



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 9 OF 1997

MERU MEDICAL STORES CO.LTDPLAINTIFF/RESPONDENT

VERSUS

STANLEY KARIBA MWITHIMBU1ST DEFENDANT/APPLICANT
FRANCIS MUNGORI IMANENE2ND DEFENDANT/APPLICANT
GEORGE M. MARANGU T/A SHELTER AUCTIONEERS3RD DEFENDANT

RULING

This suit was filed on 11th February by the firm of M/S Charles Kariuki & Co. Advocates. Appearance was entered for 1st defendant by the firm of M/S Dauti Kibanga & Company Advocates on 24th February, 1998; M/S F. K. Gitonga & Company Advocates entered appearance for 3rd defendant.

Defence was filed for 1st and 3rd defendants on 2nd March, 1998 and for 3rd defendant on 9th March, 1998. The suit came up for hearing of plaintiff's Chamber Summons dated 18th March, 1998 on 17/07/1998, 30/07/1998 and lastly set down for hearing on 22nd September, 1998. The court record do not show what happened on 22nd September, 1998.

That the record shows that the application was subsequently set down for hearing on 13th March, 2006, 20th September, 2007, 15th November 2007, and 14th February, 2008. That on 30th March, 2009 the firm of M/S Maitai Rimita & Co. Advocates filed an application dated 27th March, 2009 for orders:-

- (a) ***That this suit be dismissed for want of prosecution.***
- (b) ***The costs of the suit be paid to the defendants.***
- (c) ***The costs of this application be provided for.***

It purports to be brought under the Provisions of Order XVI r 5 and O.L r (1) of Civil Rules (not Civil Procedure Rules). The Civil Procedure Rules, O.XVI rule 5, before it was repealed provided, in pertinent part, as follows:-

“ If, within three months after:-

(a) The adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal”.

The applicant's counsel in prosecuting the application dated 27th March, 2009 relied on affidavit dated 27th March, 2009. The Supporting Affidavit of Stanley Kabira Mwithimbu dated 27th March, 2009 states that this suit was filed on 12th August, 1997 and is more than 12 years old.

He averred that it was clear the plaintiff has not been keen to prosecute the case. He averred the suit was last in court on 14th February, 2008 and that is over a year ago. That after 12 years the court may be unable to conduct a fair hearing as some witnesses are either dead, relocated or lost memory of the exact events.

The applicant's counsel submitted that no action was taken by the plaintiff to set suit down for hearing. He said the repealed Civil Procedure Rules gave three months as a period within which applicant can apply for dismissal of suit for want of prosecution. He said the delay in this matter is inordinate and inexcusable. He prayed for the suit to be dismissed and said he relies on Civil Procedure Rules, without quoting any order.

The counsel for plaintiff Mr. Otieno Advocate relied on affidavit of Mr. Leonard Kimeu Mwanthi dated 21st October, 2009 and 11th January, 2010 in opposing the application. I have perused the said affidavits of Mr. Leonard Kimeu Mwanthi. He has averred that his co-director has continuously been living in USA since 1994 and unavailable to assist in the prosecution of the case. He has under paragraph 3 stated that the court file was lost or misplaced from mid 1998 upto early 2006 and he made many requests to court through letters annexures LKMI, LKMII and LKMIII.

The deponent Mr. Leonard Kimeu Mwanthi stated that the loss of court file for 8 years stood to benefit the defendants more than the plaintiff and gave incidents running from 17/7/1998 to 30th July, 1998 and the court file did not resurface until 2006 when the issue of health of 1st and 2nd defendants was raised and a proposal to use another advocate was rejected by 1st defendant. He averred that the disappearance of court file was stage-managed by the court's registry to assist the defendants as when the plaintiff threatened the Executive Officer with reporting him to the Chief Justice and at Kenya Anti-Corruption Commission the file was traced soon thereafter. The respondent raised issue of his poor health as a ground forcing court to adjourn the matter twice. He attached medical records LKMVI(a), (b), (c), (d), (e), (f), and (g). He averred if the application for dismissal of his suit is granted his family will suffer irreparable loss and damages. I have gone through the further replying affidavit and have noted matters raised thereto in opposing the applicant's application.

I have considered the submissions by Mr. Otieno, Advocate for the 1st respondent in which he stated the delay was not caused by the plaintiff but due to court file being misplaced and could not be retrieved or traced till 2006. That delay was also caused by defendant's former Advocate who was sick. He submitted that the plaintiff was not sitting on his rights as he continued pursuing the tracing of court file from the registry where it was misplaced.

The counsel stated that under Article 159 of the Constitution and Section 1(A) of Civil Procedure Act his client is entitled to justice. I will later deal with Article 159 of the Constitution and Section 1(A) of the Civil Procedure Act.

Mr. Nyenyire Advocate in reply stated that Section 1A of the Civil Procedure states that matters should be dealt with expeditiously and this was in support of the Applicant's application. He prayed that the suit be dismissed.

I would at this stage like to point out that the allegation of court file having disappeared or being misplaced was not controverted by the applicant through his affidavits or through submission from the bar, though that is not allowed, in serious matters of disappearance of case file from the court registry.

I would like to go back to Order XVI r 5, of Civil Rules(I think applicant meant O.XVI Rule 5 of Civil Procedure Rules). The Rule gave the defendant option of either setting the suit down for hearing or apply for its dismissal. The 1st defendant did not opt to set the suit down for hearing. He opted to apply for its dismissal. In exercising its discretion under O.XVI Rule 5 Civil Procedure Rules, the court has to consider two things. The rule gives a defendant two options. The first option is to set suit down for hearing.

