



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 37 OF 2013

AUTO XPRESS LTD.....PLAINTIFF/APPLICANT

VERSUS

SECUREX AGENCIES (K) LTD.....DEFENDANT/RESPONDENT

RULING

1. This suit was filed by the Plaintiff on 17/04/2013 praying for Judgment to be entered against the Defendant for the sum of Kshs.7,708,948.31 with costs from 5th December, 2010. The Plaintiff also sought for costs and interest of the suit.

2. On 29.4.2015, the court was satisfied that both parties had complied with the provisions of Order 11 of the Civil Procedure Rules and the matter was certified ready for trial. A hearing date was fixed for 2.12.2015 but when parties appeared before the court, they informed the court that there were ongoing negotiations and had agreed to take out the matter. The matter was then stood over generally as requested by the parties.

3. The matter was never fixed for hearing until on 14/12/2018 when it was dismissed for want of prosecution.

4. In the Application dated 27.5.2019, which is the subject of this ruling, the Plaintiff/Applicant is seeking to reinstate the Plaintiff/Applicant's case that was dismissed on 14/12/2018 for want of prosecution. The application also seeks for costs of the application.

5. The Application is premised on the grounds that;

(a) the Plaintiff/Applicant's advocate received the Notice to show cause why the suit should not be dismissed via post several months after the date that the matter came up for dismissal;

(b) the Parties had previously indicated to the court that they were pursuing out negotiations which yielded no fruits; and

(c) the Plaintiff has a meritorious case and should be given an opportunity to prosecute the suit. The application is further supported by the affidavit of Mr. Mutuma Kibanga, the Plaintiff/Applicant's advocate sworn 27/5/2019 which in essence reiterates the grounds set on the face of the application.

6. The Application was opposed by the Defendant vide the grounds of opposition dated on 20/6/2019 and filed on 21/6/2019,as follows:

(a)To wit, the Defendant opposed the matter was listed for hearing on 4/5/2016 but was not heard.

(b)That the Plaintiff's advocate has never fixed the matter for hearing and has not taken any steps to prosecute the matter for a period of over 3 years.

(c)The Defendant avers that it would be prejudicial to the defendant for this case to be revived since 9 years after the alleged cause of action all its witnesses would not be available to give evidence.

7. This court gave out directions that the application be disposed by way of written submissions. Both parties obliged, the Plaintiff/Applicant filed its submissions 29/7/2019 whilst the Defendant/Respondent filed its submission on 15/8/2019.

Plaintiff/Applicant's submissions

8. The Plaintiff/Applicant submitted that the notice to show cause was received long after the suit had been dismissed and therefore the mistake should not be placed on the Plaintiff. It is also submitted by the applicant that the application was made without any undue delay. It is further submitted that the court's duty is to do justice and this justice would be seen only if the Plaintiff's case was reinstated and the plaintiff allowed to prove its case against the defendant. This, according to the Plaintiff/applicant would be in line with the courts overriding objectives as well as Article 50 of the Constitution. The Applicant/Plaintiff then seeks to have the court exercise its discretion in its favour and accordingly set aside the order made on 14/12/2018. On this line of argument, the Plaintiff/Applicant called to his aid a plethora of judicial precedents which include *James Mwangi Gathara & Another –v- Officer Commanding Station Loitoktok & 2 Others [2018] eKLR, Gold Lida Limited –v-NIC Bank Limited & 2 others[2018] eKLR, Wachira Karani –v- Bildad Wwachira [2016]*

The Defendant/Respondent's Submissions

9. The Defendant/Respondent submitted that the suit was filed more than 6 years ago and the Plaintiff has been indolent for not listing the same for hearing. It is also submitted by the Respondent that equity does not aid the indolent and according to the Defendant/Respondent, the Plaintiff went to slumber and has only been awoken by the dismissal order. It is further submitted that the delay in prosecuting the matter is a clear indication that the Plaintiff had lost interest in the suit herein.

10. It is the Defendant/Respondent's case that in exercise of its discretion, this court should consider the prejudice the Defendant will suffer if this suit is reinstated. The Defendant avers that it would no longer have any witnesses and would not be able to adequately defend the suit since the alleged cause of action arose on the 5th of December, 2010 a period of almost 9 years. The Defendant holds the position that delay as exhibited by the Plaintiff defeats justice. On this line of argument the Defendant relies on the case of *Ivita –vs- Kyumba (1984) KLR 441* and *Rajesh Rughani –v- Fifty Investments Limited & another [2016]eKLR*.

