



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO 181 OF 2010

SAAREL INVESTMENT LIMITED.....PLAINTIFF

VERSUS

PYRAMID CONSTRUCTION COMPANY LTD.....1ST DEFENDANT

KENYA RURAL ROADS AUTHORITY.....2ND DEFENDANT

RULING

1. The 1st defendant prays that this suit be dismissed. The plaintiff filed the suit under certificate of urgency nearly four years ago. To be more precise, on 21st December 2010. Contemporaneously with the suit, the plaintiff filed a chamber summons dated 20th December 2010 under Order XXXIX of the old Civil Procedure Rules (now repealed). On the same date, the plaintiff was granted an *ex parte* injunction restraining the 2nd defendant from releasing some funds to the 1st defendant.
2. The 1st defendant entered appearance on 24th January 2011. On 3rd August 2012, the Court (Mshila J) delivered a ruling on the interlocutory application confirming the injunction and requiring the parties to deposit a sum of Kshs 5,300,000 in a joint interest earning account of both parties. Since that date, the plaintiff has not taken any steps to fix the suit for hearing.
3. The 1st defendant has thus presented a notice of motion dated 10th April 2014 praying that the suit be dismissed for want of prosecution. The pith of the motion is that the plaintiff has lost interest in prosecuting the suit. There is filed an affidavit sworn by Henry Lelei in support of the motion. He avers that it is now over one and a half years since the matter was last in court. He says that due to the delays, the 1st defendant is prejudiced and unlikely to get a fair trial.
4. The plaintiff opposes the application. There is a replying affidavit sworn by Paul Suter, the Managing Director of the plaintiff. He deposes that the plaintiff was initially represented in the suit by J.N. Njuguna & Company Advocates until the 2nd July 2014 when the company appointed Gicheru & Company Advocates. This was due to a dispute with its former counsel. In May 2013, the plaintiff asked its former counsel to surrender the file in this matter to its new counsel. The latter held on to the file as lien over unpaid fees. In the meantime, the former lawyers filed an advocate-client bill of costs in Miscellaneous Application 74 of 2013. The bill was filed on 22nd May 2013.
5. The plaintiff contends that the disagreement with its former counsel and the proceedings for taxation of the bill are responsible for the delay in fixing the suit for hearing. It is only in May 2014 that the disputed payments to its lawyers were finally made. In a nutshell, the plaintiff's case is that it is not to blame for the delays; and, that it is keen on prosecuting the suit.
6. On 8th October 2014, learned counsel for the applicant and respondent appeared before me. The applicant's counsel stated he was relying entirely on the grounds in the motion and the supporting

- deposition. The plaintiff's learned counsel said he was relying entirely on the replying affidavit. I have heard the rival arguments. I have also paid due regard to the records before me, the pleadings, and depositions.
7. Under Order 17 rules 2 (1), (2) and (3) of the Civil Procedure Rules 2010, if no step is taken in any suit by either party for one year, any party may apply to the court for dismissal of the suit. In the instant case, the suit was filed on 21st December 2010. It is common ground that it was *last* in court on 3rd August 2012 when the ruling on injunction was delivered. So a period of *over* one and a half years has passed without any step being taken by the plaintiff to fix this suit for hearing. The application is thus well anchored upon Order 17 rule 2(3) and is properly before the Court.
 8. The test in a matter of this nature was well laid out in *Ivita Vs Kyumbu* [1984] KLR 441. It is whether the delay is prolonged and inexcusable, and if it is, whether justice can still be done. In that event, instead of dismissal, the court may exercise its discretion to set the suit down for hearing.
 9. I have studied the record of the court. Facts can be very stubborn. The truth of the matter is that the plaintiff has *not* taken any steps to set down the matter for hearing since 3rd August 2012. True, there were separate proceedings over a bill of costs between the plaintiff and its former lawyers. The defendants were *not* parties to those proceedings. Even if I accept the proposition that the former lawyers had exercised a lien over the file, the record of the court shows that a notice of change of advocates was only filed on 2nd July 2014. That was well after the 1st defendant had filed its notice of motion for dismissal of this suit back in April 2014. The point is this; despite the disputes with its former lawyers, there was nothing to prevent the plaintiff from taking a hearing date or appointing new counsel. And since appointing its new counsel, there *still* has not been *any* step taken to fix the suit for hearing.
 10. It is thus apparent that the blame for failure to progress the suit for the last one and a half years, and at any rate since 3rd August 2012 rests at the plaintiff's doorstep. Inordinate delay by the plaintiff has thus been established. The delay has not been well explained. It is thus inexcusable. *Ivita Vs Kyumbu* [1984] KLR 441, *Allen Vs McAlpine* [1968] 1 All ER 543, *Ramuka Agencies Ltd vs Esther Wanjira Maina and another* Nairobi, High Court ELC 1187 of 2007 [2012] eKLR.
 11. In *Fitzpatrick Vs Batger & Co. Ltd* [1967] 2 ALL ER 657 Lord Denning, citing his decision in *Reggentine Vs Beecholme Bakeries Ltd* [1967] 111 Sol. Jo. 216, said as follows;

“It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition the delay is far beyond anything we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution”.
 12. The court has inherent power to strike out such a dormant suit. The power was well explained in *Mukisa Biscuit Manufacturing Company Vs West End Distributors Ltd* [1969] EA 696. It is not enough to simply state that there were other proceedings over a bill of costs or disputes with its former counsel. That is not the kind of step contemplated by Order 17: the plaintiff has to take *actual* and *solid* steps to set down the suit for hearing.
 13. It has not been lost on me either that this is a commercial claim for sums running into nearly Kshs 5,300,000. The plaintiff has been enjoying an injunction since the filing of the suit on 21st December 2010. I would then have expected the plaintiff to be a little more diligent in pursuing its commercial interests in the suit. Sadly, I have not seen any compelling evidence that the plaintiff did so. Discovery has not even been done. Instead, a portrait of a lethargic and disinterested litigant emerges.
 14. With the overriding objective to do justice to the parties, it is also in the interests of a fair trial to determine a suit expeditiously. The 1st defendant here is obviously prejudiced by the existence of a stagnant suit. There are costs that go with it. In *Mugo Njogu Vs Mary Githinji* [2010] e KLR the Court was of the view, and I agree, that the plaintiff or its lawyers must take full responsibility for such delay.
 15. Lastly in *Nilam Doshi Vs Credit Agricole Indosuez Limited and 3 others* Nairobi HCCC No. 802 of 2002 (as consolidated with HCCC Nos. 803 & 804 of 2002) (unreported), I observed that the dictates of justice and the inherent power of the court require, in circumstances such as these ones,

to free the defendants from the hold of the plaintiff's inert grip.
16. For all the above reasons, this is a clear case of a disinterested plaintiff; one who has slept on its rights for far too long. I commiserate with the plaintiff for the predicament it now faces but justice is a two way street. Granted the circumstances, the suit cannot be sustained any longer against the defendants. In the result, I order that the plaintiff's suit be and is hereby dismissed with costs to the 1st defendant.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 18th day of November 2014.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Aseo for the plaintiff instructed by Gicheru & Company advocates.

Mr. Mwinamo for the 1st defendant instructed by Mwinamo, Lugonzo & Company Advocates.

No appearance for the 2nd defendant.

Mr. J. Kemboi, Court clerk.