In Allen – VS – Sir Alfred McAlphine & Sons(1968) 1 ALL E.R 543. The court said:-

“ It is seldom in the defendant's interest to press on with the trial of action, whatever view he takes of the plaintiff's chances of success. He has in any event the use during the period of delay of any money which he might ultimately have to pay damages.”

It seems to me that the court considered it improper to require a defendant to spur the plaintiff to proceed to advance his cause when such action will be against his interest. I am of the view that the court where the delay is not prolonged should be slow to dismiss a suit under O XVI Rule 5 of Civil Procedure Rules. The defendant is required or should first take steps to set the suit down for hearing so that at later stage if plaintiff goes to sleep and seems to forget the matter he will be perfectly placed to apply for dismissal of the suit.

I would like to make it clear that the position should be different where the delay is prolonged and there is no explanation for delay. In case of such disappearance or misplacement of court file giving rise to circumstances of a substantial risk that fair trial of the matter in controversy would not be realized to me cannot be said to be prolonged period without explanation. It is my view in such circumstance the proper course open to the defendant is not to apply for the dismissal of the action.

In considering application under OXVI Rule 5 Civil Procedure Rules each application has to be considered on the basis of its own peculiar facts as no case is similar to the other.

A court should not dismiss a suit merely because three months has elapsed without setting the suit down for hearing. The wording of the Rule, as far as I can understand it, creates an obligation on the defendant in certain circumstances either to set the suit down for a hearing or to apply for its dismissal depending on circumstances of the particular case.

In this case the plaintiff/respondent made a serious allegation that the court file disappeared or was misplaced at the registry leading to his counsel failure to take a hearing date. The issue of disappearance of court file has not been controverted and this court, has not doubt in taking it that, the plaintiff/respondent as well as the defendants could not take any action or fix a date between late 1998 and 2006 when court file went missing.

The delay in setting the suit down for hearing between late 1998 and 2006 is inordinate but excusable as the plaintiff/respondent could not do more than raise the issue of disappearance of court file with the registry. The defendant's failure also in setting matter down for hearing I think also was caused by disappearance of court file to which the plaintiff was not to blame.

In cases where court files disappear and are traced after a long delay, it would be unconscionable, unfair and inhuman to dismiss the suit through fault of court registry. The court should in such cases give dates on priority basis and order files to be under key and lock.

The counsel for the plaintiff/respondent referred the court to Article 159 of the Constitution which provides:-

”Under Article 159(1) and (2)

“ judicial authority is derived from the people and rests in, and shall be exercised by, the courts and tribunals established by or under this constitution . 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.....”.

The court was also referred to Section 1(A) of Civil Procedure Act which provides as follows:-

“ The overriding objective of this Act and rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil Disputes governed by the Act”.

The principles laid down under Article 159 are clear and court in exercising Judicial authority should be guided by principles of doing justice to all and such justice shall not be delayed. The court is therefore expected to exercise Judicial Authority in a manner that would avoid injustice but afford just, expeditious, proportionate and affordable resolution of civil disputes governed by Civil Procedure Act.

This action concerns eviction, and reinstatement and compensation for loss and damages as well as restoration of goods taken away by the defendants. The particulars of special damages are to the tune of Kshs.8,059939/20. The trial in this cause has never commenced. The plaintiff averred that the court file went missing from court registry late 1998 and was not traced till 2006. I had earlier on in analyzing the affidavits by both parties and submissions by both counsel noted that the allegation of the file having gone missing was not controverted by the Applicant.

The failure by the court registry to avail the court file affected the plaintiff's constitutional rights in that justice was not done and justice was delayed on his part by the registry's failure to avail court file for setting suit down for hearing. It would therefore be wrong to hold the delay against the plaintiff. The plaintiff was denied his rights of setting the action in motion. He could not take any step to have suit heard as such. The defendants though they had filed application for dismissal of this suit for want of prosecution on 27th March, 2009 they did not attempt to take a hearing date between late 1998 and 2006. This I believe is because the court file could not be traced.

The defendants appear to be keen to have this matter dismissed on account of delay in prosecuting the same. I note the defendants did not attempt to take option of setting the suit down for hearing, but anyway they exercised the option that would best serve their interests.

The plaintiff's advocates since the time of tracing file in 2006 set the suit for hearing on 14/9/2006, 20/09/2007 and 14/2/2008 and thereafter stopped taking hearing date. The plaintiff's advocate should move with speed to ensure this suit is set down for hearing and determination without any further delay.

Considering the circumstances obtaining in our courts, the delay of any period running to one year and below in setting matter for hearing though long is not inordinate and also considering the disappearance of court file and constant adjournments due to ailment of the plaintiff and at one time of the defendant's late counsel as well as the subject matter in dispute I will grant the plaintiff indulgence.

The application dated 27th March, 2009 is disallowed but I will condemn the plaintiff to pay the costs of the application. The plaintiff should set the suit down for hearing within the next 45days in default whereof the suit shall stand dismissed.

DATED AND DELIVERED AT MERU THIS 3RD DAY OF NOVEMBER, 2011

J. A. MAKAU

JUDGE

03/11/2011

Delivered in Open Court in Presence of :

1. **Mr. Rimita for the defendant/applicant**
2. **Mr. Kiogora for plaintiff/respondent**

J. A. MAKAU

JUDGE

03/11/2011