



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

**CIVIL SUIT NO. 633 OF 2009**

**KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF**

**- VERSUS -**

**DR. JOHN M. KHAMINWA T/A**

**KHAMINWA & KHAMINWA ADVOCATES.....DEFENDANT**

**RULING**

1. The application before me is for the setting aside of the orders made on 18<sup>th</sup> June 2015. On that date Riechi J. dismissed the plaintiff's suit after the learned Judge had concluded that there had been inordinate delay in the prosecution of the case.
2. The plaintiff has complained that it had been actively pursuing the prosecution of its case at the time when the court dismissed it.
3. Secondly, the plaintiff complained that it was never served with any Notice requiring it to show cause why the suit should not be dismissed for want of prosecution.
4. According to the plaintiff, its advocates had attended at the Court Registry on diverse occasions, with a view to fixing a date for the Case Management Conference.
5. A perusal of the court file reveals that on 17<sup>th</sup> July 2014, the plaintiff's advocates wrote to the advocates for the defendant, inviting them to attend at the Court Registry on 25<sup>th</sup> July 2014, for the purposes of fixing an early date for a pre-trial conference.
6. The plaintiff has exhibited their copy of the said letter, which bears an endorsement by the defendant's advocates. The said endorsement shows that the defendant's advocates received the letter on 21<sup>st</sup> July 2014.
7. The letter dated 17<sup>th</sup> July 2014 also bears another endorsement, bearing the words;

***"Ct file untraced"***

8. That second endorsement was by hand, and below it there is a signature, and the date 25<sup>th</sup> July 2014.
9. According to the plaintiff, it is a member of the Judiciary Staff who wrote those words, and signed against the same.
10. It is noteworthy that the defendant has not challenged any of those facts.
11. The plaintiff has also made available its copy of the letter dated 23<sup>rd</sup> September 2014, which was received by the defendant's advocates on 24<sup>th</sup> September 2014.
12. By that letter, the plaintiff invited the defendant's lawyers to attend court on 30<sup>th</sup> September 2014,

- so that the parties could, jointly, fix a date for the pre-trial conference.
13. It is the plaintiff's case that on 30<sup>th</sup> September 2014, the staff at the Court Registry advised the plaintiff's Court clerk that the parties needed to first comply with the new High Court Practice Directions which had been published in the Kenya Gazette dated 28<sup>th</sup> July 2014.
  14. It is common knowledge that the Honourable the Chief Justice of the Republic of Kenya did cause the publication of Gazette Notice No. 5179 on 28<sup>th</sup> July 2014. The said Gazette Notice introduced Practice Directions in the Commercial Division of the High Court of Kenya at Milimani Courts, on a pilot basis.
  15. The purpose and intent of the said Practice Directions was to compel parties to make full disclosure of all their documentary evidence as well as of their Witness Statements, at the earliest opportunity.
  16. Once parties exchanged their respective Witness Statements and Bundles of Documents, none of them would be taken by surprise when the case got off to trial.
  17. Indeed, the new practice during trial would exclude oral testimonies in-chief. The witness would, after being sworn, adopt his Witness Statement as his evidence-in-chief. Therefore, it would be possible for the other party to know the full scope of the evidence being tendered, in advance. It thus becomes possible for parties to plan, fairly accurately, on how long the cross-examination of each witness would be.
  18. After parties give to the court their respective estimates of the time they require, the court is better-suited to allocate the time for hearing appropriately. Thereafter, the court is able to hold the parties to the length of time allocated to each such witness.
  19. The nett result is intended to be a definite reduction in the length of time which each trial takes.
  20. Secondly, it is fairly possible to have better planning with witnesses, so that they can come to court only when they are likely to actually testify.
  21. I am aware that I have digressed, by making detailed reference to the Practice Directions. But I hope that my excitement is palpable and also contagious! For, if parties prepare their respective cases early and also place all their cards on the table, trials will be concluded within much shorter periods of time. As no new evidence can be sprung up by any party, trial by ambush will have come to a screeching halt.
  22. Reverting to the application before me, I note that the staff at the Court Registry drew the plaintiff's attention to the Kenya Gazette notice which embodied the Practice Directions which I have alluded to above.
  23. The plaintiff's advocate then took steps to comply with the said Practice Directions.
  24. I so find because the Case Management Checklist is one of the instruments created by the Practice Directions, in an endeavour to help both the parties and the court verify whether or not all the pre-trial procedures had been complied with.
  25. When the Judge is satisfied that all the pre-trial procedures had been complied with, he would sign the Case Management Checklist, and certify the case as ready for trial.
  26. The plaintiff says that by May 2015, it was ready to file the Case Management Checklist. That fact has not been challenged by the defendant. I therefore find that the Checklist was indeed ready for filing in court.
  27. However, at that time the Commercial Division of the High Court, at Milimani Court Nairobi, was undergoing a File Audit and re-organization. Therefore, the court file was not available at the Registry, to enable the plaintiff file its checklist.
  28. It is within that context that plaintiff's case was dismissed for want of prosecution.
  29. When dismissing the suit, the learned Judge indicated that there had been an inordinate delay of 3 years since the last step was taken in the case on 11<sup>th</sup> July 2012.
  30. A perusal of the court records reveals that on 20<sup>th</sup> June 2013 the plaintiff filed the Witness Statement of Joshua Bosire.
  31. Thereafter, the plaintiff invited the defendant's advocates to attend at the Court Registry on 25<sup>th</sup> July 2014 and again on 30<sup>th</sup> September 2014.
  32. Those invitations were received by the defendant's advocates, and were also duly acknowledged by the court.
  33. Due to the un-availability of the court file, it was not possible to fix dates for pre-trial conference.
  34. However, it is inaccurate to state that the plaintiff had failed to take any steps for 3 years. There is

