costs to the First and Second Defendants,
- (e) the costs of the applications dated 23rd March 2012 and 17th September 2012 shall be in the cause.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 27th day of May, 2014

M. J. ANYARA EMUKULE

JUDGE