REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL CASE NO. 24 OF 2018

PRD RIGS KENYA LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....DEFENDANT

RULING

1. This suit was filed on 31st October, 2019 by the plaintiff against the defendant claiming that the Defendant contracted the plaintiff to repair and maintain the Defendant's drilling rig and sought that the plaintiff supplies the Defendant with various tools and accessories necessary for the drilling of boreholes. As a result, the subject drilling rig was delivered into the possession of the Plaintiff who proceeded to repair, service and maintain the same as per the agreement. The Plaintiff also delivered to the Defendant assorted tools and accessories to enable the drilling of boreholes.

2. It was the Plaintiff's case that the total cost of the repair and value of the said tools and accessories was Kshs 13,066,496.85 out of which the Defendant paid Kshs 3,793,103.45 leaving balance of Kshs 9,273,937.31 unpaid. It is this sum that the plaintiff seeks in this suit as well as the accrued storage charges.

3. By an application dated 6th August, 2019, the Defendant sought an order that the Plaintiff be compelled by way of mandatory injunction to release drilling rig registration number KHMA 138G belonging to the County Government of Machakos and the costs of the application. Pursuant thereto by its ruling delivered on 24th September, 2019, this Court found that the Plaintiff having, rightfully so, opted to file a suit for the balance of the amount due to it, ought not at the same time, contrary to the express provisions of the law, continue holding the Defendant's drilling rig. In the premises, the Court issued a mandatory injunction directed to the Plaintiff to release to the Defendant drilling rig registration number KHMA 138G belonging to the County Government of Machakos.

4. From the record, the matter seems to have gone silent until 9th December, 2020 when the application dated 8th December, 2020, the subject of this ruling, was filed by the same defendant primarily seeking orders for dismissal of the suit for want of prosecution.

5. The said application, brought by way of Notice of Motion and expressed to be brought under the provisions of Order 17 rule 2(3) of the ***Civil Procedure Rules*** as well as section 3A of the ***Civil Procedure Act*** and all other enabling provisions of the law, is supported by an affidavit sworn on 8th December, 2020 by **Felix Mutua**, the defendant's advocate. In the said affidavit, it is deposed that since the ruling delivered on 24th September, 2019, more than one year ago, no action has been taken by the Plaintiff to prosecute the suit, an indication that the Plaintiff has lost interest in the same. The Defendant contended that since litigation must come to an end, the matter cannot be kept in abeyance indefinitely. To the deponent, there can be no justifiable reason for the delay and the continued pendency of the suit is not only prejudicial to the Defendant but will continue to cause undue difficulty on their art and lead to more expenditure in terms of legal fees and time on a matter that has stalled without reason.

6. The application was opposed by the Plaintiff vide a replying affidavit sworn by **P. S. Saravana Kumar**, its director on 6th January, 2021. According to the deponent, after the orders of 24th September, 2019, the Plaintiff released the drilling rig to the Defendants who proposed to pay the outstanding amount. According to legal advice, there were no available dates before the end of 2019 and upon the resumption of the Court from the December, 2019 holiday, COVID 19 pandemic struck and the operations of the courts were scaled down hence a hearing date could not be fixed. The deponent however averred that the Plaintiff was ready and eager to fix the matter for hearing at the earliest reasonable hearing date as flights into the country had resumed.

7. In the deponent's view, the move to dismiss the suit was informed by ulterior motives with a view to divert the payment due to them to another person.

Determination

8. I have considered all the matters raised in this application and this is the view I form of the matter.

9. The decision whether or not to dismiss a suit is purely discretionary. However, like any other exercise of discretion, the same must be based on reason and should neither be based on sympathy nor exercised capriciously. Each case must ultimately be decided on its own facts and it must always be kept in mind the court should strive to sustain the suit where possible rather than prematurely terminate the same. In the case of **Sheikh vs. Gupta and Others [1969] EA 140 Trevelyan, J** stated as follows:

