



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 449 OF 1998

ARUN JAIN.....1ST PLAINTIFF
A.B. DHILON.....2ND PLAINTIFF
J.N. PETERS.....3RD PLAINTIFF
M.C. SHARMA.....4TH PLAINTIFF
BALBIR SINGH.....5TH PLAINTIFF

VERSUS

MARTIN LAKITURU
JUSTIN MUUNGWANA SAI (THE ADMINISTRATORS OF THE ESTATE
OF MUUNGWANA SWAI (DECEASED)).....1ST DEFENDANT
TUSKER MATTRESSES LIMITED.....2ND DEFENDANT

RULING

1. This ruling relates to a Notice Motion Application dated 26th January 2016. It is brought under the provisions of Order 17, Rule 2 of the Civil Procedure Rules, Section 3A of Civil Procedure Act, and all other enabling provisions of the law. It is supported by the grounds on the face of it and the Affidavit sworn by M.A. Khan Advocate dated 26th January 2016.

2. The Applicant is seeking for orders that:

- *The Honourable Court be pleased to set aside the Order made on the 15th June 2015 dismissing the Plaintiff's suit.*
- *The suit be reinstated and be fixed for hearing and determination on merit.*
- *The Costs of the Application do abide the outcome of the main suit.*

3. The Applicant's case is that, on 15th June 2015, the Court on it's own motion dismissed this suit. Prior to the same, the Court Clerk from the law firm of Messrs M. A. Khan Advocate, visited the Court Registry on several occasions with a view of getting the file to put the lawyers Notice of Appointment of

the firm of M.A. Khan on record. However, on the several occasions the file was not traced. That, due to this none availability of the file, no step was taken in the matter. That, the order of dismissal only came to the Plaintiff's Advocate knowledge when the Court Clerk once again went to locate the file so that he could file the said Notice of Appointment of M.A Khan. The said firm of M. A. Khan Advocate was coming on record in place of Mr. M. G. Sharma Advocate, who had instructed Mr. M.A.G. Sharma to come on record, as Mr. M.A.G Sharma, Advocate has not been keeping good health and had to go to India for treatment. The Applicant argued that the dismissal of the suit is quite drastic. It is in the interest of justice that the Plaintiff's suit be reinstated; and the claim be heard on merit. That, the reinstatement of the suit will not prejudice the Defendants in any way.

4. The Application was opposed based on the grounds of opposition dated 8th February 2016, and filed in Court on 9th February 2016. The grounds states that:

- a. The Application is incompetent having been brought under the wrong provisions of the law.***
- b. No grounds have been advanced nor reasons given why the Plaintiffs/Applicants failed to prosecute the case prompting the Court to issue the Notice to Show Cause hence the dismissal.***
- c. The averment by the Plaintiffs/Applicants that their former advocate had been indisposed and undergoing treatment is not supported by the Affidavit of the said Advocate or even medical proof and thus constitutes inadmissible hearsay evidence.***
- d. This application is therefore, an abuse of the process of this honourable Court and should be dismissed with costs to the Defendants.***
- e. The Plaintiffs/Applicants are not vigilant litigants and in accordance with the Maxim of Equity aids the vigilant and not the indolent, the Plaintiffs/ Applicants should not be allowed to reap from their indolence.***
- f. The Application is also an afterthought since the Court rightfully exercised it's discretion in dismissing the suit for want of prosecution when the matter came up for hearing on the notice to show-cause why the case should be dismissed.***
- g. The Application for reinstatement has been filed over six months after the dismissal of the suit which is a greater illustration of the Plaintiff's indolence and lack of interest in their suit.***
- h. The suit was properly dismissed and it has not been shown that the Court's discretion was not exercised properly.***
- i. The Plaintiffs' Application is thus untenable and should be dismissed with costs to the Defendants.***

5. The Parties agreed to dispose of the Application through written submissions. The Court gave each Party 14 days within which to file and serve their respective submissions. The Respondent was to file and serve their submissions upon service of the Plaintiff's submissions. On 19th January 2017 when the matter was scheduled for highlighting of the submission, Mr. Mwangi holding brief for Mr. M. A. Khan informed the Court that, the Plaintiffs had not filed their submissions. Mr. Mwangi then sought to be allowed to dispense with the filing of submissions and rely on the Affidavit sworn in support of the Application. He was allowed to. In the meantime, the 2nd Defendant /Respondent had filed it's submissions. As a consequent whereof, the 2nd Defendant fully relied on the submissions filed without highlighting the same.

