

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 458 OF 2010

PAUL KAMAU MBUGUA..... 1ST PLAINTIFF

SAMUEL WAHINYA WAWERU 2ND PLAINTIFF

- V E R S U S -

PAYLESS CARE HIRE & TOURS LIMITED1ST DEFENDANT

PIUS OJUNGA WERE2ND DEFENDANT

RULING

1. The defendants herein took out the motion dated 23rd July 2015, in which they sought for the plaintiffs' suit to be dismissed for want of prosecution. The motion is supported by the affidavit of Alake Lugonzo. When served, the plaintiffs filed the affidavit of Paul Kamau Mbugua to oppose the motion. The motion was disposed of by oral submissions.

2. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. I have also considered the rival oral submissions. It is the submission of the defendants that the plaintiffs have lost interest in pursuing this case since they have not taken any steps to fix the matter for hearing since the date of filing suit on 8/10/2010. The defendants further stated that the delay is so inordinate and inexcusable making it impossible for the defendants to raise witnesses.

3) In a lengthy affidavit, the plaintiffs beseeched this court not to dismiss the suit for want of prosecution. The plaintiffs blamed the firm of M/s Njoroge Wachira & Co. Advocates for failing to take steps to expedite the hearing of the suit. The plaintiffs said they were prompted to withdraw instructions from aforesaid firm of advocates when they realised their folly. The plaintiffs beseeched this court not to visit the mistakes of their advocates on them.

4) The main reason advanced by the plaintiffs in seeking the indulgence of this court to spare the suit from dismissal is that they were let down by their erstwhile advocates. This court appreciates the fact that at times parties are let down by advocates who do not take seriously their professional duties in representing their clients. In such cases the court will have to examine the conduct of the clients to discover whether or not there was collusion or connivance. Where there is no evidence of collusion between the clients and the advocates, then the court will not visit the mistakes of the advocate on the client. In the matter before this court, the plaintiffs were able to show this court that there was a long period of delay occasioned by the inaction of their advocates. They have subsequently withdrawn instructions from the offending firm of advocates. In the circumstances, I decline to dismiss the suit by dismissing the motion. The defendants are given thrown away costs of the motion assessed at kshs.10,000/=.

Dated, Signed and Delivered in open court this 10th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant