



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 511 OF 2012

BETH WANJIRU MWANGI.....1ST PLAINTIFF

IDEAL MATUNDA LIMITED.....2ND PLAINTIFF

IDEAL BUSINESS LINK LIMITED.....3RD PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT

ANTIQUA AUCTION LIMITED.....2ND DEFENDANT

TRADE LIGHT EXPRESS LIMITED.....3RD DEFENDANT

CHARLES MWANGI.....4TH DEFENDANT

JOHN ANTHONY RAVEL.....5TH DEFENDANT

RULING

1. This ruling is in respect to 2 identical but separate applications dated 6th February 2018 and 23rd April 2019. The earlier application was filed by the 1st and 2nd defendants while the later one was filed by the 3rd defendant. In both applications, the defendants/applicants seek the dismissal of the plaintiffs'/respondents' suit for want of prosecution. Considering that both applications seek the same orders, I will confine this ruling to the application dated 6th February 2018 and order/direct that the findings in the said application shall apply to the application dated 23rd April 2019.

2. The application dated 6th February 2018 is brought under Order 17 rule 2(1) and (3) of the Civil Procedure Rules(CPR) and is supported by the affidavit of **Felix Mutua**, advocate for the applicants, who avers that the case was last in court on 4th December 2014 when the court directed the parties to comply with the new practice directions so as to set down the matter for Case Management and that for a period of more than 3 years, no tangible steps, have been taken by the plaintiffs to list the suit for hearing.

3. The applicants' case is that the delay in complying with the practice directions is inordinate, inexcusable and prejudicial to the defendants considering that the suit was filed in 2012 and that most of the defendant's officers and possible witnesses, with knowledge over the subject matter, may have since left their employment.

4. The respondents/plaintiffs opposed the application through the 1st respondent's replying affidavit sworn on 18th April 2018 wherein she avers that the plaintiffs have always been ready and willing to prosecute this suit and have on countless occasions taken dates for hearing including the hearing date of 14th March 2018 when the matter was adjourned so as to enable the respondents file a replying affidavit to the instant application.

5. She further states that she has been unwell and had to seek treatment abroad as shown in annexure marked "**BWM1**" comprising copies of travel documents, medical records and reports from the year 2014 to 2018. She further avers that her ill-health greatly hampered her ability to effectively prosecute the case but reiterates that she is ready to continue with the case, if granted a chance to do so.

6. Parties filed their respective submissions to the application which I have carefully considered and I note that the main issue for consideration is whether the respondent's suit should be dismissed for want of prosecution.

7. Dismissal of suit for want of prosecution is founded on the provisions both the Constitution and the Civil Procedure Act and Rules. Article 159(2) of the Constitution provides that justice shall not be delayed while Section 3A and 63(e) of the Civil Procedure Act vests the court with unlimited power to make orders as may be necessary for the ends of justice to be met, to prevent abuse of the court's process and to make orders as appear to be just and expedient.

8. Furthermore, Section 1A and 1B of the Civil Procedure Act empower the court to ensure that overriding objectives of the Civil Procedure Act and Civil Procedure Rules are attained in the administration of justice in a just, fair and expedient manner. The court also takes judicial notice of the fact that the rise in the backlog of cases in our courts can largely be attributed to the failure by the litigants to prosecute their cases in time or at all thereby clogging the court system with many dormant files.

9. Order 17 Rule 2 of the Civil Procedure Rule allows the court, on its own motion or on notice to the parties, to dismiss suits for want of prosecution where no action has been taken in a suit for one year to either set down the suit for hearing or apply for its dismissal for want of prosecution. In effect therefore, the court can, on its own motion (*suo moto*) dismiss a suit for want of prosecution.

10. In the oft cited case of *Ivita v Kyumba* [1984] eKLR 441 it was held:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

11. In the case of *Naftali Onyango v National Bank of Kenya* [2005] eKLR the court outlined the conditions that a party seeking the dismissal of a suit must meet. While citing the decision of *Allan v Sir Alfred MC Alphine & Sons Ltd* [1968] 1 ALL ER 543, the court held as follows:

“The defendant must show:

i. That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.

ii. That this inordinate delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.

iii. That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between themselves and the plaintiff or between each other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule the longer the delay the greater the likelihood of the prejudice at trial.”

12. The common thread that runs through the above cited cases is that the power granted to courts to dismiss suits for want of prosecution is a discretionary one which discretion must be exercised judiciously and in the interest of justice regard being focused on whether the initiator of the case has lost interest in it, whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable and is likely to cause prejudice to the defendant.

13. In the present case, a perusal of the court record shows, as I have already stated in this ruling, that the suit was filed together with an interlocutory application on 10th August 2012.

14. The interlocutory application was determined on 9th May 2013 after which the matter moved to the pretrial directions stage and was thereafter listed for hearing on numerous occasions when the hearing did not take off with the last hearing date, before this application was filed, being on 4th December 2014 when the matter was adjourned to enable parties file witness statements.

15. From the above overview of the proceedings that were conducted in the matter since its inception, it is clear that no action was taken by the plaintiffs to have the matter prosecuted from the 4th December 2014 upto the time of filing this application in February 2018. One can therefore conclude that the 1 year period envisaged under Order 17 Rule 2 Civil Procedure Rules within which a suit should be set down for hearing lest it be dismissed for want of prosecution had already lapsed. The question which then arises is whether the delay in prosecuting this case is excusable and whether the defendants have been prejudiced by the delay.

16. The respondents' deponent attributed the delay in prosecuting the case to her long illness and treatment both locally and abroad. The 1st respondent attached copies of her treatment records as annexures to the replying affidavit which records indicate that she suffers from illness in the nature of brain tumour for which she has been undergoing treatment for the period between 2014 up until January 2018.

17. I am satisfied that the reasons advanced by the respondents for failure to prosecute the case are plausible and excusable. It is trite law that the mistakes by counsel should not be visited on the client. In the present case, I find that the advocate did not make any mistake as she cannot be faulted for falling sick. The respondents have also indicated their willingness to prosecute the case, if granted the opportunity.

18. For the above reasons, I am not satisfied that this is one of the cases where the court can exercise its discretion and dismiss the suit for

want of prosecution. Consequently, I decline to grant the orders sought in the twin applications dated 6th February 2019 and 23rd April 2019 which I hereby dismiss with orders that costs shall abide the outcome of the main case.

19. I further order the respondents/plaintiffs to comply with the pre-trial requirements to fix the main suit for Case Management within 30 days from the date hereof failure of which the suit shall be deemed as dismissed for want of prosecution.

20. Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 7th day of November 2019.

W. A. OKWANY

JUDGE

In the presence of

Mr. Mwenesi for Mutua for 1st and 2nd defendant/applicant

Mrs Gitau for Njenga for 3rd defendant

Miss Njoki Mwaura for plaintiff/respondent

Court Assistant – Sylvia