



Rtw Shipping & Logistics Ltd v Omondi & 10 others (Civil Case E044 of 2023) [2024] KEHC 16891 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 16891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E044 OF 2023
F WANGARI, J
NOVEMBER 21, 2024**

BETWEEN

RTW SHIPPING & LOGISTICS LTD PLAINTIFF

AND

BONIFACE OMONDI 1ST DEFENDANT

SHEVID HASSAN ALI 2ND DEFENDANT

EXTROL LOGISTICS KENYA LTD 3RD DEFENDANT

JOSIA MWANGI 4TH DEFENDANT

AFRZAL CAPITAL INVESTMENTS LIMITED 5TH DEFENDANT

ELIMAX GENERAL AGENCIES 6TH DEFENDANT

KATRONIX VENTURES ENTERPRISES 7TH DEFENDANT

PRODES INVESTMENTS 8TH DEFENDANT

RACHBIDEK GLOBAL VENTURES 9TH DEFENDANT

JOHN OTIENO ATIENO 10TH DEFENDANT

KENYA REVENUE AUTHORITY 11TH DEFENDANT

RULING

1. For ruling is the 3rd Defendant's application dated 5th July, 2024 brought under the provisions of sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 17 Rule 2 (3) of the Civil Procedure Rules and all other enabling provisions of the law. It seeks as hereunder: -

a. The suit against the 3rd Defendant be dismissed for want of prosecution; and



- b. That costs of the application and the dismissed suit be awarded to the 3rd Defendant.
2. The grounds in support of the application are that the Plaintiff filed the matter on 7th June, 2023 and served the same upon the 3rd Defendant through email. Upon service, the 3rd Defendant instructed counsel who filed a memorandum of appearance and a statement of defence on 17th and 26th July of the same year. It equally filed a list of witnesses and served all the documents upon the Plaintiff within the requisite timelines.
 3. It is stated that since the date of filing suit on 7th June, 2023 over one year and two weeks have passed and the Plaintiff has never made any attempts to have this matter listed either for pretrial and/or hearing of its suit. The Plaintiff inaction is said to be prejudicial to the 3rd Defendant since it cannot properly with its business which the suit has created bad image in the logistics industry and the more the suit hangs over it, the 3rd Defendant risks losing business due to the bad to the bad negativity occasioned by this suit.
 4. The 3rd Defendant states that at this point, the Plaintiff is not interested and ready to prosecute the matter and the 3rd Defendant should not be made to suffer over the Plaintiff's inaction as the delay is an injustice. It lastly states that the court ought to strike out the suit with costs to the 3rd Defendant. The application is further supported by the affidavit sworn by one Rasheed Omar, its director.
 5. Through a replying affidavit sworn by the Plaintiff's country manager, the application is strenuously opposed. He deposes that if the 3rd Defendant's application is allowed, it would greatly prejudice the Plaintiff beyond unfathomable proportions and deprive it of the benefits of litigation. According to the Plaintiff, the delay in obtaining dates at the registry was not due to lack of diligence or intentional inaction on their part but due to unforeseen administrative complications and procedural delays beyond their control.
 6. He further states that they are fully committed to prosecuting the case and case in point is the negotiations with the 11th Defendant which resulted in a consent dated 23rd August, 2024 and adopted on 3rd September, 2024 thereby marking its suit against the 11th Defendant withdrawn. It is stated that the 3rd Defendant has not demonstrated any substantial prejudice it has suffered due to the delay in obtaining dates at the registry.
 7. It is the Plaintiff's contention that it has suffered financially on account of the 1st to 10th Defendants who were the tortfeasor that caused the 11th Defendant to detain the subject containers causing substantial losses in terms of charges payable to the owners of the subject containers being Maersk (K) Limited. That dismissing the suit at this stage a disproportionate response to the delay in obtaining court dates. The interest of justice would be better served by allowing the case to proceed on merits than dismissing it due to procedural delays that were beyond its control.
 8. It is averred that the 3rd Defendant's liability arises out of the 1st Defendant who held who held out himself as the 3rd Defendant's manager and acted as the 2nd Defendant's agent who committed the offence of falsifying the value of the goods in the containers to evade custom duty thus necessitating the 11th Defendant's actions of detaining the containers thus causing unnecessary financial losses. It urges the court to disallow the 3rd Defendant's application seeking dismissal of the suit for want of prosecution.
 9. Directions were taken to have the application canvassed by way of written submissions. It is only the Plaintiff who filed submissions. They are dated 6th November, 2024. Due regard has been given to the said submissions.



