



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 47 OF 2018

DEVSHIBHAI & SONS LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

ALLIED PLUMBERS LIMITED.....DEFENDANT/APPLICANT

RULING

1. Before this court for determination is the Notice of Motion dated 28th May, 2019 brought by the defendant/applicant seeking for the dismissal of the plaintiff's/respondent's suit against it for want of prosecution.

2. The Motion is supported by the grounds presented in its body.

3. The plaintiff/respondent filed a notice of preliminary objection and put in a replying affidavit sworn by *Rahab Kagiri* to oppose the application. The notice of preliminary objection raises the following grounds:

a) THAT the application offends the mandatory provisions of law.

b) THAT the application is bad in law and fatally defective.

4. When the Motion was placed before this court for hearing, it was agreed by consent of the parties that the said Motion would be canvassed through written submissions.

5. The applicant argued that the notice of preliminary objection brought forth by the respondent does not specify the provisions which the application offends, thereby making it ambiguous and unmerited.

6. The applicant went on to state that since filing the suit on 8th March, 2018 the respondent has not prosecuted it for over one (1) year.

7. In that regard, it was the applicant's contention that there has been an inordinate and inexcusable delay in presenting the suit, thus making it ripe for dismissal. The applicant referred this court to *inter alia*, the case of **Governors Balloon Safaris Limited v Skyship Company Limited & another [2013] eKLR** where the High Court rendered that the duty falls on a plaintiff to ensure the prosecution of his or her case.

8. The applicant was of the view that it has satisfied the requisite conditions to warrant the dismissal of the respondent's suit.

9. It was also the applicant's position that its application is properly before this court since it laid out the grounds supporting it and in the absence of any affidavit evidence, did not require the filing of a supporting affidavit, as provided for under **Order 51, Rule 4** of the **Civil Procedure Rules** as follows:

“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

10. The respondent through its submissions argued that the applicant had not discharged the burden of proof to satisfy this court that the suit is worthy of dismissal.

11. The respondent was of the view that the applicant had not shown the prejudice it stands to suffer should the order for dismissal of the suit be denied. The respondent drew from the case of **Martha Mwikali Nyamai & another v Barclays Bank of Kenya Ltd & another [2017]**

eKLR where the High Court restated the legal position that a defendant must explicitly demonstrate that he or she has been and will continue to be prejudiced by the delay in the suit.

12. On the contrary, it was the respondent's contention that there has been no inordinate delay in its prosecution of the suit and even if the case was different, then it would be in the interest of justice for the respondent not to be driven from the seat of justice but to be granted an opportunity to prosecute its case on merit, as was acknowledged in **Essanji & another v Solanki [1968] EA 218** among various other authorities quoted by the respondent.

13. I have considered the grounds set out in the body of the Motion, the notice of preliminary objection, the replying affidavit, and the rival submissions and numerous authorities.

14. To begin with, I have looked at the grounds laid out in the notice of preliminary objection and I noted that the same were vague to say the least. The notice of preliminary objection did not set out the provisions claimed to have been offended, neither did it specifically and clearly bring out the manner in which the application was fatally defective.

15. It is noteworthy that a preliminary objection ought to raise clear points of law which need not require the examination of facts. In the present instance, I am not satisfied that the respondent's notice of preliminary objection complies with the above and I do not hesitate to dismiss it with no order on costs.

16. The law on dismissal of suits for want of prosecution is portrayed under **Order 17, Rule 2 (1) and (3)** of the **Civil Procedure Rules**. **Rule 2(1)** concerns itself with the dismissal of suits upon issuance of a notice to show cause by the court whereas **Rule 2(3)** provides for the dismissal of suits upon the application of a party under **sub-rule 1** hereinabove.

17. The guiding principles in an application of such nature have been addressed in a number of authorities, some of which the parties have cited. I choose to draw reference from **Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others [2014] eKLR** which articulated the principles as hereunder:

i) Whether there has been inordinate delay in the prosecution of the suit by the plaintiff;

ii) Whether the delay is intentional and thus inexcusable;

iii) Whether the plaintiff has offered a reasonable explanation for the delay;

iv) Whether the delay is an abuse of the court process;

v) Whether the delay prejudices the defendant(s);

vi) The prejudice that will be visited upon the plaintiff; and

vii) Whether justice can still be done notwithstanding the delay.

18. On the first principle, it is apparent from the record that the suit was instituted on 8th March, 2018 and that the applicant put in its statement of defence on 17th May, 2018.

19. It therefore follows that one (1) year lapsed between the date of filing the statement of defence and filing the Motion on 4th of June, 2019. There is no record of the parties having appeared before the court for any directions whatsoever before the Motion was brought.

20. To my mind, while there has admittedly been a delay in the suit, I do not find the same to be inordinate.

21. In respect to the second, third and fourth principles, *Rahab Kagiri* in her replying affidavit stated that the applicant was solely to blame for the delay in failing to dispense with its notice of preliminary objection to the suit and for further failing to comply with the provisions of **Order 11(5)** of the **Civil Procedure Rules** to do with filing and exchanging of the documents to be relied on at the trial.

22. On its part, the applicant took the position that the burden fell on the respondent to move the suit.

23. From my perusal of the record, I have established that the applicant did in fact put in a notice of preliminary objection to the suit; there is no indication that the same was ever heard and/or determined.

24. It is also apparent from the record that whereas the respondent has filed its pleadings, the applicant is yet to file the documents to its defence and reasonably so, since the suit it would appear has never been placed before a judge for pre-trial directions.

25. I am of the view that while it is apparent that the applicant has somewhat contributed to the delay by failing to have its preliminary objection heard and determined before all else, the respondent is ultimately held responsible for ensuring the progress of its suit. There is nothing to show any such attempts were made by the respondent to move the court appropriately. I am not entirely satisfied by the explanation given by the respondent though I might add that there is no indication of there being an abuse of the court process by the said respondent.

26. In regard to the subject of prejudice, I observed that the applicant did not expound on the manner in which it stands to be prejudiced.

27. The courts have previously reasoned that an applicant in an application of such nature is expected to demonstrate in specific terms the prejudice he, she or it stands to suffer. Take for instance the court's following analysis in **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR**:

“...the Defendant must show he suffered some additional prejudice which is substantial and results to 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant. It must also be shown that the delay has worsened the Defendant's position in the suit. It will not, therefore, be sufficient to just make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out herein above.”

28. In the absence of any clear indication of prejudice, I find on the one hand that the applicant has not satisfied the threshold for the above principle.

29. On the other hand, I noted that whereas the subject on prejudice was not discussed in the replying affidavit, the respondent submitted on it by arguing that the amount being sought in the suit is colossal.

30. Upon my perusal of the plaint, I have established that the respondent is seeking to recover special damages in the sum of 29,776,576/ which truly is a colossal amount. Should the suit be dismissed, I am convinced that the respondent has shown that it will be greatly prejudiced since it will lose its day in court.

31. I am equally convinced from the circumstances of the case that justice can still be done notwithstanding the delay going by its recent age.

32. In any event, courts of law are also courts of justice and it is my duty as a matter of principle to do substantive justice to the parties rather than to lock them out.

33. In the end, the Motion is hereby dismissed with costs abiding the outcome of the suit.

Dated, signed and delivered at Nairobi this 21st day of January, 2020.

.....

J. SERGON

JUDGE

In the presence of:

.....for the Plaintiff/Respondent

.....for the Defendant/Applicant