11. It is further submitted that the case was dismissed because of unexplained delay and failure to prosecute the case cannot be described as something resulting from accident, inadvertence or excusable mistake on the Plaintiff's part. That the Plaintiff has not given an iota of evidence and or any plausible reason for the delay and the excuse advanced by it that parties were negotiating is lame and untrue since there was no communication of the outcome to that effect.

12. This court is also invited to consider the holding in the case of *Fran Investments Limited –vs- G4S Security Services Limited [2015] eKLR*, where the court was of the view that the dismissal by the court does not require service. Therefore in the instant case, it would be unfair for the Plaintiff to feign lack of service of the notice to show cause after a period of more than 6 years. The Defendant seeks the court to dismiss the application for lack of merit.

Analysis and Determination

13. I have considered the application and the supporting affidavit on record and the replying affidavit and submissions of all counsels on record and do find the following issues ripe for determination:

- a) Was there proper notice?
- b) Whether the delay is excusable?
- c) Will setting aside be prejudicial to the defendants?

Was there proper notice?

14. On the issue of notice, Order 17 Rule 2 (1) of the Civil Procedure Rules grants the court power to dismiss a suit in which no step has been taken for one year. The Order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit. The Plaintiff/Applicants case is that the notice was served to its advocates by registered post and by the time the same was received, the suit had long been dismissed.

15. I agree with Hon Justice Gikonyo in the case of *Fran Investments Limited v G4S Security Services Limited [2015] eKLR* in holding that;

“This order (Order 17 Rule 2 (1)) 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 and the overriding objective which 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 that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under Article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff. This is the test I shall apply here.”

16. Order 17 Rule 2 (1) of the Civil Procedure Rules, does not require service of notice; it uses the word “give notice”. The court may give notice of dismissal through its official website or through the cause-list. I do find that the notice of dismissal of the suit was given through the judiciary's website and a cause-list prepared which to the court, was adequate notice to the parties. My answer to the ongoing question is therefore in the positive.

Was the delay inordinate and is there a justification for the delay?

17. I note that this case was initiated by way of plaint dated 22/11/2012 and filed in court on 17/4/2013. As earlier indicated the matter has never been listed for hearing since then. Which is a period of close 7 years. I do find the delay of close to 7 years inordinate. Mr. Mutuma Kibanga, the Applicant's advocate states in his supporting affidavit that the parties had earlier informed the court that they were pursuing out of court negotiations which have not been successful. I have checked the court record and noticed that on 2/12/2015, is when parties sought to pursue negotiations. The record also shows that on 28/1/2016, the Plaintiff in the absence of the Defendant fixed a hearing date of 4.5.16. However, the record does not reflect on what transpired on 4.5.2016 when the suit was to be heard.

18. The Plaintiff only states that there were ongoing negotiations but there is no single proof tendered to affirm the same. It is trite law in evidence that he who asserts must prove his case. In such cases, the burden of proof lies with whoever would want the court to find in his favour in support of what he claims. No evidence for the negotiations was adduced by the Plaintiff/Applicant. **Section 107 of evidence Act** succinctly states:

“Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

And **Section 108 of Evidence Act**, further states thus:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

19. This court therefore finds that even if the parties were negotiating, it was not for the entire period from 2/12/2015. This court presumes that when the Plaintiff fixed the matter for hearing on 28/1/2016, such negotiations had stalled. This court finds that there is no reasonable and or plausible excuse for the inordinate delay which has been provided by the Plaintiff /Applicant.

Will setting aside be prejudicial to the defendants?

20. On whether setting aside the dismissal will prejudice the fair hearing of the case, I have found that the delay of close to 7 years has not been satisfactorily explained and do further find such delay is a source of prejudice to the Respondent as it affects the fair administration of justice. Article 47 of the constitution of Kenya 2010 provides for the right to administrative action that is expeditious, lawful, reasonable and procedurally fair. Article 159 of the said Constitution provides that justice shall not be delayed. Failure to set down the suit for hearing for close to 7 years was a clear infringement of the provision of Article 159 of the Constitution of Kenya, 2010 as the failure delayed justice in this matter.

21. In conclusion, I do not find merit in the application dated 27.5.2019 and the same is dismissed. This suit stands dismissed. I will, however, not condemn the Applicant to costs as it has already lost its right to be heard on merit.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 13th day of May, 2020.

D.O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes