



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 264 OF 2006**

**COME TO AFRICA SAFARIS LTD ..... PLAINTIFF**

**VERSUS**

**KENYA AIRPORTS AUTHORITY ..... DEFENDANT**

**RULING**

Vide a notice of motion dated 25<sup>th</sup> March 2014 and filed in court on 15<sup>th</sup> April 2014, supported by an affidavit in support thereof sworn by Martin Munyu advocate on 25<sup>th</sup> March 2014, the applicant who is the defendant in this suit seeks from this court orders dismissing the respondent/plaintiff's suit filed on 17<sup>th</sup> March 2006 for want of prosecutions with costs.

It is premised on the grounds that the plaintiff has failed to take relevant steps in prosecuting this matter since the last hearing date on 20<sup>th</sup> March 2012; the delay by the plaintiff to take steps to set down the suit for hearing is in excess of two years which is inordinate, unreasonable and inexcusable and that it is in the interest of justice that litigation must come to an end.

The affidavit of Martin Munya further avers that the delay in prosecuting the suit herein has caused the defendant great prejudice as it has been condemned to live with the anxiety of a suit hanging over its head and that it is clear that the plaintiff has lost interest in the suit.

The defendant's advocates on record Iseme, Kamau & Maema did effect service of the said application upon the plaintiff's advocates M/s Okong'o Wandago & Co Advocates on 6<sup>th</sup> May 2014. No opposing affidavit was ever filed by the plaintiff to resist the orders being sought. Neither the plaintiff nor its representatives attended court on 16<sup>th</sup> October 2014 when the application herein came up for hearing so I allowed the defendant/applicant's counsel to proceed with the hearing of the application, having satisfied myself that there was sufficient service, no explanation for non attendance by the plaintiff/respondent despite service upon them having been effected on 6<sup>th</sup> May, 2014.

Mr. Munyu reiterated the contents of the notice of motion and the supporting affidavit in urging the court to allow the application dated 25<sup>th</sup> March 2014 and dismiss the plaintiff's suit with costs adding that a similar application had been lodged in 2008 but the same was withdrawn by consent on 14<sup>th</sup> May 2008 before Hon. Lady Justice Nambuye and that since then, the plaintiff has not demonstrated any interest to prosecute their suit, or have it determined.

I have examined the pleadings in this case. The plaint filed on 17<sup>th</sup> March 2006 sought orders for

damages for the value of the unexpired term of the lease which was purportedly prematurely terminated by the defendant, general damages for breach of covenant including aggravated and special damages for loss of profit; and general damages for unlawful eviction and trespass. It was alleged by the plaintiff that by a lease agreement made on 17<sup>th</sup> December 2003 between them and as tenant and the defendant as landlord, the latter rented out office space to the former within Jomo Kenyatta International Airport at the Passenger Terminal Building for 5 years and six months from 1<sup>st</sup> December 2000 at an agreed revisable rent which they paid but that without colour of right, the defendant by letter of 16<sup>th</sup> February 2006 purported to terminate the said tenancy agreement and proceeded.

On 18<sup>th</sup> February 2006, while the plaintiff's employees were absent broke into and destroyed property of unknown values thereby subjecting the plaintiff to loss and damage.

The defendant entered appearance on 11<sup>th</sup> April 2006 and filed their defence on 24<sup>th</sup> April 2006. The plaintiff filed reply to defence on 28<sup>th</sup> April 2006. From thence, the plaintiff did not take any other action to set down the matter for hearing or other action prompting the defendant to file an application dated 15<sup>th</sup> January 2008 on 25<sup>th</sup> January 2008 seeking to have the suit dismissed for want of prosecution. When that application came up for hearing on 14<sup>th</sup> May 2008 before Hon. Justice Nambuye (as she then was) the parties agreed to have it withdrawn on condition that the plaintiff moves the court within 14 days failure to which the suit to stand dismissed.

On 29<sup>th</sup> May 2008, the plaintiff invited the defendant's advocates for a mention to fix a hearing date and the hearing date was fixed for 14<sup>th</sup> and 15<sup>th</sup> October 2008. On 14<sup>th</sup> October 2008 when the matter came up for hearing before Hon. Mr. Waweru, the matter was taken out of the hearing list on the ground that the plaintiff had only served the defendant with a hearing notice for 15<sup>th</sup> October 2008 and not 14<sup>th</sup> October 2008; and that since the following day had its own matters fixed for fresh hearings, the suit could not commence the following day.

The defendant's counsel too was in court but he indicated that he would be ready for hearing as served for 15<sup>th</sup> October 2008. The matter was again mentioned on 10<sup>th</sup> October 2009 when a hearing date for 2<sup>nd</sup> June 2010 was fixed but there is no record as to what transpired on 2<sup>nd</sup> June 2010.

