



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**HCCC NO. 144 OF 2015**

**NYORO CONSTRUCTION COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**PRASHANTH PROJECTS LIMITED.....1<sup>ST</sup> DEFENDANT**

**KENYA PIPELINE COMPANY LIMITED..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. On its own motion, the Court invited parties to show why this suit should not be dismissed for want of prosecution.
2. Prior to the invitation dated 6<sup>th</sup> August 2019, the last action taken in this matter was on 15<sup>th</sup> June 2017 when this Court delivered a Ruling. Between that time and the date of the Notice to Show Cause is in excess of 1 year and the suit would be a candidate for dismissal under the provisions of Order 17 Rule 2 of The Civil Procedure Rules, 2010 which reads:-

**“2. (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 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”.**
3. Only the Plaintiff resists the dismissal. What explanation does it proffer? In an affidavit of Josiah Njoroge Njuguna sworn on 29<sup>th</sup> August 2019, he states that on 4<sup>th</sup> December 2015 the Court made a decision in which it dismissed the Plaintiff’s application for injunction. Aggrieved by that decision it, the Plaintiff filed a Civil Application No. 106/2016 in the Court of Appeal.
4. The Plaintiff states that the application was last in the Court of Appeal on 15<sup>th</sup> November 2017 when it did not proceed. That the said Court is yet to allocate dates for the said application. Njuguna then disposes:-

**“That the issues at the High Court are closely interwoven with the issues in the Court of Appeal hence the delay in dealing with the matters in the High Court”.**
5. The Plaintiff assures Court that it is keen to proceed with the hearing of its case.
6. It has however turned out that what the Plaintiff says in respect of the status of the Court of Appeal matter is not accurate. In response to the Notice to Show Cause, the 2<sup>nd</sup> Defendant filed a replying affidavit through Constantine Ogari who is an advocate in the firm of Ogetto

Otachi & Co. Advocates which has the conduct of this suit on its behalf.

7. She depones that when the application came up for hearing before the Court of Appeal on 15<sup>th</sup> November 2017, counsel for the Applicant was allowed an adjournment because he was indisposed. Subsequently, the Court of Appeal issued a Notice for hearing on 17<sup>th</sup> January 2018. On that day the Plaintiff's counsel was not present and the application was dismissed with costs. A copy of the dismissal order by the Court of Appeal is attached to the affidavit. It shows that the Court of Appeal consisting of a coram of Nambuye, Warsame and Gatembu JJA dismissed the matter as there was no attendance for the firm of Walubengo Waningilo & Co. Advocates who were on record for the Applicant. Yet for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Mogire Hezron and Morara Omule attended.

8. The Plaintiff did not react to the information put forth by the 2<sup>nd</sup> Defendant regarding what transpired at the Court of Appeal and the current status of its application before the Court of Appeal. The Court takes the position made out by the 2<sup>nd</sup> Defendant to be true. The Court is unable to tell whether the Plaintiff deliberately misled the Court or was unaware of what had transpired on 17<sup>th</sup> January 2018 seeing that its advocates were not in Court.

9. By agreement of the parties, this matter was argued through written submissions. The Court has considered those arguments alongside the affidavits presented to Court.

10. The delay under consideration is the period between 15<sup>th</sup> June 2017 and 6<sup>th</sup> August 2019. A period of over 24 months. This, for certain, is inordinate delay when it is taken into account that the suit was filed in March 2015. The Court does not accept that the matter before the Court of Appeal could hold back the prosecution of this matter as there were no orders staying these proceedings. Whilst the Plaintiff maintains that the Court of Appeal matter was interwoven with this matter, it has not demonstrated how the pendency of the Appeal affected the progress of this suit. At any rate the Court of Appeal application was dismissed on 17<sup>th</sup> January 2018, yet the Plaintiff remained inactive until August 2019 (more than one year later) when the Notice to Show Cause was taken out.

11. This Court holds that the delay is both inordinate and not sufficiently explained. Yet the Court will always lean towards a meritorious disposal of a matter unless it can be shown that the delay has compromised the possibility of a fair trial or has caused a grave injustice to the Defendant/s. For example, if the delay has led to memory loss of some witnesses, unavailability of documents or potential witnesses. It may also be possible that delay leads to the Defendant suffering a bigger penalty on interest than if the suit had been promptly prosecuted.

12. Now, the Defendants here have not told Court that the delay has handicapped them from defending this matter robustly or has in any other way prejudiced them.

13. This Court will give the Plaintiff an opportunity to prosecute its case. However, as the matter is old and because the Plaintiff was less than candid on its explanation for the delay, the suit survives on the following conditions:-

(a) The Plaintiff will meet the Defendants Costs of the Notice to Show Cause proceedings, in any event.

(b) The Plaintiff shall within 60 days hereof take steps towards the hearing failing which the suit shall stand dismissed without need of a further Court order.

**Dated, Signed and Delivered in Court at Eldoret this 13<sup>th</sup> Day of May 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

No appearance for Plaintiff

Opiyo holding brief for Mugeru for 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> Defendant