



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 239 of 1991

ELIZABETH WAKIURU..... PLAINTIFF

Versus

DAMARIS WAMBURA KARIUKI)

NYERI COUNTY COUNCIL)..... DEFENDANTS

RULING

On 9th July, 2002, the 2nd defendant herein filed a Notice of Motion dated 8th July, 2002 in which it sought the following orders:-

1. The plaintiff's suit against it be dismissed for want of prosecution.
2. The costs of this application and those of the entire suit be awarded to it.
3. That such further and other relief as this Honourable court may deem fit and just in the circumstances.

The grounds upon which the application was made are essentially that the plaintiff had refused, failed and or neglected to set down the suit for hearing since 16th January, 1998. That the plaintiff had not been keen and has been reluctant to prosecute the suit. In the premises the plaintiff's suit should not be allowed to continue hanging over the 2nd defendant's head like the democles' sword. It was therefore only meet and just that this litigation be brought to an end by allowing this application.

The application was supported by the 2nd defendant's affidavit sworn on 9th July, 2002. The following paragraphs of the said affidavit are pertinent and deserve specific mention and are reproduced below:-

1. "....."
2. That the plaintiff instituted this suit on 13th November, 1991.
3. That the defendants herein then duly filed their statements of defence on 30th March, 1992 and 7th March, 1992 respectively.
4. That the matter then came up for hearing of summons for directions on 21st April 1993 and the parties were ordered to file separate statements of issues.

5. That since then the matter has been fixed for hearing on various dates but has failed to take off for one reason or the other.
6. That this matter last came to court on 16th January, 1998 for directions and was stood over generally due to failure of the plaintiff and his advocates on record to attend court.
7. That since 16th January, 1998 the plaintiff has failed, refused and/or neglected to set down the matter for hearing.”

In response to the application, the plaintiff filed grounds of opposition. She claimed that the 2nd defendant was aware that the court file had been missing for a long time hence the filing of the application dated 26th June, 2008 which has not been heard yet. The suit could not have been prosecuted in the absence of the court file. That attempts had been made to transfer the suit to the lower court. The plaintiff was still keen to prosecute the suit and finally that the application was brought in bad faith.

When the application came up for interpartes hearing before me on 24th September, 2009, the defendants were represented by Mr. Ndirangu and Mugambi, learned counsel respectively whereas the plaintiff was represented by Mr. Mahan, learned counsel as well. Both counsel advanced arguments and counter argument in support of their respective positions on the application.

Mr. Mugambi reiterated that the last time this suit was in court was on 16th January, 1998, a period in excess of 11 years. The delay was thus inordinate and unexplained. That delay is prejudicial to the 2nd defendant. No replying affidavit had been filed and though grounds of opposition had been filed, they did not address the factual basis of the application. Much as the plaintiff claimed that the court file had been missing, there was nothing to show the steps she had taken to prosecute the suit. In support of these submissions counsel cited several authorities to wit;

1. Meridian Properties Ltd VS Aspi Variava & 2 others NRB HCCC 120 of 2002.
2. National Industrial Credit Bank Ltd VS Frescho International Ltd & 4 others NRB HCCC 593 of 2001.
3. Basil Criticos (alias Vassilis Criticos) VS Agricultural Finance Corporation and Anor. NRB HCCC 1497 of 1996.
4. John Samuel Mbugua & Anor. VS Mary Ruguru Njoroge NRB HCC 2911 of 1996.

Mr. Ndirangu, learned counsel for the 1st defendant supported the application though he had not filed any affidavit. He submitted that the application predated the application for the reconstruction of the court file. He invited the court to look at what had happened before the instant application was filed.

Mr. Mahan in response orally submitted that the court file could not be found in the court registry. He had written several letters to the court over the issue. Following the reconstruction of the court file, he could not take steps in the suit because of the instant application.