Later, on 24<sup>th</sup> March 2011 the matter was mentioned in the registry and by consent of both parties a hearing date was fixed for 21<sup>st</sup> July 2011. Again, there is no record for 21<sup>st</sup> July 2011. On 5<sup>th</sup> December 2011, both parties' representatives again met in the registry and by consent fixed the suit herein for hearing on 20<sup>th</sup> March 2012.

There is no record as to what transpired on 20<sup>th</sup> March 2012. Consequently, following the plaintiff's disquiet since 5<sup>th</sup> December 2011 when they last moved the court to have the matter heard on 20<sup>th</sup> March 2012, the defendant on 16<sup>th</sup> April 2014 filed an application herein seeking dismissal of the plaintiff's suit for want of prosecution as no action has been taken to set down the suit for hearing since 20<sup>th</sup> March 2012.

The applicable provisions for dismissal of suit for want of prosecution is found in Order 17 Rule 2 of the Civil Procedure Rules which provides that,

***“Where 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 the court may dismiss the suit.”***

Under Order 17 Rule 2(3), a party to the suit may also apply for dismissal of the suit for want of prosecution if no steps have been taken to prosecute the suit for a period of one year.

The court's discretion to dismiss the suit under Order 17 must be exercised on the basis that it is in the

interest of justice regard being had to whether the court is satisfied that the party instituting the suit has lost interest in it, or whether the delay in prosecuting it has been inordinate, unreasonable or inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. I am persuaded on this point by the holding in INTER – VS – KYUMBA [1984] KLR 441 in which court held that

***“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite 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 time. It is a matter of and in the discretion of the court.”***

I have carefully examined the record herein which clearly shows that upon the filing of the suit and pleadings closing, the plaintiff went to slumber for 2 years prompting an application by the defendant to dismiss the suit and which application was withdrawn by consent.

However, from 20<sup>th</sup> March 2012 when the suit herein ought to have come up for hearing after fixing a hearing date on 5<sup>th</sup> December 2011, no other steps have been taken by the plaintiff to have the suit set down for hearing.

The defendant’s application dated 25<sup>th</sup> March 2014 was filed on 15<sup>th</sup> April 2014, two years after 20<sup>th</sup> May 2012.

The plaintiff’s advocates were served with the said application to dismiss the suit for want of prosecution on 6<sup>th</sup> May 2014 as shown by the acknowledgement attached to the affidavit of service sworn by Vihaki Armstone on 14<sup>th</sup> May 2014 and filed in court on 15<sup>th</sup> May 2014 but they did not attend court on 16<sup>th</sup> October 2014 to oppose the application and neither did they file any replying affidavit or grounds of opposition.

I hasten to add that courts of law shall not be used to archive parties’ pleadings forever. Litigation must of necessity come to an end. If the parties choose to use the courts to ventilate their grievances then they must of necessity and with expedition have their disputes resolved without necessarily clogging the court with dormant litigation.

In this case, the delay or failure to set down the suit herein for hearing since 20<sup>th</sup> March 2012 has not been explained. No explanation has been offered by the plaintiff why it has not set down the case for hearing. I am conscious of the fact that the act of dismissing a party’s suit is a draconian act which should be exercised cautiously as it drives the plaintiff away from the judgment and seat of justice.

But I am also bound to dispense justice without undue delay. Justice in this case is for both the plaintiff and the defendant; and that is the balance I apply in this case, noting that inordinate delay occasions injustice to either party to a dispute. Delay defeats equity.

In my view, the plaintiff in this case Come to Africa Safaris Limited did arrive and went to slumber. It must take the responsibility for its indolence. Equity aids the vigilant and not the indolent. Other than hurriedly filing this suit in court following their alleged illegal eviction from the defendant’s premises, the record does not show any vigilance or keen interest on their part to have the suit herein heard and determined on merit.

The defendant, in my view, has been prejudiced by litigation hanging on their head for over 8 years undetermined. That infringes on their rights and legitimate expectations that the dispute against them should be resolved expeditiously. They did not file any triable counter claim dispute intimating in their defence that they would do so. They have no claims against the plaintiff pending.

In the premise, and as the plaintiff is not before the court to seek a second chance, to fail to grant the

applicant the orders sought in their application dated 25<sup>th</sup> March 2014 will be a lavish exercise of discretion which I am not prepared to engage in.

Accordingly, I allow the defendant/applicant's application dated 25<sup>th</sup> March 2014 by way of notice of motion and dismiss the plaintiff/respondent's suit herein filed on 17<sup>th</sup> March 2006 with costs to the applicant/defendant.

**Dated, signed and delivered at Nairobi this 17<sup>th</sup> Day of November, 2014.**

**R.E. ABURILI**

**JUDGE**