



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT 943 OF 1999**

**COMMUNICATION COMMISSION OF KENYA.....PLAINTIFF**

**VERSUS**

**BENJA INVESTMENTS LIMITED.....1ST DEFENDANT/APPLICANT**

**GEOFFREY CHEGE KIRUNDI T/A KIRUNDI & CO. ADVOCATES.....2ND DEFENDANT**

**RULING**

This is one of the oldest matters in this Division yet to be determined. The suit has a long and winding course which I will address briefly in the course of this ruling. Having remained for that long without determination, the defendants filed an application on 24<sup>th</sup> May, 2018 seeking the dismissal of the suit for want of prosecution. That application is dated 27<sup>th</sup> April, 2017 more than a year before it was filed. The application was brought under Sections 1A, 1B, 3A of the Civil Procedure Act and Order 17 Rule 2 (3) of the Civil Procedure Rules. It is based on the grounds set out therein alongside an affidavit sworn by the 2<sup>nd</sup> defendant.

The plaintiff filed a replying affidavit on 3<sup>rd</sup> July sworn by Mercy Wanjau, the then acting director legal services with the plaintiff. This was followed by a further affidavit sworn by the 2<sup>nd</sup> defendant and filed on 23<sup>rd</sup> July, 2018. Both parties have filed written submissions together with some authorities.

Order 17 Rule 2 (3) of the Civil Procedure Rules allows a party to a suit to apply for its dismissal where no application has been made or step taken by either party for one year. There is no doubt that there has been some delay in the prosecution of this case. For the defendants to succeed in this application, they must demonstrate that the delay was inordinate and inexcusable. If the delay is explained, then such an application may not succeed. The order sought is discretionary, which discretion shall be applied judiciously.

The proceedings on record show that several judges have handled this matter, some administratively and others dealing with substantial matters of law. The latter included Visram J (as he then was) Nambuye J (as she then was) Rawal J (as she then was), Waweru J and Onyancha J.

The fact that the matter was not completed by those judges was due to various reasons including transfers and promotions. There is also an indication that at some point the court file was misplaced in the registry and therefore the parties could not move the court.

I note from the defence filed that there was also a counter claim against the plaintiff the value of which was also substantial. In a counter claim, the defendant takes the position of a plaintiff while the plaintiff becomes the defendant. The interests of the parties herein cannot be taken lightly. This application is silent on the counter claim. The effect of dismissing any claim before the court has the effect of driving a party out of the seat of justice without a hearing. Courts are slow in making such orders and the practice has been to maintain a suit rather than dismissing it except in the clearest of cases. In the case of **Ari Credit and Finance Limited vs. Transnational Bank Limited** the court had the following to say,

**“The court should be slow to dismiss the case for want of prosecution where the suit can be heard without further delay and where the defendant will suffer no hardship and where there has been no fragrant and comfortable inactivity on the part of the plaintiff.”**

In the case of Mwangi **S. Kimenyi vs. Attorney General & Another (2014) e KLR** the court had the following to say,

**“1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay**

alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.

Applying the above tests and principles, and the requirement imposed upon the court by the provisions of Sections 1A and 1B of the Civil Procedure Act, I am of the view that the application by the defendants cannot be allowed without resultant injustice on the part of the plaintiff.

Although counsel for the plaintiff ought to have exerted more effort in the expeditious prosecution of the suit, it is clear that the plaintiff was also a victim of systemic challenges that exist in the justice chain. The plaintiff cannot be held responsible for non-availability of the court file, the transfer of Judges or promotion thereof, which in most cases are done without notice to the parties.

I believe the ends of justice will be met if this suit is retained and strict time lines imposed within which to prosecute the same. The application is therefore dismissed and the costs shall be in the cause. I shall give hearing dates forthwith for the parties to finalise this long standing dispute.

*Dated, signed and delivered at Nairobi this 8<sup>th</sup> Day of October, 2019.*

**A. MBOGHOLI MSAGHA**

**JUDGE**