



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 202 OF 2004

KENYA RAILWAYS CORPORATION.....PLAINTIFF

-VERSUS-

ATULKUMAR RAMANBHAI PATEL.....DEFENDANT

RULING

1. The application for determination is the one dated 25th August 2015 brought under the provisions of section 1A, 1B, 3A & 63 (e) of the Civil Procedure Act and Order 17 rule 2, Order 40 rule 6 & 7 and Order 54 rule 2 of the Civil Procedure Rules. The Defendant/Applicant is praying for an order:

1. Spent

2. That the plaintiff's suit be dismissed for want of prosecution

3. That the plaintiff do pay the defendant/applicant's cost of this application and of the suit.

2. The applicant submitted that the cause of action is a lease dated 1st November 1988 granted to the lessee without a board resolution. That the plaintiff has been enjoying orders of injunction since 2004. The defendant contends that in spite of several directions given by the Court, the plaintiff failed to comply with order 11 within the set timelines and even failed to set down the suit for hearing. That this delay has been inordinate, inexcusable and has not been explained. The applicant relied on the cases of **Abdul & Another vs Home & Overseas Insurance Co. Ltd (1971) EA 564** and **Argan W. Okumu vs Dima College Ltd & 2 others (2015) eKLR** where it was held that:

i. The delays were not satisfactorily accounted for.

ii. That it was the duty of the plaintiff to fix the matter for hearing.

3. The defendant submits that he has suffered in his business as the effect of the injunction stops him from completing the construction of a warehouse. To buttress this, they annexed a valuation report outlining the extent of the damage/loss suffered. That the prejudice include that amongst the defendant's witnesses one is deceased and the other cannot be traced. That an undertaking as to damages should not give a party comfort as it would not bring the witnesses to achieve a fair trial. The defendant urged the Court to grant the orders sought in the present application..

4. The application is opposed by the plaintiff. The plaintiff relied on the replying affidavit filed on

1.3.2016 and grounds of objection dated 29.2.16 together with the written submissions filed and case law cited. It is the plaintiff's case that their documents had disappeared and there was reluctance on the part of their witnesses who are former employees. However they have since traced & filed their documents on 1.3.2016 showing a willingness on their part to prosecute this case. The plaintiff relied on the case of **Eastern Produce (K) Ltd vs Rongai & Transporters Ltd (2014) eKLR** to support this argument.

5. The plaintiff continued that each time the matter was fixed for hearing, it was taken out by consent. That the order to comply with pre-trial directions was applicable to both parties. In distinguishing the case laws relied on by the defendant, the plaintiff submitted that in the case of **Ivita vs Kyumbu (1984) KLR 441**, the Court found that the plaintiff should be given an opportunity to present his case. That in the case of **Trill & Another vs Sacher & Others (1963) All ER 961** striking out was proper because the delay was for six (6) years. That this case involves a public property therefore public interest is at stake. He urged the Court to grant them a hearing as they have complied with order 11 of the Civil Procedure Rules and that they have given an undertaking to meet any losses that may be suffered by the defendant.

6. I have perused the Court record and note that the file was active from the date of its inception in dealing with the interlocutory application seeking injunctive reliefs. When the same was concluded, the matter listed down for hearing of the main suit. The record does show that the matter was listed for hearing on 4th March 2008, 20th May 2009 and 2nd November 2009. In all the three occasions, the matter was taken out by consent of the plaintiff and the defendant to enable them complete the process of discovery of documents to be used during the hearing. The file was again fixed for hearing on 9th July 2012. But the Court proceedings are missing to enable this Court know what was the reason for the adjournment on that date. Thereafter a lull occurred until when the defendant filed the present application.

7. In the grounds of opposition and the replying affidavit filed on behalf of the Respondent both dated 29.2.2016 stated that dismissing the suit for want of prosecution will not achieve the overriding objective resolving the underlying dispute of the acquisition of public property by unlawful means therefore the matter should be heard on merits. The plaintiff has also explained the reasons for the delay.

8. There is definitely delay in prosecuting this matter given that it has been alive in Court for more than ten (10) years. It is also obvious from the Court records that no hearing or activity took place from 9th July 2012 to the time this application was filed. This contravened the provisions of Order 17 rule 2 of the Civil Procedure Rules which states thus ***"In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."***

9. The question therefore for this Court to determine is not when the cause of action arose as submitted by the applicant to be the facts giving rise to their application but whether from 9th July 2012, the plaintiff has shown any cause why they have not set down the suit for hearing. Secondly, whether the delay is excusable since in my view I agree and hold the delay of 3 years is inordinate. Lastly whether the delay has occasioned the defendant prejudice or he is likely to be prejudiced by such delay.

10. On whether delay is excusable, the plaintiff submitted that they could not trace their documents and there was unco-operation from some of their witnesses who had ceased to be their employees. One such employee is named as Edith Siganga Jemkins. However the plaintiff failed to tell this Court by annexing a letter to the affidavit or stating orally when the said employees left and or why their replacements could not subsequently take over their duties and deal with this case. The plaintiff/Respondent further deposed that they could not trace the documents in support of their case which were mischievously missing. I have read through the affidavit of Justine Omoke and see nowhere the explanation of how they were now able to retrieve the documents that they filed in Court on 1.3.2016. I also note that most of the documents are letters drawn by other offices which they could have easily accessed copies if they were more diligent.

11. Will the delay cause prejudice to the defendant. The defendant explained that one of his witnesses who signed the lease is deceased and the other cannot be traced. This indeed is a visible prejudice but it

is not without a remedy as the defendant can still invoke the proviso to section 35 of the Evidence Act to produce a document where it is established that procuring the attendance of the maker of such a document is impossible either because it's expensive or the person is dead. In the case of **Delphis Bank Ltd vs Allied Wharf Ltd (Mombasa) HCC 324 of 2000** relied on by the defendant may be distinguishable as in this instance, the defendant refers to a lease document not oral evidence of the witnesses who have died or cannot be traced. While in the case of **Al – Fayed vs Emanoel Antiques Ltd (1997)** deal with the issue where inordinate and inexcusable delay formed a ground to justify striking out. In the instant application, the Court has not been called upon to strike out the suit.

12. In conclusion, I am satisfied that there is inordinate but excusable delay (on account of the explanation offered) by the plaintiff in prosecuting this matter. On the basis that they have now complied with the provisions of Order 11 before this application was heard, I will grant them one **LAST** opportunity in the interest of justice to present their case. They will not be accommodated to seek any further extensions in the guise of public interest. To compensate the defendant for waking up the plaintiff from their slumber, I shall award them costs of this application to be agreed and or assessed by the deputy registrar. This matter shall forthwith be fixed for pre-trial directions.

Dated, signed & delivered at Mombasa this 1ST day of November 2017

A. OMOLLO

JUDGE