



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 50 of 2004

FANUEL AMIMO.....PLAINTIFF/RESPONDENT

VERSUS

TAMASHA CORPORATION LIMITED.....DEFENDANT/APPLICANT

R U L I N G

This is a Notice of Motion application dated 20th June, 2008 seeking the dismissal of the suit for want of prosecution.

The case was last in court on 2nd May, 2006 when it was adjourned generally. The Defendant claims that it is more than two years, three months since the suit was adjourned generally. He claims that the plaintiff lost interest in the suit and is not keen on prosecuting the suit to its final conclusion. That the continued subsistence of the suit is prejudicial to the interests of the Defendant. It is the Defendant's argument that in the interest of justice, the suit should be dismissed for want of prosecution.

The application is opposed. Plaintiff has filed a replying affidavit that was sworn by Alfred Nyandieka. Counsel admits blame for part of the delay. Counsel explained that he had been unwell and away from the office. That his assistant had left his firm. He deposes that, that was the reason why no replying affidavit was obtained from the Plaintiff who resides in Western Kenya. Counsel deposes that on the 17th November, 2006, his firm invited the Defendant to take dates. However the court diary was closed. Counsel deposes that the delay in taking dates after 17th November, 2006, which was the last time the Advocate invited the Defendant's Advocate to take dates. The advocate also states that the last adjournment of the case on 2nd May, 2006, the matter was adjourned on the Defendant's instance and that the Plaintiff was in court ready to prosecute the case.

Mr. Ogembo for the Defendant relied on the case of NIC BANK LIMITED VS. FRESHCO INTERNATIONAL LIMITED & OTHERS, MILIMANI HCCC NO. 593 OF 2001 for the principles applicable in determining an application of this nature. From that case, I will quote the principles set out in a reported case. IVITA vs. KYUMBI [1984] KLR 441 at page 4 as clearly set out the principles applicable.

"The court of appeal stated that the above principles apply in Kenya and had indeed been followed consistently by Kenyan Courts. Chesoni, J. as he then was applied the principles in the case of Ivita vs. Kyumbu KLR. When he observed as follows:

"3. The test applied by the Courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the

delay. Thus, even if the 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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."

Mr. Ogembo also relied on the case of Magdalene A. Obote & Others vs. Magdalene A. Obote & Others NRB HCCC No. 3587 of 1990 for the following preposition

"In considering whether an action should be dismissed for want of prosecution the court may take into account the delay before the filing of the suit in ascertaining whether subsequent delay after proceedings have commenced is inordinate, inexcusable and prejudicial to the defendant even though the earlier delay was excusable."

Mr. Ogembo submitted that the cause of action in the instant case arose in 1992 and arose out of a contract between the parties entered in 1974. Counsel urged the court to find that there was inordinate delay. Counsel also urged that since the orders sought in the plaint were for an injunction and for taking of accounts, the Defendant would be prejudiced at the trial for reason of difficulty to get witnesses.

Mr. Nyabesa for the Plaintiff opposed the application and relied on the replying affidavit. Mr. Nyabera sought to set the record straight by saying that last time the matter was adjourned the Plaintiff was ready to proceed. Further that it has been only one year since last adjournment. Counsel urged court to find that the issues prior to filing of suit were irrelevant. Further that the NIC case supra, supported the Plaintiff's position at page 4 of the authority. Page 4 is the part I have included in the body of this ruling.

I have considered submissions by the two advocates. The power of court to dismiss a suit for want of prosecution is discretionary and must be exercised with caution in order not to drive the Plaintiff from the judgment seat unheard. The duty and obligation to have a case set down for hearing lies on both parties equally. The only qualification being that the Defendant has an option to request that the suit be dismissed instead. The Defendant was within its right therefore to apply for the suit to be dismissed for want of prosecution. However, I note from the record that this case has been set down for hearing only once. That was the only time the case has been adjourned, 2nd May, 2006. It is not denied that the adjournment was at the instance of the Defendant on the grounds that the Defendant's advocates was unwell. Since that time, the Plaintiff Advocate invited the Defendant's advocate to take hearing dates in the court registry by a letter dated 10th November, 2006. The letter is annexed to the Replying Affidavit. The explanation given by the Plaintiff's advocate is that the court diary was closed and so no dates were taken.

Considering the brief history of this case, it is clear that the only time the case was to be heard was in November, 2006 and that the Defendant occasioned the adjournment. It is trite that a party should not benefit out of a situation it has created. Why should the Defendant benefit from the adjournment of the case caused by its own default?

The dismissal of a suit is discretionary. A party seeks the court to do its discretion in its favour must themselves have acted equitably. There is a lack of bona fide and equity in this case as against the Defendant. The delay which has occurred in this case has been occasioned by the Defendant. The Defendant cannot manipulate the circumstances to its favour at the expense of the Plaintiff's right to be heard.

I am not satisfied that the court's discretion to dismiss the suit for want of prosecution should be exercised in the Defendant's favour for the reasons shown in this case. For that reason this application is dismissed with costs to the Respondent.

Dated at Nairobi this 9th day of October, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mr. Ogembo for the Applicant

LESIT, J.

JUDG