



REPUBLIC OF KENYA



KENYA LAW
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OSS v Bianchi Umberto Vant t/a Bianchi Plant and Machinery (Civil Case 153 of 2014) [2023] KEHC 11 (KLR) (5 January 2023) (Ruling)

Neutral citation: [2023] KEHC 11 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 153 OF 2014
OA SEWE, J
JANUARY 5, 2023**

BETWEEN

OSS PLAINTIFF

AND

**BIANCHI UMBERTO VANT T/A BIANCHI PLANT AND
MACHINERY DEFENDANT**

RULING

1. The plaintiff filed this suit on December 15, 2014 seeking general and special damages for breach of contract and loss of profits, together with interest and costs. Concomitantly, the plaintiff filed a notice of motion dated December 15, 2014 seeking for various interim orders, including orders for security and accounts. The said application was dismissed by Hon Kasango, J. on June 25, 2015. The matter thereafter came up on June 30, 2015 for review of the ruling dated June 25, 2015 on the aspect of costs.
2. Thereafter, counsel for the defendant filed a bill of costs on November 29, 2016 in respect of the dismissed application; whereupon the Deputy Registrar issued a notice of taxation dated February 23, 2016. The taxation is yet to happen in respect of that bill of costs. Accordingly, on December 9, 2021, the court issued and served a notice to show cause, pursuant to order 17 rule 2 of the *Civil Procedure Rules*, why the suit should not be dismissed for want of prosecution.
3. The parties filed their respective responses to the notice to show cause by way of affidavits. The plaintiff's affidavit was filed on March 15, 2022. According to him, the last time this matter came up was on June 6, 2018. He explained that during the years 2018 to 2020, he was unavailable to issue instructions to his advocates because of personal problems which greatly affected his mental health as well as finances. At paragraph 4 of his affidavit, he deposed that sometime in 2018, his son, SS, was diagnosed with [particulars withheld] and was being treated at [particulars withheld] Hospital in London; and that, with the onset of the Covid-19 pandemic, he was completely in a bad place mentally,



- physically and financially. He annexed a letter dated July 10, 2020 from [particulars withheld] London Hospital (marked annexure “OSS-1”) to his affidavit to buttress his averments.
4. Further to the foregoing, the plaintiff annexed copies of the relevant pages of his passport (marked annexure “OSS-2”) to demonstrate that during the period in question, he was shuttling between Kenya and London, and therefore had not time to pursue his business in Kenya or the instant suit. He added that he trusted his erstwhile Advocates to take appropriate steps to progress the suit and keep him informed. He added that he has since changed counsel and if given the opportunity, he will move with speed and cause the suit to be fixed for hearing.
 5. On his part, the defendant relied on his affidavit sworn on March 21, 2022. He averred that the last time this matter was in court was during the delivery of the ruling by Hon Kasango, J. on June 25, 2015; and that no explanation has been given for the plaintiff’s indolence for over 6 years. At paragraph 10 of his affidavit, the defendant deposed that he has been adversely affected by the delay in that, with the passage of time, availing his witnesses may be a challenge. He consequently prayed for the dismissal of this suit with costs.
 6. Counsel for the parties relied entirely on the affidavits aforementioned and left it to the court to determine the notice to show cause. As indicated herein above, it was issued by the court suo motu under order 17 rule 2 of the Civil Procedure Rules, which states:
 1. 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.
 2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
 3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.
 4. The court may dismiss the suit for non-compliance with any direction given under this order.
 7. Accordingly, the issues falling for consideration in this application are:
 - (a) Whether there has been inordinate delay herein in the prosecution of the suit;
 - (b) Whether the delay is excusable; and,
 - (c) Whether the applicant has been prejudiced by the delay.
 8. In the case of Allen v Sir Alfred McAlpine [1968] All E.R. 543 at p. 546, Lord Denning, MR, aptly stated that:

“The delay of justice is a denial of justice...all through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear...To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it.”
 9. Accordingly, I have perused the court record and confirmed that the suit was dormant between July 30, 2015 and March 6, 2018, but that delay was overtaken when the plaintiff caused the suit to be listed for pre-trial conference. There was a further period of inactivity of about three and a half years between June 7, 2018 and December 9, 2021 when the instant notice to show cause was issued for which the plaintiff has endeavoured to offer an explanation in his affidavit. From the documents annexed to his



affidavit, I am satisfied that a plausible cause has been shown by the plaintiff as to why he was unable to give his attention to this suit, namely, the sickness of his son.

10 Indeed, in *Ivita v Kyumbu* [1975] eKLR it was held that:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

11. In the premises, it is my finding that sufficient cause has been shown by the plaintiff for the delay. It is accordingly hereby ordered that the suit be fixed for pre-trial conference for further directions by the court. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 5TH DAY OF JANUARY 2023.

OLGA SEWE

JUDGE

