



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 349 OF 2009

BETWEEN

KENYA COMMERCIAL BANK LIMITED PLAINTIFF

AND

ANNE KAJUJU CHARLES alias

ANN KAJUJU MAGONDU alias & 24 OTHERS DEFENDANTS

RULING

1. The plaintiff filed this suit in 2009 seeking several orders against the defendant in respect of a fraud allegedly perpetrated by the 1st defendant in collusion with the other defendants which caused it to lose about Kshs. 70,000,000.00.
2. By an application dated 3rd August 2018, the 1st, 2nd, 24th and 25th & 26th defendants have applied to dismiss the matter for want of prosecution under **Order 17 Rule 2** of the **Civil Procedure Rules** on the ground that the plaintiff has not taken any active steps to prosecute the suit for the last 3 years and that the failure to prosecute the suit will substantially prejudice the right to a fair hearing. The application is supported by the deposition of Charles Magondu sworn on 3rd August 2018.
3. Counsel for the plaintiff, Ms. Amino Akong'a, filed a replying affidavit sworn on 4th February 2020 in which she opposed the application on behalf of the plaintiff. She admitted that the suit came up for Notice to Show Cause why it should not be dismissed on 13th March 2017 before Ngetich J., who directed the matter to mediation. That steps were taken to start the mediation process but it did not take off since it was last in court on 29th March 2017 as a mediator was never appointed. Thereafter no action took place until the present application was filed. Counsel for the plaintiff pleaded with the court to preserve the proceedings and hear the suit and in that regard, the plaintiff is ready to comply with any directions or orders that the court may give.
4. Whether or not the court will dismiss a suit is a matter for the court's discretion bearing in mind the right of the parties to be heard expeditiously as is provided in **Article 159** of the Constitution. The principles to this kind of application have been articulated in several cases among them **Utalii Transport Limited and Others v NIC Bank Limited and Another ML HCCC No. 32 of 2010 [2014] eKLR** where Gikonyo J, summarized them as follows:

I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:

- 1) *Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
- 2) *Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- 3) *Whether the delay is an abuse of the court process;*
- 4) *Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
- 5) *What prejudice will the dismissal occasion to the plaintiff?*
- 6) *Whether the plaintiff has offered a reasonable explanation for the delay;*

7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?

5. I will now consider the circumstances of this case against the principles that have been outlined. I think it is important to note that court had, on its own motion, proposed to dismiss the suit for want of prosecution on 13th March 2017, 8 years after the suit was filed. The court's excused the delay and allowed parties to proceed with mediation. This alone ought to have put the plaintiff on its alert to ensure that it proceeded to prosecute the suit with alacrity.

6. Although the plaintiff blames the court for failing to take steps to proceed with mediation after the mention on 29th March 2017, it did not take steps thereafter to either enquire about the mediation or even to take steps to prosecute the suit. It is recognized that in this day and age parties have the obligation to prosecute the suit actively. Long gone are the days when advocates and their clients would just sit and wait for the court to take steps. They must now actively prosecute their suits. This obligation has a statutory underpinning in **sections 1A and 1B** of the **Court Procedure Act (Chapter 21 of the Laws of Kenya)** and several decisions of our courts (see Kimaru J., in **Savings and Loan Limited v Susan Wanjiru Muritu ML HCCC No. 397 of 2002(UR)**).

7. I find that the plaintiff has not given any explanation why it has not taken any steps to prosecute the matter since it was adjourned by the Deputy Registrar on 29th March 2017. In this respect the burden is heavier on the plaintiff to prosecute its claim with dispatch since it involves a huge amount of money and as earlier stated, the court had intimated that its desire to dismiss the suit for want of prosecution.

8. I have also considered the prejudice to be suffered by the multiple defendants. This is a case of fraud, the element of parties' intention is relevant and as time passes, memories fade, documents get lost, witnesses disappear and no doubt 11 years in the circumstances is a long time and would no doubt prejudice a fair trial.

9. Taking the aforesaid factors in to consideration, I am not prepared to grant indulgence to the plaintiff. This suit must and is hereby dismissed for want of prosecution with costs to each defendant.

DATED and DELIVERED at NAIROBI this 7TH day of FEBRUARY, 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango

Ms Akong'a instructed by MM & N Advocates for the plaintiff.

Mr Simiyu instructed by Muma and Kanjama Advocates for the 1st, 2nd, 24th, 25th and 26th defendants/applicant.