



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 496 of 2006

MAE PROPERTIES.....PLAINTIFF

VERSUS

DOMINIC KAMAU WIATHUKI.....1ST DEFENDANT

POSITIVE INVESTEMENTS LIMITED.....2ND DEFENDANT

ALIKAM ENTERPRISES LIMITED.....3RD DEFENDANT

SECOND EDITION LIMITED.....4TH DEFENDANT

R U L I N G

The application is a notice of motion dated 27th January 2009 brought under Order XVI rule 5(a) and Order L rule 1 of the Civil Procedure Rules. It seeks the following orders.

1. THAT the Plaintiff's suit against the Defendants be dismissed with costs to the Defendants for want of prosecution.

2. THAT the costs of this application be awarded to the Defendants in any event.

The grounds upon which the application is premised are on the face of the application namely:

1. THAT this suit was filed on 6th day of September, 2006, a period of over two years ago.

2. THAT the Defendants herein filed their Memorandum of Appearance on 15th day of November, 2006 and later filed their Defence on 27th day of November, 2006, which was served upon the Plaintiff's Advocates on 27th November, 2006.

3. THAT the Plaintiff never filed their (sic) Reply to Defence and thus the pleadings closed on or about the 12th December, 2006.

4. THAT after the close of pleadings, a period of more than two (2) years ago, the Plaintiff has never bothered to set the suit down for hearing.

5. THAT it is manifest that the Plaintiff has lost interest in this suit.

6. THAT the continued delay by the Plaintiff in prosecution of this suit is highly prejudicial to the Defendants who find it difficult to trace their witnesses and documents and conduct a fair defence.

There is supporting affidavit of even date sworn by Mr. Kairu Timothy Waweru, Advocate and a supplementary affidavit by the same advocate dated 13th March, 2009.

The application is opposed. The Defendant has relied on a replying affidavit sworn by Onyancha Bw'omote dated 12th February, 2009 and a further affidavit by the same deponent dated 9th March, 2009. The deponent of the two affidavits is the Advocate for the Plaintiff.

I have considered the application, the affidavits filed, and submissions by counsel. No cases were cited on this matter. I am however guided by the leading case on the issue of dismissal of suits for want of prosecution, that is **Ivita v. Kyungu [1984] KLR 441**. At page 449 Chesoni, J. as he then was stated as follows:

“The test is whether the delay is prolonged and inexcusable and if it is can justice be done despite such delay. Justice is justice to both the Plaintiff and the Defendant, so both parties to the suit must be considered and the position of the Judge too because it is no easy task for the documents, and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the Court that he will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus even if 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 notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

The Plaintiff has to show that the delay, even though prolonged is excusable and it must offer an explanation for the said delay. On the other hand, the Defendant also has a duty to satisfy the court that it will be prejudiced by the delay and it must also show that justice will not be done in the case due to the prolonged delay of the matter.

The Plaintiff’s Advocate has annexed several correspondences which are invitations to the Defendant’s counsel to send its representative to the High Court Registry for purposes of taking hearing dates. The first letter was on 21st May, 2007. The Advocate explains that no dates could be taken because the court diary was full. The other letter is dated 4th February, 2009. It was inviting the Defendant’s Advocate to send his representative to the High Court Registry on 12th February, 2009 in order to take hearing dates. The Plaintiff’s Advocate avers that by the time the said letter was served on the Defendant’s Advocate, the Plaintiff had not been served with the instant application.

On the Defendant’s part, they blame the Plaintiff for not preparing the suit for hearing. They contend that no documents have been filed and no step has been taken to prepare the suit for hearing. They also contend that since 25th May, 2007 there was a period of two years when the Plaintiff took no action in having the matter heard and that the letter of February, 2009 inviting the Defendant’s Advocate to take hearing dates, was only raised in order to counter the instant application. The period of delay which is under consideration is either 20 months taking into consideration the attempt of 27th May, 2007 to fix the case for hearing. Alternatively, it is one month, taking into account the attempt made in February, 2009 to invite the Defendants to take dates for the hearing of the suit. The Applicants have not denied that the said attempt was made before the Respondent was served with the current application. I have considered that there have been some attempts by the Plaintiff to have the suit set down for hearing, which attempts have not been denied. It is my view that the delay involved in this matter is prolonged but is nevertheless not inordinate. I also find that the Defendant has not demonstrated that it is suffering or stands to suffer any prejudice due to the delay in having the suit heard. It has not been shown that justice will not be done in the case despite the delay in having the matter set down for hearing. In the circumstances, I think it will be very harsh to dismiss this suit when the delay is not inordinate. In conclusion I rule as follows:

1. The Defendant's application dated 7th January, 2009 be and is hereby dismissed.
2. Each party will bear its own costs.
3. The parties should comply with order X rule 11 of the Civil Procedure Rules as to discoveries within sixty (60) days from today.
4. The parties should file agreed issues, in any event within sixty (60) days from the date hereof.
5. The Plaintiff should set this suit for hearing on a priority basis ten (10) months from the date hereof with each party having leave to apply.

Dated at Nairobi this 30th day of April, 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Wambua for the Applicant

Mr. Bw'omote for the Respondent

LESIIT, J.

JUDGE