



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 127 of 1999

MUTEGI MURANGO T/A MURANGO PLAINTIFF

VERSUS

KENYA TEA DEVELOPMENT AGENCY LTD DEFENDANT

RULING

Chamber summons dated 21st February 2006 brought by the defendant/applicant seeks that the plaintiff/respondent's suit be dismissed for want of prosecution. The applicant arguing that the respondent has failed, refused and/or neglected to prosecute this suit for a period of over six months since the applicant's earlier application was dismissed for non-attendance.

The respondent has opposed the application arguing that the application is an abuse of the court process since an earlier similar application dated 10th December 2003 was dismissed. That the applicant is also guilty of delay in prosecuting the instant application. The respondent further deposes that the delay has partly been caused by an attempt to settle the dispute out of court, and partly due to the absence of a judge at Meru Law courts.

I have considered these arguments and hold the following view in the matter. The suit by the respondent claiming Kshs. 620,489.65 from the applicant for services rendered was filed on 23rd November, 1999. The applicant filed a defence on 15th December 1999. On 11th December 2003, some three years after summons for directions were taken out, the applicant filed an application to dismiss the suit for want of prosecution. On 16th March 2005 that application was dismissed for non-attendance. Then this application was filed some ten (10) months after the dismissal.

The application is expressed to be brought under Order 15 Rule 5(d) of the Civil Procedure Rules, instead of Order 16 Rules 5. The rule provides for (before the amendment introduced by L.N. No. 36 of 2000) situations for dismissing a suit for want of prosecution within 3 months after:-

- (i) the close of pleadings; or
- (ii) an order for the hearing or a summons for directions (amended); or
- (iii) the removal of the suit from the hearing list; or
- (iv) the adjournment of the suit generally.

Pleadings are closed after a reply, if any, to a defence has been filed. Pleadings were closed when the

defence was filed on 15th December 1999. But after that date summons for directions was heard and the suit set down for hearing on 12th October 2000. On that date, the matter was marked S.O.G. to enable parties exchange documents and pursue an out of court settlement. On 25th May 2001, the hearing of the suit was fixed for 16th August, 2001 but by consent of counsel the hearing was adjourned to 6th November, 2001. It was once again adjourned to 13th March, 2002. On that day neither counsel nor the parties were in attendance and the matter was marked S.O.G. The same day in the registry the suit was fixed by consent for hearing on 13th July 2002 when once more it was marked S.O.G. by consent.

After one year and some five months, the applicant brought the first application to dismiss the suit for want of prosecution. As I have observed that application was itself dismissed on 16th March 2005. After this dismissal nothing happened in the matter until 22nd February, 2006 when the current application was filed. We are concerned with the period after the dismissal. Counsel for the respondent was in attendance when the applicant's application was dismissed. The application was clear that it sought the dismissal of the suit for want of prosecution. The dismissal of that application presented a God-sent opportunity to the respondent to fix the suit for hearing but this opportunity was not seized at all. The applicant was entitled under rule 5(d) of Order 16 to move the court to dismiss the suit without itself necessarily set it down for hearing.

The respondent took no steps for over ten (10) months after the suit was adjourned following the dismissal of the applicant's earlier application.

It is the policy of the courts and the spirit of the law as evidenced in the provisions of Order 16 that courts must be slow in dismissing a suit. That is why the said order 16 rule 5 gives the defendant and the court the option to set the suit down for hearing where the plaintiff has failed to do so. The flip side of that policy to give parties a chance in court while parties who are aggrieved and who have sought the court's intervention in their disputes must show seriousness by taking steps to prosecute their cases. Where they have failed to demonstrate seriousness the courts cannot joint them in the slumber. This position was succinctly expressed by Salmon, L. J in **Fitzpatrick V. Batger & Co. Ltd (1967)** 2ALL ER 657 at pg 659 as follows:-

“They no doubt, however, were relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to suppose that a dog which had remained unconscious for long periods as this one, if left alone, might well die a natural death at no expense to themselves; whereas if they were to take out summons to dismiss the action, they would merely be waking the dog up for the purpose of killing it at great expense which they have no chance of recovering.”

In the same case Lord Denning, MR. equally observed that:-

“..... it is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition..... It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse.”

The courts have developed certain principles in numerous decisions aimed at striking the balance. It is not every delay that will invite dismissal of the suit. It is only if the delay is prolonged and inexcusable and is such as grave injustice is likely to be occasioned to the other side. The court also considers whether there has been a flagrant and culpable inactivity on the part of the plaintiff. See **Ivita V. Kyumbu** (1984) KLR 441 and **Victory Construction Co. Ltd V. A.N. Duggal** (1962) EA 697.

I have noted that this suit was filed in 1999, approximately 18 years ago, the same is pending without a single witness having testified, yet it does not present weighty issues. The dispute itself dates back to 1993.

In view of this fact, I find that justice cannot be done. The respondent has had enough time to move this matter forward but has opted to go to sleep. This application is allowed and the suit is hereby dismissed for want of prosecution with costs to the applicant.

Dated and delivered at Meru this 13th..day of February. 2008.

W. OUKO

JUDGE