Torino Enterprises Limited & another v Boit & 6 others (Civil Case 401 of 2011) [2023] KEHC 2397 (KLR) (Civil) (23 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2397 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 401 OF 2011

A MABEYA, J

MARCH 23, 2023

BETWEEN

TORINO ENTERPRISES LIMITED ..... 1ST PLAINTIFF

ABENAQUI DEVELOPERS LIMITED ..... 2ND PLAINTIFF

AND

KENNETH KIPTOO BOIT ..... 1ST RESPONDENT

JAMES CHERUIYOT BOIT ..... 2ND RESPONDENT

PATRICK KIBAGENDI OSERO ..... 3RD RESPONDENT

FRED OREGO ..... 4TH RESPONDENT

BENARD KOYYOKO ..... 5TH RESPONDENT

JULIET MUKAMI NDUNGU ..... 6TH RESPONDENT

REGISTRAR OF COMPANIES ..... 7TH RESPONDENT

RULING

1. On September 22, 2021, the Court issued a Notice to Show Cause why this suit should not be dismissed for want of prosecution.

2. The plaintiffs alleged that there was a consent in place and only one signature was pending. This was repeated to Court on October 21, 2021 and November 9, 2021. The parties were given time to file that consent which, however, never materialized.

3. On December 7, 2021, the parties were directed to respond to the *NTSC* by way of affidavit. On February 1, 2022, Mr Kiplagat for the 2nd plaintiff filed a notice dated January 21, 2022 which was allowed and he effectively ceased acting for the 2nd plaintiff.

4. The 2nd defendant filed a Repying Affidavit sworn by Anthony Ambaka Kegode on March 29, 2022. He was the 2nd plaintiff's director. He stated that the parties were engaged in out of court negotiations with a view to reaching a settlement.

5. That however, the firm of Okoth and Kiplagat Advocates which represented the 2nd plaintiff and 2nd defendant insisted on a fees agreement as a pre-condition to further representation, leading to a break down in the advocate-client relationship. That the advocate retained a lien on the file pending payment and the effort to sign the consent were therefore thwarted.

6. That before the Shareholders Agreement could be filed, judgment was entered in Civil Appeal No 84 of 2012 *Hon AG vs Torino Enterprises Ltd* which held that the suit property did not lawfully belong to the 1st plaintiff herein. That the premise on which the agreement had been entered into collapsed and it was necessary to re-evaluate the consent.

7. That the basis of this suit was the assertion of a right to shareholding in the 1st plaintiff company by the 2nd plaintiff and 1st to 5th defendant in the suit and counterclaim. That the Court of Appeal's decision did not alter the substratum of this suit whereby the Court ought to allow the suit to proceed to full trial.

8. The firm of Okot & Kiplagat filed a response to that affidavit despite having ceased from acting. Their Replying Affidavit was sworn by Kent Omondi on November 14, 2022. He denied that the instructions were withdrawn due to disagreement on legal fees. That it was due to Mr Kegode's failure to sign the consent despite that firm having represented to Court on three different occasions that the consent would be filed upon him signing. That the firm could not continue offering an unfaithful representation that an agreement was being awaited whereas Mr Kedoge had decided not to sign the agreement.

9. That all other parties had executed the agreement but for him. The agreement was annexed as "KO1". That the issue of legal fees did not arise as the same was provided for in the said agreement and the firm of Okoth & Kiplagat Advocates executed that agreement.

10. That the Court of Appeal case had no bearing on the instant case and the shareholding in the plaintiff company had been agreed to by all parties so no triable issue remained.

11. This Court has considered the above affidavits. Order 17 Rule 2 of the *Civil Procedure Rules* provides: -

> " 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."

12. In *Argan Wekesa Okumu vs Dima College Limited & 2 others* [2015] eKLR, the court observed: -

> " The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay. As such the 3rd defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of *Ivita v Kyumbu* [1984] KLR 441. Further to this, the decision of

whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

13. From the foregoing, it is clear that there is discretion in deciding whether or not to dismiss a suit that has remained unprosecuted for a period exceeding one year. However, the Court must consider the reasons advanced for the delay or failure to prosecute the suit. The delay must be excusable, reasonable and with just cause. Further, the Court must also consider if the delay may cause prejudice to the other party.

14. The reason advanced by the 2nd defendant for the delay is that he fell out with his former advocate on record due to an alleged disagreement on legal fees. That in the premises, his efforts to sign the Shareholder's Agreement were frustrated. The advocate however denied that claim.

15. This Court has seen the copy of the Shareholder's Agreement. The party-and-party legal fees for all advocates had been agreed by the 1st plaintiff company and all advocates involved had executed the agreement wherein all party and party costs were fully recognised and the advocates fully indemnified.

16. Further, all the other parties, including the 2nd defendant's former advocates had signed the agreement but save for the 2nd defendant. The allegation that the former advocate declined to sign the agreement over issues of legal fees does not therefore hold any water.

17. The court's record confirms that the 2nd defendant's former advocate had indicated on three occasions that they were waiting for the 2nd defendant to sign the agreement for it to be filed, but that promise never materialized. The advocate's explanation for lack of instructions and decision to cease acting and stop misleading this Court is more acceptable.

18. The 2nd defendant did not explain why he had not signed and released the signed Shareholder's Agreement for filing. He did not also explain why no step had been taken to prosecute the suit or counterclaim over the last 5 years.

19. The Court of Appeal case referred to by the 2nd defendant is not relevant to this case. As evidenced by the Court's judgment dated February 4, 2022 attached as AAK 4, that suit related to ownership of land parcel No 22524, Grant No IR 85966, whereas this suit relates to the 1st plaintiff's shareholding. The outcome of that case did not bar the 2nd defendant from signing the Shareholder's Agreement or from prosecuting this suit or counterclaim.

20. This Court also takes note of annexure KO 2 being a letter from M/S Wagara, Koyyoko & Company Advocates dated December 31, 2021 wherein the 2nd defendant's current advocate on record was notified that in the event the 2nd defendant declined to sign and release copies of the duly executed Shareholders Agreement, all other parties would sign a consent for the matter to be dismissed for want of prosecution.

21. There is no evidence that the 2nd defendant responded to that letter. Almost one year later, the 2nd defendant has not raised a finger to prosecute the suit, yet he has held all other parties hostage by holding on to the Shareholding Agreement signed by all other parties but himself without any plausible explanation.

22. It is quite evident that there has been no justifiable reason for the inordinate delay of 5 years since this suit was last prosecuted. Though the other parties showed their interest in finalizing the matter

by signing the Shareholders Agreement, the 2nd defendant did not show any such intention. There is nothing to show that the delay is excusable, reasonable or with any just cause.

23. Nevertheless, since the 2nd defendant has intimated an intention to prosecute claim by signing and filing the consent, the Court will only give a slim window for that consent to be recorded.

24. Accordingly, the Court makes a determination of the NTSC by directing the parties to file the proposed consent within 14 days of this ruling in default of which the suit shall stand dismissed for want of prosecution without need for further recourse to Court. There will be no order as to costs.

It is so ordered.

DATED and DELIVERED this 23rd day of March, 2023.

A. MABEYA, FCIArb

JUDGE