



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 251 OF 2010

MERCY NYAMBURA KANYARA.....1<sup>ST</sup> PLAINTIFF

MARY NJERI MBURU.....2<sup>ND</sup> PLAINTIFF

VERSUS

NYAGA STOCK BROKERS LIMITED

(UNDER STATUTORY MANAGEMENT).....1<sup>ST</sup> DEFENDANT

WYCLIFF SHAMIAH.....2<sup>ND</sup> DEFENDANT

NAIROBI STOCK EXCHANGE.....3<sup>RD</sup> DEFENDANT

CAPITAL MARKETS AUTHORITY.....4<sup>TH</sup> DEFENDANT

PATRICK GAKIAVIH.....5<sup>TH</sup> DEFENDANT

PATRICK NDWIGA.....6<sup>TH</sup> DEFENDANT

RULING

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants' Notice of Motion application dated 3<sup>rd</sup> September 2013 and filed on 9<sup>th</sup> September 2013 was brought pursuant to the provisions of Order 17 Rule 2 (3) and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. It sought the following prayers:-

**1. THAT the Plaintiff's/Respondent's suit against the First, Second and Fourth Defendants/Respondents (sic) be dismissed for want of prosecution.**

**2. THAT the costs of this application and the suit herein be awarded to the First, Second and Fourth Defendants/Applicants.**

THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 5<sup>TH</sup> DEFENDANTS' CASE

2. The application was premised on the grounds on the face of the application and on the affidavit of Zehrabanu Janmohamed that was sworn on 3<sup>rd</sup> September 2013. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants' case was that the Plaintiffs had neither fixed the Chamber Summons application dated 21<sup>st</sup> April 2010 on which the suit herein was presented to court nor the suit itself which was indicative of their disinterest in the matter herein.

3. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants contended that it was in the best interest of justice that the application herein be allowed as they sought to suffer prejudice of the same was not allowed.

4. In the submissions dated 11<sup>th</sup> June 2014 and filed on 13<sup>th</sup> June 2014, the said Defendants blamed the Plaintiffs of laxity and indolence in failing to prosecute the suit as was evidenced by the numerous times the matter had come to court without the same having been heard. They

pointed out that the Plaintiffs' advocates had never taken any action since they filed their Notice of Change of Advocates and were only awakened from their slumber after they filed the present application.

5. They dismissed the Plaintiffs' assertions that they had not been able to serve the 5<sup>th</sup> and 6<sup>th</sup> Defendants as they had the option of seeking leave of the court to effect service by way of substituted service. It was their argument that the inordinate delay had not been adequately explained and urged this court to dismiss the suit herein as equity aids the vigilant and not the indolent.

### **THE PLAINTIFFS' CASE**

6. In opposing the said application, the Plaintiffs filed their Replying Affidavit that was sworn on their behalf by Mary Njeri Mburu on 13<sup>th</sup> January 2014. She stated that the advocate who had conduct of the matter on behalf of the Plaintiffs, one Donald Okonjo, had left the firm of advocates that was acting for them and had not been aware of the said fact until very recently but that they had instructed a new firm of advocates to act for them.

7. She expressed the difficulties they had encountered in serving the 5<sup>th</sup> and 6<sup>th</sup> Defendants who, she said, had gone into hiding. They reiterated that it was upon receiving this information that they instructed the present firm of advocates to take over the matter and urged the court to allow them to prosecute both the application and the suit.

8. The Plaintiffs averred that the suit was of great interest as it involved a sum of Kshs 15,200,000/= and it would suffer injustice if its suit was dismissed. They reiterated the averments they had advanced in their Replying Affidavit in their written submissions dated and filed on 28<sup>th</sup> July 2014.

### **LEGAL ANALYSIS**

9. 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.”**

10. 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.”**

11. 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 for the just, expeditious, proportionate and affordable dispensation of matters.

12. The failure or the delay by the Plaintiffs' past and current advocates to prosecute the matter herein was inordinate and inexcusable. The Plaintiffs' assertions that the specific advocate who was handling their matter left the firm of advocates that was on record for them was a bad excuse as they did not demonstrate to the court that there was no other advocate in that firm who could have handled their case. Again, as was rightly pointed out by the Defendants, nothing stopped the Plaintiffs from seeking leave to effect service upon the 5<sup>th</sup> and 6<sup>th</sup> Defendants by way of substituted service.

13. The court wholly concurred with the submissions by the Defendants that the Plaintiffs had been indolent and casual about the way they had handled a matter they considered so important as it involved a sum of Kshs 15,200,000/=. They had sought an equitable relief and would ordinarily be disentitled from enjoying the said relief as the suit herein was filed on 21<sup>st</sup> April 2010 and had not been set down for hearing since then.

14. However, although the Defendants had contended that the inordinate delay in prosecuting the matter had caused them anxiety and prejudice, they did not, however, explain the prejudice they had suffered.

15. Accordingly, having considered the pleadings, the affidavit evidence and the written submissions by both parties, the court has come to the conclusion that this is not a suitable case where suit should be dismissed for want of prosecution. A perusal of the court file shows that there has been activity in the file in the recent past.

16. Parties do not also appear to have complied with the provisions of Order 11 of the Civil Procedure Rules, 2010 that were applicable at the time suit has been in existence in which case the suit could not have been said to have been ready for hearing by any standards.

### **DISPOSITION**

17. The upshot of this court's ruling is that the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants' Notice of Motion application dated 3<sup>rd</sup> September 2013 and filed on 9<sup>th</sup> September 2013 was not merited and the same is hereby dismissed.

18. The court hereby directs that the parties comply with the Practice Directions High Court of Kenya Commercial & Admiralty Division Kenya Gazette Notice No 5179 of 28<sup>th</sup> July 2014 within thirty (30) days of the date of this ruling.

19. Matter will be mentioned on 28<sup>th</sup> November 2014 for the case conference to confirm compliance and/or for further orders and/or directions by the court.

20. It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 23<sup>rd</sup> day of October 2014

**J. KAMAU**

**JUDGE**