



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 73 OF 2001

TRUST BANK LIMITED.....PLAINTIFF

-VERSUS-

AJAY SHAH.....1ST DEFENDANT

VINOD CHAUNDRY.....2ND DEFENDANT

ARUN JAIN.....3RD DEFENDANT

PRAVIN MALKAN.....4TH DEFENDANT

JAGNESH DESAL.....5TH DEFENDANT

NAYAN MURTHI SABESAN.....6TH DEFENDANT

RENKA SHAH.....7TH DEFENDANT

PRAFUL SHAH.....8TH DEFENDANT

NITIN CHANDARIA.....9TH DEFENDANT

RULING

1. 1st and 5th Defendants have filed a Notice of Motion application dated 13th August 2018. They seek the dismissal of this suit for want of prosecution. In the alternative they seek that this suit be struck out for the Plaintiff's failure to comply with the conditions previously imposed by the Court on 18th May 2015. I need to state that there is no Ruling, in this matter of 18th May 2015. Accordingly, that alternative prayer fails.

2. The application is supported by the affidavit to Daniel Ngaca Gacugia Advocate for the 1st and 5th Defendants. He deponed that this suit was filed in the year 2001. The Plaint was amended on 12th February 2009. The Plaintiff initially sued nine Defendants but subsequently discontinued the case against 2nd, 3rd, 4th, 6th and 7th Defendants. The case continued against 1st, 5th and 8th Defendants.

3. A previous application was filed seeking the dismissal of this case for want of prosecution. The application was however dismissed by the Ruling of Justice Ochieng of 18th March 2015.

4. 1st and 5th Defendant alleges that there has been delay on the part of the Plaintiff in prosecuting this case.

5. The application was supported by the 8th Defendant. By his affidavit in reply, Praful Shah, deponed that closed to 18 years he had lived with apprehension of this case. He was of the view that the delay in prosecuting this case was prejudicial to him.

6. The application was opposed by the Plaintiff through the affidavit of Micah Lekeuwan Nabori, the Plaintiff's liquidation agent. After giving a background of this matter he deponed that the Mr. Billing Advocate who was then acting for the 1st and 5th Defendants passed away on 18th May 2015. After his passing away the Law Society of Kenya delayed in appointing an Advocate to wind-up the firm. The deponent

further stated that the Plaintiff genuinely believed the 1st and 5th Defendants desired to continue being represented by the firm of Mr. Biling. This was because the 1st and 5th Defendant did not appoint another Advocate to act for them until July 2018. The Advocate who took over the representation of 1st and 5th Advocate immediately on coming on record filed the present application for dismissal. The deponent state the Plaintiff is desirous of prosecuting this case.

ANALYSIS AND DETERMINATION

7. Once an application is made for dismissal of a suit for want of prosecution the onus is on the Plaintiff to show cause why the suit should not be dismissed. It has been a long standing principle of law that once a party files a case against Defendant's such a party should proceed with the prosecution of the case within reasonable time.

8. In this case the Court was satisfied, through the ruling of Justice Ochieng of 18th March 2015, that up to that date the Plaintiff had shown cause why the suit should not be dismissed. The Plaintiff in opposing the present application gave the reason for not fixing the case for hearing after that ruling was because of the death of the Advocate representing the 1st and 5th Defendants. The death of that Advocate was not denied by the said Defendants.

9. The Court in considering an application for dismissal of a suit for want of prosecution has wide discretion. In my view the Plaintiff has presented reason enough for that discretion to be exercised in its favour. The Plaintiff cannot, in my view, be penalized for having held back fixing this case for hearing until the 1st and 5th Defendants got alternative legal representation. **It is for that reason the application by Notice of Motion dated 13th August 2018 fails. Having failed I do order each party to pay their own costs of the same.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR DEFENDANTS**