

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 190 OF 2010

RONGAI WORKSHOP & TRANSPORT LTD.....PLAINTIFF/APPLICANT

VERSUS

WADADLI LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This suit was filed on 22nd March 2010. On 26th September 2018 it was listed before court for the plaintiff to show cause why it should not be dismissed for want of prosecution. On that day the court believing the plaintiff's advocate had been served proceeded to dismiss for want of prosecution. On 4th March 2019 this suit was reinstated on the court realizing the plaintiff had not been served with a notice to show cause. On that day the court ordered the plaintiff to show cause why the suit should not be dismissed. The plaintiff filed an affidavit in response.

2. Having perused the affidavit and the file herein I do find that there is basis for allowing the plaintiff to proceed with the trial of this case. The plaintiff through the affidavit of its learned advocate has shown that delay in proceeding with this case is due to myriad of circumstances such as the need to undertake case management and the fact the file was at sometime missing from the court registry. The totality of the affidavit evidence before me leads me to find that the delay hereof to prosecute this suit is not inordinate and I do not find that the defendant will not be prejudiced if the suit does proceed to trial. A case in point is **MWANGI S KIMENYI V ATTORNEY GENERAL & ANOTHER (2014) eKLR** thus:

*“The decision whether a suit should be re-instated for trial is a matter of justice and it depends on the facts of the case. See the case of **IVITA v KYUMBU [1984] KLR 441, Chesoni, J.** (as he then was) that:*

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

CONCLUSION

a. The plaintiff has shown cause why this suit should not be dismissed for want of prosecution.

b. This claim, since it falls under the pecuniary jurisdiction of the Chief Magistrate's Court I order that this file be hence forth transferred to the Chief Magistrates Court Milimani, Nairobi for trial.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of October, 2019.

M. KASANGO

JUDGE

Ruling read in open court in the presence of

Sophie Court Clerk.

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANT