REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU
CIVIL SUIT NO 206 OF 1995

WATAALAMU CONSTRUCTION WORKS

LTD…….....PLAINTIFF/RESPONDENT

V E R S U S

BRITISH ARMY TRAINING LIASON STAFF KENYA

MINISTRY OF DEFENCE OF THE GOVERNMENT OF UNITED

KINGDOM……...…….APPLICANTS/DEFENDANTS

RULING OF COURT

This suit was filed on 22/11/1995. Summons for directions were taken on 25/3/1998.

On 10/5/2000 the plaintiff complied with an order made during the summons for directions by filing a list of documents. Mrs Ndorongo strongly argued that since the pleadings were closed the plaintiff had done little to fix the suit for a hearing that the delay was inexcusable and inordinate. She further argued that the cause of action arose as early as 1993 when the defendant is alleged to have terminated the contract from which the claim arose; that due to such failure in bringing the suit to a hearing by the plaintiff the defendant and the possible witnesses had moved away from Kenya back to United Kingdom, many of them to unknown areas so that even if the case is fixed for a hearing now, it will be difficult to trace them and that even if the witnesses were to be located, it will be financially prohibitive to bring them back to Kenya to give evidence; that if the suit is not dismissed as prayed, the defendant will be highly prejudiced for reasons not of their own making; that even if the suit were dismissed, the plaintiff would still have a chance to recover from the plaintiffs advocate who is responsible for the offensive conduct in form of client-advocate suit: that the plaintiff must have been dilatory and indolent and deserves such a dismissal, and finally, that the fact that the defendants would themselves have fixed the suit for hearing was a mere option and not a rule and would not deny the defendants the relief sought. Mr. Mithega answered on behalf of the plaintiff. He said that an application of this nature can only succeed if :-

a) The plaintiff has been extremely inactive for an unreasonable period.

b) That the relief sought here is discretionary and that dismissal would be unfair to the plaintiff.

c) That the service upon the defendants were very difficult because they were the British Government itself.

d) That the defendants' conduct brought part of delay, if delay there was, since they failed to attend the Summons for Directions in March, 1998 but thereafter filed an application for discovery and

inspection which could have been ordered during the summons for directions and which application was not prosecuted by the defendants until November 2000.

e) That thereafter even after orders for discovery and inspection were ordered by consent, the defendants failed to act without delay since they have not done so even upto now.

The plaintiff also asserted that despite these facts, it should be noted from the records that he fixed the case for hearing on 15.2.2000 but the defendants failed to attend court. Besides, there was the plaintiff's unprosecuted application for discovery still lying in the file, which could not be by passed-by a hearing of the main suit. Another issue which had to be contended with, further argued the plaintiff, was the fact that the original firm of advocates representing the plaintiff was in the meantime dissolved and it took time to distribute files between the original advocates. The plaintiff also argued that despite these difficulties, he managed to have the case fixed for a hearing again on 9/10/2003 when the hearing failed to take off because there was no judge.

For the above reasons, argued the plaintiff, the plaintiff was not guilty of inordinate delay or any delay at all to warrant a dismissal for want of prosecution.

Both counsel cited relevant legal authorities, each in support of his case. I have carefully perused the arguments presented by both sides. It is not denied that although the case was filed in 1995, the summons for directions were not taken until March 1998. That is the time when the court could decide whether or not the pleadings have closed and whether therefore the suit was ready for a hearing. Unfortunately the defendants failed to attend court only to file an application five days later for discovery and inspection. This application was not finalized until April 2000 when a consent order by both parties was filed which fixed the filing and inspection of the relevant documents within 44 days. It is not disputed that the plaintiff filed his documents within the agreed period, on 10/5/2000. The defendants did not however, comply with the consent then nor have they done so up to now in that they have never to date filed the list of documents nor inspected those filed by the plaintiff. The defendants did not deny the above assertions by the plaintiff nor did they deny that the plaintiff fixed the case for a hearing first on 15/2/2000 when the defendants chose not to attend although they were properly served. The plaintiff claims that he could not proceed to prosecute the case ex parte because the order for discovery and inspection by the defendants had not been complied with by the defendants themselves. Once again the defendants did not deny this assertion. The plaintiff again fixed a hearing on 9/11/2003 when the hearing could not take off as there was no judge at the station. It can be noted however, that this application had been filed in November 2002 and was pending on the record. The hearing fixed a year after, might not accordingly have taken off unless this application was first resolved. It is therefore, reasonable to conclude that the period during which the plaintiff was in a 'slumber' of some sort was that between 15/2/2000 and 2003 when he once more purported to fix another hearing, for whatever it was worth after a period of 44 months. The plaintiff also asserted that during the said period of slumber the defendants also had a right themselves to fix the case for a hearing but failed to do so. Plaintiff argued therefore, that in such circumstances the defendants have to bear part of the blame which should deprive them of the moral right to blame the plaintiff.

To this the defendants answered that fixing the case for hearing was on their part an option not a rule or obligation.

I have considered all these facts and arguments. The rule under which this application is specifically brought is Order XVI, Rule 5 of the Civil Procedure Rules which states:-

"If, within three months after:

(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".

It will be noted that under the above rule and subrule the defendants had the two options, first of which was to fix the suit for hearing while the second would be to file an application for dismissal. It has been

said that a defendant who is threatened under the suit and possibly stands to lose financially, has no reason to hasten such an event by fixing the case himself. He would rather take advantage of the plaintiff's delay, it is argued, to take the second option for dismissal when time is ripe. That may be attractive argument, but in my view, if the first option had no purpose and can be completely ignored by the defendants; then the legislature could have no purpose in including the said part in the provision. The fact that the legislature in its wisdom decided to include it means that the said first part of the provision has some meaning and in my view defendants who ignore it, do so at some risk. In my opinion a defendant who first takes the first option, strengthens his chances of obtaining a favourable result when he later applies for the second i.e., the dismissal of the suit. In conclusion in respect to this point, therefore, it was not wholly wise of the applicants herein that they did not themselves attempt to fix the suit for hearing when they believed that the plaintiff had become dilatory on indolent, notwithstanding that this omission might not alone be the decisive ground for granting or refusing the application of this nature.

All said however the plaintiff was in this case under obligation to explain why he failed to fix this case for a hearing for several years. He answered to the effect that although the case was first filed in 1995, there was some action going on in the case.

He argued that the first problem was that service of summons was not easy to effect because it was to be done against the British Government which was no little task.

It is not clear from the record as to when or whether the pleading were closed. This would be important because delay would importantly occur after the pleadings are closed and parties are supposed to set the suit for a hearing. The court accepts that summons for directions were taken on 25/3/1998 and that the Defendants failed to attend although they had been served. It is also accepted that the defendants instead filed an application for discovery and inspection, which themselves failed to prosecute until 11/4/2000 when a consent order was recorded to the effect that discovery and inspection should be done within 44 days. The record shows also that although the plaintiff complied with the order, the defendants have never complied with it. Although the plaintiff could have moved to foreclose against the defendants in accordance with order 10 rule 20, he did not do so. This however, in my view did not absolve the defendants from the delay they may have themselves caused by the fact that they failed to attend the Summons for Directions under which the order for discovery and inspection could have been recorded. Had they done so, the parties could have saved the wasted period between March 1998 and April 2000 when the orders were finally obtained. Secondly, the defendant's total failure to file their list of documents and thus enable the plaintiff to do inspections, cannot itself be anything but a conduct which contributed as well to the delay in this case. Clearly therefore, the failure to fix the suit for a hearing can validly be considered from 15/2/2000 when the first hearing fixed could not take off. The period of delay from 15/2/2000 until this application was filed in November 2002, was a period of 33 months. This by any standards and even taking into account other circumstances of this case, is definitely a long and inordinate delay.

I have considered these facts and in my view, unless either party's conduct can excuse the plaintiff, this suit is liable for dismissal without much ado. As stated by Kneller, J. (as he then was) in the case of ET Monks & Co. Ltd =v= Evans [1985] KLR, 584, whether an application for dismissal of a suit for want of prosecution should be allowed or not is a matter of the discretion of the judge who must exercise it judicially. The court should among other things, consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was unexcusable. However, each case will turn on its own circumstances. It is not therefore, the mere actual length of delay period that will carry the day but the circumstances relating to the conduct of each party that will matter. For example facts of some cases may show that the failure which caused the delay came from the plaintiff alone. Some may show that both parties are to blame. Others may show that if the defendant genuinely believed that he was being prejudiced by the delay he would or should have applied for an early hearing date or an early dismissal for want of prosecution. The basic test was that enunciated by Lord Dennings, M.R. in the case of Allen =v= Sir Afred Mclpine & Sons Ltd and quoted by Edmund Davies, L.J. in Peston =v= Allsopp [1971]3 All E.R, 370 at page 378:-

"The principle on which we go is clear: when the delay is prolonged and inexcusable, and is

such as to do grave injustice to on side on the other, or to both, the court may in its discretion dismiss the action straight away". So the overriding consideration always is whether or not justice can be done despite the delay. Thus, Lord Denning, M.R., referred later in his judgment in that case, to "delay…….so great as to amount to a denial of justice…….".

The justice stated her is justice to both parties, taking into account the length of delay, the parties to the suit, the evidential documents availability or missing, availability or not of the witnesses and/or the expense likely to be used to avail them, if the court is satisfied, despite the delay that justice can still be done, not withstanding the delay, the action may not be dismissed. The above mentioned principle was considered by Chesoni, J. as he then was, in the case of Ivita vs Mutua in Nairobi Civil Case No. 340 of 1971. Chesoni, J. stated in passing that the court will frown at any inexcusable delay and will do everything possible to enforce expedition of trials.

In this case before me the case was filed in 1995 but was not fixed for a hearing for the first time until February 2000. It was not heard on that occasion because the defendants failed to turn up in court despite being properly served. The defendants have never complied with the order for discovery and/or inspection. They were the cause for failure to proceed with the hearing of the case on the date above mentioned by the court. They themselves failed to fix the suit for hearing if they felt prejudiced by the delay that ensued. They failed to apply for the dismissal of the suit earlier than later. I find that the delay was contributed by the conduct of both parties and neither of them should benefit from such conduct. I am conscious of this courts discretion to either dismiss or save the suit at this point in time. I am also aware from the facts that the defendants witnesses may have left Kenya after serving their stint in Kenya. In my view this should have been the more reason why the defendants should not have played part in delaying the hearing of the case, as earlier revealed they did. It would be easier if the fault in this case lay only with the plaintiff, for then it would be easy to dismiss this suit for inordinate delay and no injustice would be counted on him since the fault would wholly be his. It is not so here and in my view the plaintiff's delay here cannot be termed inexcusable under the above circumstances nor such as can do grave injustice to one side or the other or both.

Having carefully thus considered the facts of this case and the applicable principles of the law. I have come to the conclusion that I will not dismiss this case. I therefore hereby dismiss this application with costs in the cause. The plaintiff is hereby ordered to obtain a hearing date without further delay as he may not be so lucky next time round.

DATED AND DELIVERED THIS 17TH DAY OF DECEMBER 2003

D.A. ONYANCHA

JUDGE