



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Suit 539 of 2008

DANIEL KAIRU KIARAHO..... 1ST PLAINTIFF

SAMUEL MIRIE GACHATHI..... 2ND PLAINTIFF

VERSUS

MOYEZ BHANJI..... 1ST DEFENDANT

GREENWOODS LIMITED 2ND DEFENDANT

RULING

By a Notice of Motion dated 24th November, 2011, the Defendants have moved the court under Order 17 Rules 1 and 2 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act to have the Plaintiff's suit dismissed for want of prosecution. The application is grounded upon the Supporting Affidavit of Moyez Bhanji sworn on 24th November, 2011 and the written submissions dated 29th February, 2012.

The Defendant gave the background and the entire history of the case since its filing on 18th September, 2008 to 12th November, 2010 when the court delivered a ruling on an application dated 26th January, 2010 by the Defendants to lift a caveat over LR No. 1/152 (original No.1/12/03) Vol. No. 32 Folio 349/18, Nairobi (hereinafter "the suit property"). The Defendant contended that no step whatsoever had been taken by the Plaintiff since the said 12th November, 2010 to prosecute the suit, that the said failure was because the Plaintiff was enjoying a caveat over the suit property, that the delay in prosecuting the suit was prejudicial to the Defendant as they could not exploit the suit property commercially and that it was therefore just and fair to dismiss the suit.

Mr. Kithi, learned Counsel for the Defendants addressed the court on the principles applicable in an

application for dismissal of a suit for want of prosecution to be the length of the delay, whether such delay is excusable, the prejudice suffered by the Defendant and whether justice can be done to the parties despite the delay. He submitted that the delay of 1 year and 12 days was inordinate, that the Plaintiffs had not explained the delay since there was no proof of the allegation that the file had gone missing, that the Plaintiffs were not interested with the suit. Counsel referred the court to the cases of **HCCC No. 356 of 2008 David Njogu Gachanga –vs- July Thongori (2010) e KLR** where a suit was dismissed on a delay of 1 ½ years, **HCCC No. 988 of 2005 Abdalla Tairara Godoro –vs- City Council of Nairobi (UR)** on the proposition that the duty is upon the Plaintiff to pursue his case up to its logical conclusion.

Mr, Kithi further submitted that because of the delay there would be no fair trial as the witnesses may have memory lapse and that would be prejudicial to the Defendants. He relied on the cases of **HCCC No. 1927 of 1999 Protein and Fruits processor Ltd –vs- Credit Bank Ltd** and the famous **Kehema & others –vs- Hansel Properties Ltd 1988 I All ER 38** for the proposition that the court cannot lend its hand to an advocate's indolence and justice may be better served by allowing the consequences of the negligence of lawyers to fall on their own heads.

The Plaintiffs filed a Replying Affidavit sworn by Samuel Mirie Gachathi on 6th December, 2011 and written submissions filed on 23rd February, 2012. The Plaintiffs' response was that on 6th January, 2011 the Plaintiffs Advocates had made attempts to trace the court file and had made a follow up on 18th January, 2011, that there had been attempted negotiations to settle the matter in March, 2011, that as at January, 2011 the diary for 2011 for the Commercial Division of the High Court had been closed. It was submitted on behalf of the Plaintiff that the Defendants had applied for typed proceedings immediately after the ruling of 12th November, 2010 and that might have caused the removal of the court file from circulation thereby leading to the missing file in January, 2011 when the Plaintiffs were looking for it. The Plaintiffs prayed for a period of 90 days to set down their suit for trial.

I have considered the Affidavits on record, the written submissions, oral hi-lights and the law.

I agree with Mr. Kithi, learned counsel for the Defendant that in an application for dismissal for want of prosecution, the court has to consider whether the delay is inordinate, whether the same is excusable or whether prejudice has been suffered by the Applicant as a result of the delay and finally whether justice can still be done to the parties despite the delay. See **HCCC No. 114 of 2006 Communications Carrier Ltd & Another –vs- Telkom Kenya Ltd (2009) e KLR**.

What is the delay? The delay according to the Defendant is between 12th November, 2010 and 24th November, 2011 when the current motion was made. That is a period of 1 year and 12 days. That is 12 days only beyond the ceiling given by the law when a suit may be dismissed for want of prosecution. In my view, that period is not inordinate. In the cases referred to by Mr. Kithi the delay was between 1½ years and 4 years. Those cases therefore will not be applicable, in my view, in the circumstances of this case.

Even if the delay was inordinate, I hold the view that the Plaintiffs have explained the same. I have seen the correspondence produced by the Plaintiffs. On 6th January, 2011, the Plaintiffs' Advocates wrote to the court requesting that the file be availed to them. A reminder was written on 18th January, 2011. I consider the said letters to be genuine since they are shown to have been received by the Court on 11th and 25th January, 2011, respectively. The fact that there is no response by the Deputy Registrar does not suggest that the file was available. If it was available and was not missing, nothing would have been easier than for the Deputy Registrar to have written as such. I have perused the record and I have not seen any response by the Court to the Plaintiffs' Advocates correspondence. The other issue is the negotiations alluded to by the Plaintiffs. A letter dated 21st March, 2011 was written by the Plaintiffs to the Defendant's Advocates. The Defendants did not address this issue. In my view, the totality of the said correspondence showed that the Plaintiffs were still interested in having the matter concluded. The letters may be regarded as a step in the suit since our Constitution recognizes alternative modes of dispute resolution. The delay is therefore excusable.

As regards prejudice, whilst the Affidavit in support of the motion was sworn by Moyez Bhanji the 1st Defendant, nowhere did he state that there was a possibility that the Defence witnesses' memory was on the verge of lapsing because of the delay. He however alluded to the Defendants suffering prejudice by virtual of their, Defendants, not being able to utilize the suit property commercially. Considering what I have stated regarding the delay and the explanation given, I am unable to agree with the Defendants that the delay in prosecuting the suit for the period in question has made them suffer the prejudice alluded to.

For the foregoing reasons, I am of the view that notwithstanding the delay, justice can still be done to the parties if this suit is prosecuted forthwith. I therefore make the following directions:-

- 1)The plaintiffs are to file and serve their bundle of documents within 21 days of today.
- 2)The Defendants are to file and serve their bundle of documents within 21 days of service by the Plaintiffs.
- 3)The Plaintiffs are to file and serve their list of and witness statements within 14 days of service of the Defendants' bundle.
- 4)The Defendants are to file and serve their list of and witness statements within 14 days of service by the Plaintiffs.
- 5)The parties are to file a statement of agreed issues within 60 days of today.
- 6)The Plaintiffs are to set down the suit for trial within 120 days.

In the premises, I will dismiss the Notice of Motion dated 24th November, 2011 as I hereby do with no order as to costs.

Dated and delivered at Nairobi this 26th day of March, 2012

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A MABEYA

JUDGE