6. I have considered the Application, alongside the grounds thereto, the Affidavit in support, the grounds of opposition, and the submissions filed by the 2nd Defendant. I find the following issues require determination:

i. Whether the Application has been brought under the wrong provisions of the law.

ii. Whether, the Applicants have advanced satisfactory reasons as to why the suit was not prosecuted before it's dismissal.

iii. Whether, the Applicant has satisfied the Court that the orders sought herein should be granted.

iv. Who should bear the costs of this Application.

7. As regards the first issue, I find that the Application has been brought *inter alia* under the provisions of Order 17 Rule 2 of the Civil Procedure Rules. These provisions states that:

1. "In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.

4. The court may dismiss the suit for non-compliance with any direction given under this Order."

In that regard, the provisions cited herein relate to the dismissal of the suit due to non-prosecution thereof. Be that as it were based on the provisions of Article 159(d) of the Constitution of Kenya, non-compliance with the procedural provision of the Civil Procedure Rules in regard to matters that can be deemed to be technical will not lead to the striking out of a matter. I shall sustain the Application. Even then the Respondent who raised the objection has not indicated the correct provisions that should have been cited. I equally find that the Applicant has not even addressed the issue of whether they received the Notice to Show Cause issued before the suit was dismissed.

8. In relation to the 2nd and 3rd issue, I find that, the suit herein was instituted vide a Plaint filed in Court on 3rd September 1998. Thus, the suit has been in Court for a period of about 18 years. The Plaint was amended and re-amended on various dates, the last Re-Amended Plaint was filed in Court on 16th December 2011. On the other hand, the 2nd Defendant Amended Statement of Defence was filed in Court on 25th January 2013. The Court record reveals that the last time the matter was heard before dismissal was on 18th January 2003. From that date to 15th June 2015 when the Court dismissed the Application pursuant to the provisions of Order 17 Rule 2 of Civil Procedure Rules, no action has been taken to prosecute the matter for a period of over two (2) years. The Application to set aside the dismissal order was filed on 26th January 2016. That is a period of three years from the date of dismissal of the suit.

9. The reasons advanced for non-prosecution of the suit are that, the Court file was missing. However, I have not seen any evidence to the effect. There is no evidence that the issue of the missing file was ever brought to the knowledge of the Court. Traditionally, the Party who wishes to prosecute a matter, and/or file a document on the Court file and who finds the filing missing, will write to the Deputy Registrar seeking that the file be availed, and/or the Court give directions. If the delay in tracing the file persists, the Party then moves the Court to re-construct the file to enable the matter proceed. That was not done herein. I therefore concur with the 2nd Defendant's submissions and that, no satisfactory grounds have been advanced nor reasons given why the suit was not prosecuted.

10. In the same vein, the Applicant averred that, it's Advocate on record Mr. M. A.G. Sharma has been indisposed due to poor health. However, as rightfully observed by the 2nd Defendant/ Respondent the same (as much as the Court is not being insensitive) the said averment are not supported by any medical

evidence. In the given circumstances, I find that the reasons given by the Plaintiffs/Applicants for the delay in prosecuting this case are not adequate or satisfactory.

11. In the case of **Governors Ballon Safaris Ltd Vs Skyship Ltd & Another 2013 eKLR**, the Court held that:

“It is the duty of the Plaintiff’s advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died, documents may have been mislaid, lost, destroyed, and the memory tends to fade”.

12. Similarly, the principles guiding the dismissal of the suit are well established. In the case of **ivita Vs Kyumbu 1984 KLR**, it was held that there should have been no prolonged delay. If such a delay exist, it should not be inexcusable, and regard should be held on whether justice will be done if the suit is dismissed or whether the Defendant will be prejudiced if the case is reinstated.

13. As already stated herein, the delay before the dismissal of the suit was for a period of over 2 years. No reasonable and/or satisfactory and excusable explanation has been offered for the same. In that case, I find that the Plaintiffs have lost interest in this matter.

14. The 2nd Defendant complied with the time frame given by the Court for filing the written submissions. The Applicant did not. Neither did the Applicant as aforesaid annex a single document to the Affidavit in support of the Application to support the reasons for delay. Therefore the manner in which the Application has been prosecuted is clearly casual hence the Plaintiff seems to have lost interest in the matter.

15. All in all, I find and concur with the 2nd Respondent’s submissions that the Applicants are guilty of delay. That Equity assist the vigilant and not the indolent. In that case I find that, the Application has no merit and I dismiss it with costs to the 2nd Respondent.

Dated, delivered, and signed on this 9th day of June 2017 at Nairobi.

G. L. NZIOKA

JUDGE

In Open Court in the presence of:

..... for the Plaintiffs

.....for the Defendants

Teresia – Court clerk