> **"The purpose of rule 6 of Order 16 is to provide the court with administrative machinery whereby to disencumber itself of case records in which parties appear to have lost interest…In this matter the claim is now eight years, less four months, old and the plaintiff, so far as the court is concerned, has done nothing for more than three years to say the least. There is a prima facie negligence on the part of the lawyers or inexcusable delay on the part of the plaintiff or both, on his own say so. In deciding whether or not to dismiss a suit under rule 6 a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship, and that there has been no flagrant and culpable inactivity on the part of the plaintiff…In the instant case there has been both culpable and flagrant inactivity on the part of the plaintiff in respect of his smallish claim and he cannot bring himself within the set of circumstances as stated...It is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition."**

10. In the case of **Et Monks & Company Ltd vs. Evans [1985] KLR 584, Kneller, J** (as he then was) stated as follows:

> **"The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable? Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances…If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates. Should the trial proceed despite a prolonged delay the plaintiffs may not succeed because it cannot after such a long time establish liability and then it has no remedy against anyone else. If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself…The court may consider the matter of limitation and whether or not the plaintiff might probably succeed in the action for negligence against its lawyers and might prefer to be slow in deciding to dismiss for want of prosecution, but looking at the matter as a whole may order the application be dismissed and award the defendants the costs of the suit and of the application…It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position. A plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy…If the court is satisfied that there will be prejudice to the defendant as a result of a delay of ten years if the case proceeds and it would be impossible to have a fair trial the suit dismissed for want of prosecution since the principle witness for the defence was dead and 3 others had left Kenya and their whereabouts were unknown".**

11. The defendant claims that the continued pendency of the suit is not only prejudicial to it but also that it will continue to cause undue difficulty on their part and lead to more expenditure in terms of legal fees and time. As indicated above, the supporting affidavit was sworn by the advocate rather than the client. It has not been alleged that the witnesses are dead, or that the documents are lost or that the memory has faded. Clearly the supporting affidavit does not mention the impracticability of holding a fair trial as the prejudice to be suffered. It has been said time and again that counsel should not swear affidavit on disputed matters or matters that are likely to be disputed when the client is available and can depose to the said facts. The rationale for the said principle is not far-fetched. It is meant to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate exposes himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided by counsel at all costs. In my view, however innocent an averment may be, counsel should desist from the temptation to be the mouthpiece through which such an averment is transmitted. In this case, in my view, it would have been more prudent the defendant's authorised officer to have been the one to swear the affidavit in support of the application. Prejudice is a factual matter and not a matter of law although courts do take judicial notice of the fact that nobody enjoys the fact of litigation is hanging over their heads like a sword of Damocles and that a prolonged delay in prosecuting cases invariably causes unnecessary anxiety on the part of the persons who are to defend the suits hence the need to expeditiously get on with the same.

12. The advent of the ***Civil Procedure Rules, 2010*** introduced some amendments to Order 17 thereof under which the current Rule 2 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) 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.***

13. As opposed to the former Order XVI Rule 6 of the ***Civil Procedure Rules*** in which it was expressly stated that the step to be considered was a step with a view to proceeding with the suit, under the present state of the law, any step seems to suffice. As already indicated above

the last step in this matter was taken when the ruling in the application dated 24th was delivered. Having said that, I am however of the view, considering the Plaintiff's explanation for not fixing the matter for hearing which inter alia, include the fact that there was a promise by the Defendant to settle the matter, it would be unjust to drive the Plaintiff from the seat of justice by dismissing the suit.

14. In the circumstances of this case I adopt the wise words of **Chesoni, J** (as he then was) in the case of **Ivita vs. Kyumbu [1984] 441**, that the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay and that even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time since it is a matter in the discretion of the Court.

15. Accordingly, I decline to dismiss the suit at this stage but direct the plaintiff to, within the next 30 days, take steps towards the prosecution of this case in default of which this suit shall stand dismissed with costs to the defendant.

16. The costs of this application are awarded to the Defendant in any event.

17. It is so ordered.

Ruling read, signed and delivered at Machakos this 15th day of April, 2021.

G.V. ODUNGA

JUDGE

In the presence of:

Mr Kimani for the Plaintiff/Respondent

Mr Mutua for the Defendant/Applicant

CA Geoffrey