I have considered the application, the affidavit in support thereof, rival oral submissions of respective counsel and authorities cited. Having done so I take the following view of the matter. It is common ground that this suit was filed on 13th November, 1991. Following the filing of respective defences, the pleadings were closed in or about January, 1998. It is also common ground that since 16th January, 1998, the plaintiff has not taken any steps to prosecute the case. It is also common ground that somehow the court file in respect of this suit went missing. However it is not clear when this was. It was upon the plaintiff to clarify this fact and state what steps she had taken towards reconstructing the same. It was not sufficient for the plaintiff to merely state in her grounds of opposition without more, that “the 2nd defendants/applicants (sic) are aware that the court file remained missing for a long time hence the filing

of the application dated 26th June, 2008, which has not yet been heard.....” Having stated so, it was expected that the plaintiff would elaborate on the steps she had taken once she learned that the court file was missing. Mr. Mahan claims that he wrote several letters to court over the issue. The said letters were not exhibited. In any event, and as correctly submitted by Mr. Ndirangu, this application predated the application for reconstruction of the court file. So that it was up to the plaintiff to explain the steps she had undertaken to prosecute the suit prior to the court file disappearing. No such explanation has been forthcoming. Further it is not lost on me that it took the 2nd defendant to apply for the reconstruction of the court. If indeed the plaintiff was keen on the prosecution of the suit then, she would ordinarily have been in the forefront in having the court file reconstructed as soon as it was practically possible. As it is she left that task to the 2nd defendant, yet it was her suit.

The plaintiff too has stated that attempts had been made to have the matter transferred to the lower court, that the application had been made in bad faith and that the plaintiff was still keen on prosecuting the suit. These grounds need to be elaborated further. Perhaps an affidavit would have done the trick. No such affidavit has been filed. Mr. Mugambi, correctly in my view, submitted that though the plaintiff filed grounds of opposition, those grounds did not deal with the factual basis of the application. I accept that submission.

The case of Allen V Sir Alfred McAlpine & Sons Limited (1968) 1 ALL EA.543 sets out the test to be applied when a court is confronted with an application for the dismissal of a suit for want of prosecution. The court must consider whether the delay has been inordinate. The court observed that it would be highly undesirable and indeed impossible to attempt to lay down a tariff of so many years or more on one side of the lien and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs. In the circumstances of this case, this suit has been pending in court from 1991. A period in excess of 18 years. The last step on record taken in the matter was on 16th January, 1998 about 11 years ago. There is no gainsaying therefore that there has been inordinate and unexplained delay in the prosecution of the suit, the disappearance of the court file notwithstanding. In the very same case aforesaid, the court held that the inordinate delay must be inexcusable. That as a rule until a credible excuse is made out the natural inference would be that it is inexcusable. What was the excuse proffered by the plaintiff in this case? That the file disappeared. However she did not account for the inordinate delay in prosecuting the suit before the court file disappeared and also why she did not take immediate remedial measures to reconstruct the court once it came to her knowledge that the court file had disappeared. In the premises the delay is certainly inexcusable. Finally, in the same authority the court observed that the court must also consider the likely prejudice that the defendants may suffer by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between each other or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule the longer the delay, the greater the likelihood of serious prejudice at the trial. As already stated the delay herein is about 18 years. It is indeed prejudicial to have a suit hanging over the defendant’s head like a sword of democles. The defendant should not be held to ransom by the plaintiff due to her failure to prosecute her case. It is quite evident that the plaintiff is not and has never been keen to prosecute the case. If anything she has been reluctant to do so. As correctly observed by Azangalala J. in National Industrial Credit Bank Ltd (supra)

“...the continued silence and inactivity on the part of the plaintiff was prejudicial to the interest of the 2nd defendant. Perpetual apprehension of the 2nd defendant to my mind is sufficient demonstration of the prejudice the 2nd defendant will suffer if this application is not allowed...”

Those observations aptly describes the state of the defendants in this case.

In the result I am satisfied that the defendants are entitled to the orders sought. Accordingly I order that this suit be and is hereby dismissed with costs for want of prosecution. The defendants too shall have the costs of this application.

Dated and delivered at Nyeri this 29th day of October, 2009.

M.S.A. MAKHANDIA

JUDGE