



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 146 OF 2016

SAMURA ENGINEERING LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated 15th February 2019 and filed on 19th February 2019 was brought pursuant to Order 17 Rule 2 (1) & (3) of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya and all other enabling provisions of the law. It sought the following prayers:-

- 1. That the suit be dismissed for want of prosecution by the Plaintiff.**
- 2. That the cost of this application be borne by the Plaintiff in any case.**

2. Its Written Submissions were dated 2nd May 2019 and filed on 3rd May 2019 while those of the Plaintiff were dated and filed on 13th May 2019.

3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE DEFENDANT'S CASE

4. The Defendant's present application was supported by the Affidavit that was sworn by its Advocate, Keziah Nyambura, on 15th February 2019.

5. It contended that since the Plaintiff was issued with an injunctive order on 2nd March 2017, it (the Plaintiff) had made no effort to prosecute the suit and that it was only after it fixed a mention date that prompted it (the Plaintiff) to serve it with Summons to enter appearance to enable it (the Defendant) file a Statement of Defence.

6. It pointed out that the Plaintiff had not fixed the matter for Pre-Trial directions and that having been granted the interim orders, it was not keen to prosecute the case.

7. It therefore urged this court to allow its application as prayed because the pendency of the suit amounted to abuse of court process.

THE PLAINTIFF'S CASE

8. In response to the said application, on 24th April 2019, the Plaintiff's advocate, Phyllis Ngaruiya, swore a Replying Affidavit on the Plaintiff's behalf. It was filed on even date.

9. The Plaintiff pointed out that it had not delayed in fixing the matter for Pre-Trial directions as the parties had entered out of court negotiations to establish whether it was liable to pay the Defendant a sum of Ksh 768,261.98/= for services it did not consume.

10. It stated that the negotiations stalled after the Defendant's Managing Director at the time was suspended from the Board.

11. It therefore urged this court not to allow the said application but to allow it to fix the matter for Pre-Trial within thirty (30) days from the date of the Ruling herein.

LEGAL ANALYSIS

12. Both the Defendant and the Plaintiff were in agreement when a matter could be dismissed for want of prosecution.

13. In this regard, the Defendant relied on the cases of **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M.D. Papat & Others [2016] eKLR**, **Charterhouse Bank Ltd & Another vs Nation Media Group & Another [2019] eKLR**, **Moses Mwangi Kimari vs Shammi Kanjirapparambil Thomas & 2 Others [2014] eKLR** amongst several other cases to buttress its argument that the Plaintiff's should be dismissed for want of prosecution.

14. The general holding in those cases was that a suit will be dismissed for want of prosecution:-

(1) where the delay had been inordinate;

(2) whether the delay had been inexcusable; and

(3) whether the defendants were likely to suffer prejudices due to the delay.

15. On its part, the Plaintiff placed reliance of the case of **Ngwambu Ivita vs Aklon Mutua Kyumbu HCCC No 340 of 1971 (unreported)** (sic) where it was held that even if the delay had been prolonged, a court would not dismiss a matter if it was satisfied by the reason for the delay and if justice could still be done to the parties.

16. It also referred this court to the case of **Agip Kenya Ltd vs Highlands Tyres Ltd HCCC No 249 of 1997** where it was held that no Plaintiff should be driven from the seat of justice and that the duty of courts is to sustain, rather than to dismiss matters on procedural faults.

17. It was emphatic that the Defendant waited for ten (10) years before it disconnected its water on account of bills which did not belong to it. It submitted out that the Defendant had not demonstrated the prejudice it (the Defendant) would suffer if it (the Plaintiff) prosecuted the matter.

18. As was observed in the case of **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M.D.Papat & Others** (Supra), Order 17 Rule 2(3) of the Civil Procedure Rules gives the court discretion to dismiss a suit for want of prosecution to be in conformity with Article 159 (2)(b) of the Constitution of Kenya, 2010 as justice delayed is justice denied.

19. As was rightly pointed out by the Defendant, since Seron J granted the Plaintiff an order for mandatory injunction on 2nd March 2017, the Plaintiff had not taken any step to prosecute its case for almost two (2) years. As at 23rd January 2018, the Plaintiff had not even served the Defendant with Summons to enter appearance. The Plaintiff only acted after the Defendant took some action in the matter herein.

20. It did appear to this court that having been granted an order for mandatory injunction, the Plaintiff went to slumber. Indeed, the order for mandatory injunction gave the Plaintiff little incentive to prosecute the suit as it was enjoying water consumption while the Defendant was patiently waiting for the matter to be heard and determined.

21. It was clear to this court that there was inordinate delay in the Plaintiff prosecuting the suit herein and the reason it gave that the Defendant's Managing Director of the Board who was negotiating with it had left the Board was unsatisfactory. It was a lame excuse making the inordinate delay inexcusable.

22. This was an infringement of the Defendant's fundamental right to have justice dispensed with speed. Indeed, Article 159(2) (b) of the Constitution of Kenya provides that:-

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(b) justice shall not be delayed.”

23. Appreciably, a case belongs to a plaintiff. It is its responsibility to progress his matter to ensure that the same is concluded expeditiously as is contemplated in Section 1A, 1B and 3A of the Civil Procedure Rules and Article 159 (2) (b) of the Constitution of Kenya. A plaintiff cannot move at the pace of a defendant.

24. Having said so, the Plaintiff was also entitled to an equally important fundamental right of having its dispute heard and determined in accordance with Article 50 (1) of the Constitution of Kenya that provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

25. Notably, having considered the parties' Written Submissions and the case law they each relied upon, this court found and held that although there had been delay by the Plaintiff in prosecuting this case and that the delay had been inordinate and inexcusable, it had not prejudiced the Defendant herein. The Defendant did not demonstrate what prejudice it would suffer if the Plaintiff was to be given an opportunity to prosecute its case.

26. Notably, a court should only dismiss a matter where all the three (3) ingredients to wit, inordinate and inexcusable delay and prejudice to an opposing party exist. If one (1) ingredient is absent, a court should lean towards saving a suit for determination on merit.

27. Indeed, in the case of **Ivita vs Kyumbu [1984] KLR**, it was held that prolonged delay should not prevent the court from doing justice to parties and that it was best that a suit be set down for hearing at the earliest available time.

28. In the case of **Agip (K) Ltd vs Highlands Tyres Ltd [2001] KLR 360**, Visram J (as he then was) stated that:-

“Where a reason for delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay”.

29. As this court fully associated itself with the holdings of the aforesaid cases, after weighing the respective fundamental rights of the parties herein, this court was persuaded that the Plaintiff would suffer more prejudice if it was shut out from accessing the court as contemplated under Article 50(1) of the Constitution of Kenya than if the Defendant was delayed for a little while longer to have this matter heard and determined.

DISPOSITION

30. For the foregoing reasons, the upshot of this court's decision was that the Defendant's Notice of Motion application dated 15th February 2019 and filed on 19th February 2019 was not merited and the same is hereby dismissed. Costs of the application shall be in the cause.

31. To progress this matter, it is hereby directed that the same be mentioned before the Deputy Registrar High Court Milimani Law Courts Civil Division on 21st November 2019 with a view to giving directions in respect of the Pre-Trial Conference.

32. It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of November 2019

J. KAMAU

JUDGE