



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 17 OF 2016

WELLS FARGO LIMITED..... PETITIONER

VERSUS

COUNTY GOVERNMENT OF MOMBASA....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. What is before this Court is Notice of Motion dated 17/4/2019. It is brought under Section 1A, 1B and 3A of the Civil Procedure Act Order 17 Rule 5(2) (3) and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Application seeks the following orders:

(i) That this suit be dismissed for want of prosecution.

(ii) That the costs of this suit and this Application be awarded to the 1st Respondent.

2. The application is premised on the grounds on the face of the application and is anchored on the supporting affidavit deposed by **K.N. KIBARA**, an advocate of the High Court who has conduct of the matter on behalf of the 1st respondent.

3. The 1st Respondent's case is that the Petitioner instituted its Petition on 25/4/2016 and the 1st Respondent filed a Replying affidavit on the 9/6/2016. The Court directed that the Application dated 25/4/2016 be dispensed with via written submissions. All the parties complied with the Court's direction, but the Petitioner has failed to fix the said Application for highlighting of submissions and/or taking of a Ruling date, and that indeed the Petitioner has not taken any action for almost 3 years now.

4. In a Replying Affidavit sworn on the 20/9/2019 by **Henry Omino** an advocate of the High Court who has conduct of the matter on behalf of the Petitioner, the deponent states that he was under a mistaken belief that the matter had been pending Ruling on the aforementioned Notice of Motion all along and that his mistakes should not be visited on his client.

5. The deponent further states that the 1st Respondent has not demonstrated that it will suffer any prejudice if the Petition is allowed to proceed.

6. On its part, the Petitioner avers that it will suffer prejudice if the Petition is dismissed, since the Petition raises important constitutional issues. Further, the deponent states that parties have all filed submission to the Application and all the Court needs do is to issue a Ruling date to the Petitioner's Application.

7. I have considered the application and submissions of parties. The decision whether or not to dismiss a suit is purely discretionary. However, like any other discretion the same must be exercised judiciously. In **Argan Wekesa Okumu vs. Dima College Limited & 2 others [2015] eKLR** the court considered the principles for dismissal of a suit for want of prosecution and stated as follows: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of *Ivita –vs-Kyumbu (1984) KLR 441*. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

8. Similarly, in **Naftali Opondo Onyango vs National Bank of Kenya Ltd [2005] eKLR**, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows:-

“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that 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.”... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate.” (Emphasis added)

9. According to the Court record, on the 11/10/2016, the Court directed the Petitioner to take a date for the highlighting of submission. No action was ever undertaken by any party to the Petition. The parties herein were awoken from slumber via a Notice to Show Cause issued on the 19/2/2019, which was to be heard on the 20/3/2019 but the same did not take place, as the Court was not sitting. It is the finding of this Court that the 1st Respondent has not demonstrated that it would suffer any prejudice if the Petition were to be allowed to proceed to its logical conclusion.

10. Since parties have filed submissions to the Petitioner’s Application seeking interim conservatory orders, this suit cannot be dismissed. What needs to be done is to determine whether or not it would be prudent to proceed with the Petition and abandon the said Application in light of the fact that the Finance Act to be challenged is already overtaken by events.

11. The upshot of the foregoing is that the Notice of Motion dated 17/4/2019 is dismissed. Costs shall be in the cause.

Dated, Signed and Delivered at Mombasa this 5th day of May, 2020.

E.K. OGOLA

JUDGE

In the presence of:

Mr. Omino for Petitioner

No appearance for Applicant/Respondents

Mr. Kaunda Court Assistant