



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 552 OF 2009

CHRISTOPHER N OMARE & MICHAEL OTACHI

t/a OMARE & PARTNERS.....PLAINTIFFS

VERSUS

SAFARICOM LIMITED.....DEFENDANT

RULING

1. On 28th February 2012 Kimondo J. ordered that the plaintiff's suit be dismissed.
2. The order was made after the plaintiff failed to attend court. On that date, the court records show that the defendant also did not attend court. Therefore, the order for the dismissal of the suit was at the instance of the court. In other words, the court was not moved by any application, when it dismissed the suit.
3. The plaintiff filed an application dated 24th August 2015, asking the court to set aside the dismissal of the suit, so that the case could be reinstated.
4. The defendant urges the court not to reinstate the case because the plaintiff had been indolent in prosecuting his case.
5. It is the defendant's submission that the plaintiff had displayed a lack of interest in the case.
6. There is no doubt that it is the duty of the plaintiff and his lawyers to take steps to prosecute the case.
7. As Lord Denning MR reiterated in **FITZPATRICK Vs. BATGER & CO. LTD [1967] 2 ALL.E.R 657**;

“Public policy demands that the business of the courts should be conducted with expedition?.

8. In that case, the court ordered that it be dismissed after the case had gone to sleep for nearly 2 years.
9. But as the defendant appreciated, when it cited the case of **UTALII TRANSPORT COMPANY LTD & 3 OTHERS Vs NIC BANK LTD & ANOTHER, Hccc No. 32 of 2010**, there is no precise measure of what amounts to inordinate delay. In that case Gikonyo J. observed that;

“On applying the court’s mind on the delay, caution is advised for courts not to take the word “inordinate? in its dictionary meaning, but in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases?.

10. I find the pronouncement by my learned brother to make perfect sense.
11. But I also remind myself that the application before me is not for the dismissal of a suit. It is for the reinstatement of a case.
12. Secondly, the case was not dismissed because the court had concluded that there had been inordinate delay in prosecuting it.
13. The reason for the dismissal of the case was that No cause had been shown. I construe that pronouncement to relate to the failure of the plaintiff to attend court. In other words, there is no indication that the learned Judge applied his mind to the duration which the case had taken in court.
14. In **JAMES KAREGI KIRATHE Vs GEORGE KANGETHE NYORO & ANOTHER Hccc No. 4462/1986**, Githinji J. (*as he then was*) rejected an application to set aside the dismissal of a suit. He said that the plaintiff did not deserve the indulgence of the court because it was not possible to conduct a fair hearing after the lapse of 15 years since the suit was filed.
15. In comparison, this case was filed almost 7 years ago. That is not a short period of time.
16. During the period after the suit was dismissed, the plaintiff says that his former advocates kept that development a secret from him. Therefore, he had no reason to take any steps to have the suit reinstated, as the defendant did not have any idea that his case had already been dismissed.
17. Of course, if his advocates told him lies about the case, the plaintiff can have recourse against the said lawyers.
18. But, this court also takes note of the possible difficulties which the plaintiff may face in that respect, given the passage of time when the probable cause of action accrued against his erstwhile advocate.
19. I do, however, remind myself that it is not the responsibility of the court to hold brief for the plaintiff or any party to the suit.
20. My sole responsibility is to have an absolute fidelity to Justice. Therefore, in determining this application I ask myself whether or not, despite the delay in the prosecution of the case, justice can still be done to the case. If the answer is in the affirmative, and provided that, therefore, the defendant would not be so prejudiced that it cannot be compensated by an award of costs, the court would be more inclined to preserve the case.
21. In this instance, the reinstatement of the case would not deprive the defendant of the Defence already canvassed by the Defendant. In effect the defendant will not be prejudiced.
22. Another factor which I have taken into account in this application is the fact that there is absolutely no record of how the date of 28th February 2012 was fixed. It is thus not clear if the plaintiff’s advocates were ever aware that the case was scheduled to come up in court on that date. Therefore, there is a real possibility that the plaintiff was literally condemned without having been accorded an opportunity to be heard on 28th February 2012.
23. In the result, I now set aside the orders made on 28th February 2012. The suit is therefore reinstated.
24. However, the plaintiff will bear the costs of the application dated 24th August 2015, in any event. I so

order because there can be no justification in saddling the defendant with costs arising from no fault on its part.

DATED, SIGNED and DELIVERED at NAIROBI this 10th day of February 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Waithaka for Kithi for the Plaintiffs

No appearance for the Defendant

Collins Odhiambo – Court clerk.