



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 334 OF 2002

SALIM MANJI1ST PLAINTIFF

MADATALLY MANJI2ND PLAINTIFF

VERSUS

MIDDLE EAST BANK LIMITEDDEFENDANT

R U L I N G

1. This matter was before me on 10th November 2014 and again on 17th November 2014.
2. At the hearing on 10th November 2014 the Plaintiff was represented by Mr Kassam holding brief for Mr Singh Gitau. The Defendant was represented by Mr Karanja.
3. On that day the Defendants were ready to proceed. Mr Karanja informed the Court that the 2nd Plaintiff had passed away and there was still no application to substitute. Further that this was the second time a hearing date had been taken and the matter had been listed for two days consecutively.
4. Mr Kassam explained that Mr Gitau was out of the Country and due to return in time for the hearing but that was not possible. He apologised to the Court. Mr Kassam was not in a position to commit to an alternative hearing date.
5. The matter was re-listed on 17th November 2014. There was no appearance recorded for either of the Plaintiffs. Nor did the firm of Messrs Singh Gitau to pursue their application.
6. I notice that there is an Application made by Notice of Motion on the Court file dated 17th May 2012 whereby the firm of Singh Gitau Advocates requested leave to cease acting for the Plaintiffs.
7. The Grounds for that Application were-
 - i) THAT the instructing Client has despite several reminders failed to give instructions to the Advocates.
 - ii) THAT the firm cannot continue representing the Plaintiffs in the absence of instructions.

8. The Application is supported by the Affidavit of James Gitau Singh. The Notice of Motion was to be served on both Plaintiffs. This was done by Registered Post and there is an Affidavit of Service of a Mr Kitheka to that effect (dated 10th May 2014).

It seems that Application was never adjudicated upon that Application.

9. From the Court file I note that the matter was listed on 16th December 2012 and did not proceed due to lack of shortage of Judges. (See letter from Singh Gitau to the 1st Plaintiff dated 16th December 2012). I note also that the letter refers to the Defendants application to have the suit dismissed for want of prosecution.

10. The Defendants issued this Application to have the suit struck out for want of prosecution as long ago as

The suit was commenced by a Plaint in 2002 and there is correspondence on the file detailing the dispute dating back to 2000 and 2001.

11. Between the Application to cease acting (April 2012) and the Notice of Hearing dated 2nd October 2014 there appears to be no steps taken by the Plaintiffs. That is a period in excess of 2 years. Even the invitation to list was not taken up. The last time the matter had been listed was 17th May 2012. On 17th May 2012 the Court ordered that the Application 4th April 2012 was allowed as prayed.

12. The Defendant wishes to pursue an Application for the suit to be struck out and/or the matter dismissed for want of prosecution with costs to the Defendant.

Law and Principles

The Court has power to struck out a suit for want of prosecution in the circumstances provided for by **Order 17 Rule 2** which provides:

“2. (1) In any suit in 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.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

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

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

13. In addition, it is necessary to have regard to Article 50 of the Constitution and Article 159(2) which provides:

“159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

a. justice shall be done to all, irrespective of status;

b. justice shall not be delayed;

c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and

traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

- (d) justice shall be administered without undue regard to procedural technicalities;
and**
- (e) the purpose and principles of this Constitution shall be protected and promoted.**

14. In addition, Section 3A of the Civil Procedure Act provides: “Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of Justice of prevent an abuse of the process of court”. From the foregoing it is clear that the Court has a wide discretion in this matter (Dubai Bank of 2009) Therefore, there appears a balancing exercise for the Court to carry out. The right of any party to seek redress by litigation is enshrined in the Constitution, 50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or,. However, that right does not include the right to delay matters indefinitely as provided in Order 17 Rule 2.

15. From the Documents on the Court File, it is clear that the Plaintiffs have not taken any steps in these proceedings for at least two years. The Plaintiff’s Advocates did not attend the Hearing on 17 November 2014 although they had agreed the date.

16. This is clearly not a case where the inaction can be laid at the door of the Advocates. The frustration of the Plaintiff’s Advocates at being without instructions is clearly demonstrated by the Application to cease acting and the Affidavit in Support of that Application.

17. The Second Plaintiff has passed on but no steps have been taken to introduce a substitute Plaintiff or Legal Representatives. That is a further indication of the absence of intention to proceed.

18. A further consideration is whether there has been an inordinate delay to the extent that it jeopardises a fair trial. Or expressed differently will either of the Parties, in particular, the Defendant be prejudiced by the delay. The fact that one of the Plaintiffs has, sadly, already, passed away, is a graphic demonstration that with the passage of time valuable evidence may be lost and therefore be unavailable to the Court.

19. The Plaintiffs’ Advocates and the First Plaintiff have been personally served with the Application to dismiss for want of prosecution. They have not responded or objected in any way, save that the Advocate wishes to cease to act for want of Instructions.

20. In the circumstances, it seems that lack of intention to proceed is clear and therefore the Defendant should not be disadvantaged further or to continue under the burden of litigation which may never conclude.

21. With the guidance that the Court should be slow to act when applying such a draconian remedy, I come to the Conclusion that the weight of evidence indicates clearly that there have been no steps in the last 12 months and also that the Plaintiffs have not shown any intention to proceed.

22. I therefore grant the Defendant’s Application and Strike Out the Claim with the consequences to follow.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF NOVEMBER 2014

F. S. M. AMIN

JUDGE