



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

CIVIL SUIT 117 OF 2003

FIDELITY COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

MUTHOGA GATURU & COMPANY ADVOCATES.....DEFENDANT

RULING

The plaintiff filed a claim against the defendants on 5th March 2003. The plaintiff in its plaint alleges negligence on the defendant's part in failing to follow instructions to institute recovery proceedings against certain debtors of the plaintiff; failing to advise the plaintiff appropriately; and failing to act diligently. The plaintiff therefore claimed recovery from the defendants of the debts they failed to recover, totaling kshs 5, 327, 298. 93 and the recovery of the professional fees paid to the defendant by the plaintiff of kshs 2, 015, 592. 60 and the plaintiff also claimed for general damages.

On service of summons and plaint on various ones who were or are presently partners in the defendant's firm, defences were filed, the last of those defences being filed on or about 15th April 2003. Needless to say the plaintiff's claim was denied.

An interlocutory application was filed by the plaintiff on 22nd January 2004 and the ruling of the same was delivered on 2nd March 2004. Thereafter there was inactivity of this matter until the filing of the present application the subject of this ruling.

That application was filed on 2nd June 2005 and dated the same date. The same seeks an order for the dismissal of the plaintiff's suit, hereof, for want of prosecution.

The applicants, that is P.J. Mwiti, Anthony K Muriu, Della Mwihaki and James O Okeyo in their said application rely on the following grounds: -

- **That the plaintiff has not taken any steps to prosecute this suit for a long time, since the court ruling of 2nd March 2004, striking out an application by the plaintiff, more than a year ago.**
- **That the applicant will be prejudiced if this suit continues hanging over their heads when the plaintiff has clearly not been keen to prosecute it as required by law.**
- **That the plaintiff/Respondent does not have any valid excuse or reason for not prosecuting the suit and in the circumstances of this matter, it would be meet and just and in the interest of justice that the suit be dismissed for want of prosecution**

In support of the application counsel for the applicants submitted that this was a suit which arose out of an

allegation of negligence on account of defendant's legal firm which were dating back to the years 1997 to 1998; that the applicants are of the view that it is unfair to have the suit continue hanging on their heads when the plaintiff has gone to 'sleep'; that the plaintiff had failed to take any action since the last appearance that is for a period of 1 year and 3 months which is a period longer than that provided under Order 16 Rule 5.

The applicants relied on the cases: -

· HCC No. 593 of 2001 (Milimani) National Industrial Credit Bank Ltd – Versus – Fresco International Ltd & Others (Unreported).

Counsel quoted the following passage:

“I agree with the 2nd defendant that 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 that the 2nd defendant will suffer if this application is not allowed.”

In this case there was a delay of 3 years.

The applicants also relied on the case SALKAS CONTRACTORS LTD – VERSUS – KENYA PETROLEUM REFINERIES MOMBASA C.A. NO. 250 OF 2003 (UR); where the court of appeal dismissed a case for want of prosecution for a period of 1 year and 2 months.

The last authority of the applicants was; IVITA – VERSUS – KYUMBU [1984] KLR 441. Here the case was dismissed for want of prosecution for a period of one year.

Learned counsel, Mr. Gitau representing the other defendants supported the application. He stated that pleadings hereof closed on 30th April 2003, and that since that date the suit had not been fixed for hearing, and the plaintiff had failed to say why it had delayed in fixing a date. Counsel relied on the case; SHEIKH – VERSUS – GUPTA AND OTHERS [1969] E A 140. The judgment quoted with approval a passage in the case of FITZPATRICK – VERSUS – BATGER & CO LTD [1967] 2 ALLER 657 as follows: -

“.....I said that it is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition.”

In opposing the application learned counsel faulted the applicants for seeking the orders sought on the basis that they allegedly had delayed prosecuting the plaintiff's suit for over 9 years. He also faulted the application for failing to annex evidence of when the pleadings hereof closed. Plaintiff's counsel also argued that it was not right for defendants to file individual defence then, on that basis claim that they will all suffer prejudice. He further stated that to prosecute the negligence claim the plaintiff needed files in defendant's custody, and the defendants were refusing to release those files without payment of fees. There was, therefore, plaintiff's counsel stated stalemate. The defendant he added cannot therefore seek dismissal. In those circumstances plaintiff's counsel said that the plaintiff had demonstrated reasonable excuse for the delay in fixing this matter for hearing.

The relevant order, which the present application is brought under, is Order XVI Rule 5. This provides: -

“ If, within three months after -

(a) The close of pleadings; or

- (b) “deleted”
- (c) the removal of the suit from the hearing list; or
- (d) 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 reading of that rule makes it clear that if after the close of pleadings or adjourning generally a suit that the defendant can move the court for dismissal for want of prosecution for a period of three months. I find that in considering an application under that rule, the court need not consider interlocutory applications made, although that can perhaps sway the court, but the court only needs to consider when the suit was last adjourned or when was the close of pleadings. Going by that finding the close of pleadings, I find in the court record, to have been 30th April 2003. The plaintiff took no action in this suit, from that date, save for the interlocutory application dated 22nd January 2004. There is no explanation offered why this suit was not fixed for hearing between April 2003 and January 2004. The explanation given which I take it covers the period after the dismissal of the plaintiff’s application dated 22nd January 2004, was that the plaintiff, in order to prosecute its suit needs the files in the defendant’s custody. Now, such an explanation is worrying, because it would mean that when the plaint was filed and it alleged that firms of advocates were negligent, the same was not based on any documentary evidence. When one considers the consequence to a firm of advocates who are alleged to be negligent in the handling of their client’s matters which can be catastrophic, then it would follow an action cannot be filed making such allegation when the party so filing has no documentary evidence. In that regard I find that there will be much prejudice suffered by the defendants in having such an action hanging over them, and not knowing when it was going to be brought to trial; that indeed is tantalising torment. The business affairs of the defendant and the confidence of their clients in their ability is likely to be affected by such an action. The more reason therefore, why plaintiff should have prosecuted this suit with diligence. The delay by the plaintiff hereof, I find is inexcusable and can lead to intolerable injustice.

In conclusion I find that the plaintiff has failed to abide by the requirements of Order 16 Rule 5 and has failed to fix the suit for hearing within three months of close of pleadings and such failure has not be explained sufficiently to the court.

The application by the defendant is merited and I grant the following orders: -

- (1) That the plaintiff’s suit is dismissed for want of prosecution, and the costs of the suit are awarded to the defendants.
- (2) That the defendants are awarded the costs of the application dated 2nd July 2005.

It is so ordered.

Dated and delivered this 27th day of October 2005.

MARY KASANGO

JUDGE