



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**PETITION NO. 10 OF 2019**

**TISCO CONSTRUCTION LIMETED.....PETITIONER**

**=VERSUS=**

**KENYA RAILWAYS CORPORATION.....1ST RESPONDENT**

**CHINA ROAD & BRIDGE CORPORATION.....2ND RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated 8.6.2021 brought forth by the Petitioner who seeks the following orders; that the court be pleased to suspend the taxation of Party and Party Bills of Costs, that the suit which was dismissed on 13.2.2020 be reinstated and the draft submissions attached to the application be deemed as duly filed.
2. The application is premised on the grounds on its face and on the supporting affidavit of one Zhang Yuan Xhiang, the managing director of the Petitioner. The deponent contends that he was not aware of the hearing date of 13.2.2020 when the suit was dismissed. That when the matter came upon on 16.10.2019, he inquired from his advocates as to what had transpired. His advocate advised him to give him time to find out from the person who had held brief in the matter on what had happened in court. Then the Covid-19 Pandemic and the containment measures came in March 2020 and the Petitioner lost touch with his advocates and he was forced to look for another advocate.
3. Additionally, the Petitioner avers that after it filed its suit, the 1st Respondent engaged them with a view to settling the matter amicably, but the discussions were not fruitful.
4. The 1st Respondent has opposed the application via the grounds of opposition dated 5.7.2021. It is averred that there has been inordinate delay in filing the current application as over 12 months have lapsed from the time of dismissal of the suit to the date of filing the notice of motion.
5. It is further contended that the failure to attend court by the Petitioner and his advocates has not been adequately explained. That the Applicant has not been vigilant in the prosecution of this case hence the application should be dismissed.
6. The 2nd Respondent has also opposed the application via grounds of apposition and a replying affidavit both dated 15.9.2021, which are more or less similar in content. The 2nd Respondent avers that the date of 13.2.2020 was set in court by consent of all parties and the Petitioner was represented. Thus the explanation given by the Petitioner as to why he was not in court on 13.2.2020 is not plausible or reasonable.
7. It is further argued that there having been a hearing date set in court, then the explanation by the Petitioner that they were engaged in an out of court settlement is not a good reason.
8. Further, the 2nd Respondent argues that the delay of one (1) year and four (4) months in filing the current application is inordinate, and that no plausible explanation was given for the delay.
9. The 2<sup>nd</sup> Respondent states that the petitioner was only woken from its slumber after being served with a Bill of Costs hence it cannot be said to be interested in the prosecution of the matter.
10. I have considered the arguments presented by the parties including the oral submissions advanced before this court on 20.9.2021. The issue for determination is whether this suit which was dismissed on 13.2.2020 should be reinstated.
11. In the case of **Mwangi Kaimenyi vs Attorney General & Another (2014)eKLR**, the Court stated that:

***“The decision whether a suit should be re-instated for trial is a matter of justice and it depends on the facts of the case, See Ivita V Kyumbu [1984] KLR 441, Chesoni, J. (as he then was). “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...”***

12. The record of the court indicates that when the matter came up before the Court on 11.6.2019, directions were given for parties to inter-alia file and exchange brief written submissions and a date was set for hearing of the main suit on 16.10.2019. The case was to be heard through affidavit evidence and oral highlighting of the written submissions.

13. Come 16.10.2019 and the court had to adjourn the matter stating thus:

***“Hearing of the Petition is adjourned to 13.2.2020 due to failure by the Petitioner to serve written submissions. Petitioner to pay court adjournment fees”.***

14. The Petitioner was then directed to file and serve submissions within 30 days and another hearing dated was set for 13.2.2020. This time round, there was no appearance for the Petitioner and the suit was dismissed.

15. What emerges from these proceedings is that the Petitioner was indeed represented on both the date of 11.6.2019 and 16.10.2019. There was no compliance with the court’s directions given on 11.6.2019 on the part of the Petitioner but the court still indulged them on 16.10.2019. The Petitioner through his lawfully appointed advocates was or ought to have been aware of the hearing date of 13.2.2020.

16. Perhaps this court would have been inclined to exercise its discretion to indulge the Petitioner again had there been a speedy move to mitigate their situation after the orders of dismissal of 13.2.2020. However, this is not the case, for the current application dated 8.6.2021 was only filed one year and four months since the date of dismissal.

17. The Applicant has unconvincingly tried to shift blame to the Covid-19 pandemic. However, even with the containment measures that came along due to the pandemic, the period of one year and four months amounts to inordinate delay.

18. In the case of **Mwangi Gachiengu & 2 Others vs Mwaura Githuku & Another (2019) eKLR**, the Court stated that:

***“it is trite law that a matter once filed in court does not belong to the advocate but to the litigant. It is the responsibility of the litigant to be in constant touch with his advocate on the position of the matter. Where a litigant goes to sleep after filing a suit, he cannot blame his advocate for having not updated him on the position of the matter, or when the matter is dismissed because it has not been prosecuted or fixed for prosecution within one year.”***

19. In light of the above holding, the Applicant/Petitioner cannot be heard to shift blame upon his advocate and the delay of one year and four months has not been satisfactorily explained.

20. The Petitioner has advanced a claim that he did not put pressure on his advocates to prosecute the suit because all along there had been negotiations going on. However, nothing is on record that touches on such an issue. In any event, the suit was set down for hearing on two occasions in presence of the advocates of the parties and none of the them had talked about on-going negotiations.

21. All in all, I find that the application dated 8.6.2021 is not merited, the same is hereby dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2021 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Mr. Kimosop for the Petitioner

Gaiho holding brief for Mwai for the 1st respondent

Masila for 2nd Defendant/Respondent

Court Assistant: Edel Barasa