- clear and uncontroverted evidence that the plaintiff took steps to try and move forward the case. Therefore, the very foundation upon which the learned Judge based his conclusion of the alleged inaction on the part of the plaintiff is non-existent. It cannot hold.
35. To my mind, that alone would be reason enough to warrant the setting aside of the orders made on 18<sup>th</sup> June 2015.
36. The record of the proceedings on 18<sup>th</sup> June 2015 shows that the learned Judge was persuaded that the plaintiff had been served with a Notice To Show Cause why the suit should not be dismissed. The Judge indicated that there was no satisfactory response from the plaintiff.
37. However, the plaintiff has made it clear that it was never served with any Notice requiring it to show cause why the case should not be dismissed. Again, the plaintiff's said deposition has not been challenged by the defendant. Therefore, I find that the plaintiff was not served with a notice requiring it to show cause why the case should not be dismissed.
38. It does therefore follow that the plaintiff could not have had reason to respond to something which it knew nothing about. I find that the plaintiff was condemned unheard. That is another reason why the orders made on 18<sup>th</sup> June 2015 ought not to be allowed to stand.
39. But the defendant is of a totally different view. He emphasizes the importance of the Overriding Objective, as outlined in Sections 1A and 1B of the Civil Procedure Act, which provide for the just, expeditious, proportionate and affordable resolution of civil disputes.
40. The defendant asks the court to place particular emphasis on expedition; efficient use of available resources and the timely disposal of proceedings.
41. By dismissing cases for want of prosecution the court was said to be acting in a manner which reflected the constitutional principle against delayed justice.
42. It is the defendant's position that;

***“The chief justice, in his capacity as head of Judiciary, in furtherance of the substantive and procedural provisions against inordinate delay, made a decision to dismiss cases such as the instant one which cause inordinate delay and thereby subvert the cause of justice. This was a decision only justified on policy grounds by the Chief Justice as the head of the Judiciary”.***

43. The decision being referred by the defendant is that in which the Chief Justice mandated the newly appointed Judges of the High Court, to hear and determine applications for the dismissal of cases in which there had been inordinate delay in their prosecution.
44. It is true as stated by the defendant that;

***“This decision was given wide media coverage in the print and electronic media, including the government gazette. Special Judges were assigned to the exercise on specific dates throughout the Republic”.***

45. As far as the defendant was concerned;

***“...this exercise was a judicial act. Further that this exercise having been successfully carried out, it cannot be re-opened, as to do so would be in breach of the policy decision by the Chief Justice as well the constitutional and statutory principles upon which the decision was anchored”.***

46. Whereas the learned Chief Justice had made a policy decision to have Judges determine whether or not cases should be dismissed for want of prosecution, it is clear that the Chief Justice did not make a decision in this case or in any other specific case.
47. As the defendant has noted, the Chief Justice assigned Judges to hear and determine the specific applications on the cases which were believed to have remained inactive for unduly long periods of time.
48. In my humble opinion, the decision by the Chief Justice was not a Judicial act: it was a policy decision. And the plaintiff is not challenging that policy decision.
49. The plaintiff is challenging the manner in which the court gave effect to the policy decision on 18<sup>th</sup> June 2015.

50. Whereas the policy decision, to dismiss cases which had remained dormant for an inordinate period of time remains sound, I find that it is unjust and inequitable to condemn a party without according to him an opportunity to render his explanations (*if any*) for the failure to be more diligent in prosecuting his case.

51. In the result, I find merit in the plaintiff's application. Accordingly, the orders made on 18<sup>th</sup> June 2015 are set aside forthwith, and the plaintiff's suit is reinstated.

52. As regards the costs of the application dated 13<sup>th</sup> August 2015, the defendant cannot be blameworthy for the action which the court took on 18<sup>th</sup> June 2015. On that date, the defendant was also absent from the court, as was the plaintiff. I therefore order each party to bear their own respective costs of the application.

**DATED, SIGNED and DELIVERED at NAIROBI this 6<sup>th</sup> day of April 2016.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of:**

*Muriuki for Ober for the Plaintiff*

*Mokua for Dr. Khaminwa Defendant*

*Collins Odhiambo – Court clerk.*