Analysis

10. This Court has carefully considered the application, the replying affidavit, Plaintiff's submissions, the authorities cited and the law and the issues that fall for the Court's determination are as follows: -
 - a. Whether the application dated 5th July, 2024 has merits;
 - b. If the answer to (a) above is in the affirmative, what orders ought to issue; and
 - c. What is the order as to costs?
11. The legal substratum for dismissal of suits for want of prosecution is founded on the principles that litigation must be expedited and concluded by parties who come to court seeking for justice. Parties ought to strive to assist in clearing backlogs in court and the ever increasing over-loads thus restoring bad public confidence and trust on the judiciary. Upon filing of cases, parties should efficiently and effectively be seen to fast track their hearing and determination.
12. There should be no delay at all based on legal maxim, "justice delayed is justice denied." Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should not be inordinate, unreasonable and inexcusable. I say so as that would be doing grave injustice to one side or the other or both and in such circumstance, the honourable thing is for the court in its discretion dismiss the action straight away.
13. The application primarily hinges on the provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules. Order 17 Rule provides as follows: -
 - 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).
 - 3). any party to the suit may apply for its dismissal as provided in Sub-rule 1". (Emphasis added)
14. Clearly, the powers granted to court hereby by law are discretionally and have to be exercised judicially, fairly and capriciously. In so doing, the test applied by court in the application for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay.
15. In other words, if the delay is satisfied with the Plaintiff's excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties before court, and hence the action would not be to dismiss it but direct that it be heard at the earliest time possible and available.
16. The court while addressing itself to the provisions of Order 17 of the Civil Procedure Rules observed as follows in *Fran Investments Limited v G4S Security Services Limited* [2015] eKLR: -

"...This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of *the Constitution* of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial "Sword of the Damocles". But in reality should be checked against yet another equally important constitutional demand that case should



be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of *the Constitution* of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff...”

17. I am equally alive to the introduction of sub-rules 5 and 6 of Order 17 Rule 2 in 2020 amendments. Sub-rule 5 recognizes that a suit automatically stands dismissed if after two (2) years, no steps have been undertaken. The present suit was filed on 7th June, 2023 and having considered the Plaintiff’s response, I do not think the period of one year two weeks’ amounts to inordinate delay. I note that steps have been made including a consent settling the claim against the 11th Defendant.
18. Weighing the parties’ competing claims, condemning a party unheard is quite a draconian step and should only be exercised in the clearest of case. To this end, I find the application merited.
19. On the second issue, the Plaintiff is directed to expeditiously list the matter for pre-trial and hearing of the suit. The same should be done within the next thirty (30) days.
20. Lastly on costs, the court reserves discretion on award. It took the 3rd Defendant’s actions to spring the Plaintiff from its slumber. Though I have found the application not merited, I exercise my discretion by awarding the 3rd Defendant costs of the application.
21. The upshot of the foregoing is that the court renders itself as hereunder: -
 - a. The Notice of Motion Application dated 5th July, 2024 lacks merit and the same is hereby dismissed;
 - b. The Plaintiff is directed to fix the matter for pre-trial within thirty (30) days from the date hereof.
 - c. In default of compliance with (b) above, any the suit against the 3rd Defendant stands dismissed for want of prosecution.
 - d. The 3rd Defendant is awarded costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF NOVEMBER, 2024.

.....

F. WANGARI

JUDGE

In the presence of;

Saisi Advocate for the Plaintiff;

N/A for the Defendants

Brian, Court Assistant

