



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 175 OF 2012

SPIRE PROPERTIES LIMITED T/A

DIANI REEF BEACH RESORT SPA..... PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

1. The defendant's application dated 15th November 2013, seeks the dismissal of the suit, for want of prosecution.
2. According to the defendant, the case was last in court on 3rd April 2012, when the court granted an adjournment at the behest of the plaintiff. Since that date, the plaintiff is said to have failed, neglected or refused to prosecute the case.
3. Meanwhile, the defendant pointed out that it filed its Defence in court on 24th April 2012.
4. As the plaintiff was not taking any steps to prosecute its case, the defendant submitted that the continued subsistence of the case constituted an abuse of the process of the court.
5. The defendant further reasoned that the plaintiff's inaction ran counter to the overriding objective of the High Court, which required parties to facilitate the just and expeditious resolution of disputes.
6. **MR. KUMAR PATEL** swore a Replying Affidavit on behalf of the plaintiff. He explained that he was a director of the plaintiff.
7. Through Mr. Patel, the plaintiff indicated that there had been neither refusal nor any neglect in the prosecution of the suit.
8. It was the plaintiff's explanation that it had instructed the firm of **APOPO & ASSOCIATES** Advocates, to prosecute the claim. Having entrusted the brief of its lawyers, the plaintiff believed that the case was receiving appropriate attention.
9. However, the plaintiff later learnt that **Mr. JOAB APOPO** advocate had been

suspended from practice. The said information was obtained by the plaintiff from the website of the Law Society of Kenya.

10. As the plaintiff had previously been unaware of the suspension from practice of Mr. Apopo advocate, it believes that it would be unfair and unjust to visit the mistakes of their lawyer upon the plaintiff.

11. The plaintiff had, thereafter, appointed the firm of **V.A. NYAMODI & COMPANY ADVOCATES** to take over the conduct of their case.

12. In the Replying Affidavit, Mr. Patel deponed that the plaintiff would suffer enormous and inestimable financial losses if the suit was dismissed. Therefore, the plaintiff is of the view that the interests of justice could only be served by rejecting the defendant's application.

13. Curiously, however, when the application came up for hearing, neither the plaintiff nor their lawyers were present.

14. Miss Jakaila, the learned advocate for the defendant, submitted that there had been inordinate delay on the part of the plaintiff, in prosecuting the case.

15. The court has perused the record of the proceedings. It shows that on 23rd March 2012 the plaintiff filed the Plaint. On that same date, the plaintiff filed an application under a Certificate of Urgency. The said application was for an interlocutory injunction to restrain the defendant from remitting to the Kenya Revenue Authority the money which the plaintiff had in its account at the Ukunda Branch of the Kenya Commercial Bank Limited.

16. The application was first listed before Kimondo J. on 23rd March 2012. Having certified the application as Urgent, the learned Judge ordered that it be heard *inter-partes* on 28th March 2012.

17. The defendant was duly served, and on 28th March 2012, Ms Ajiambo advocate attended court on its behalf, whilst the plaintiff was represented by Mr. Apopo advocate.

18. Ms Ajiambo sought a period of 7 days to enable her respond to the application. Mr. Apopo had no objection. Thereafter, the court adjourned the application to 3rd April 2012.

19. When the application was due to be heard on 3rd April 2012, Mr. Apopo advocate sought and was granted an adjournment. The reason for that adjournment was that the defendant had just served the plaintiff with a Replying Affidavit together with several exhibits.

20. In the light of the said Affidavit and exhibits, Mr. Apopo required further instructions.

21. The court granted an adjournment to the plaintiff, and put-off the application to 9th May 2012. In the meantime, the plaintiff was granted leave to file and serve a supplementary affidavit within 14 days.

22. Notwithstanding the grant of leave to file a supplementary affidavit, the plaintiff has not filed any such affidavit.

23. Secondly, there is no record about what, if any, transpired on 9th May 2012. As the plaintiff did not challenge the defendant's contention that there were no steps taken in the case after 3rd April 2012, I deem that contention to be factually accurate. In effect, the plaintiff did not take steps after 3rd April 2012, to prosecute either its application for an injunction or the suit.

24. The next action in this case was taken by the defendant on 4th December 2013, when it applied for the dismissal of the suit for want of prosecution.

25. The plaintiff blames its former lawyers for failing to prosecute the case.

26. In my considered view, the fact that the plaintiff had filed an application for an interlocutory injunction, under a Certificate of Urgency, should have led the plaintiff to demonstrate a much greater sense of urgency than happened in this case.

27. If, as the plaintiff's Director, Mr. Kumar Patel, has said on oath, the dismissal of the suit would cause the plaintiff to suffer enormous and unfathomable financial loss, that should have caused the plaintiff to keep their advocates on their toes. It was definitely very wanting in urgency for the plaintiff to simply sit back and wait for its lawyers to prosecute the application which the plaintiff had deemed as extremely urgent.

28. The plaintiff cannot blame the inaction on their lawyers yet the plaintiff has not demonstrated to the court what steps they took, with a view to pushing their lawyer to take appropriate action.

29. Secondly, the plaintiff has not disclosed to the court the date when it first became aware that Mr. Apopo advocate had been suspended from practice.

30. If the plaintiff only became aware fairly recently, that could still mean that the plaintiff had not maintained regular contact with their own lawyers; unless the said lawyers were shown to have deliberately misled the plaintiff about their lawful capacity to represent the plaintiff.

31. But if the plaintiff had become aware of Mr. Apopo's suspension fairly early, then the plaintiff should have acted sooner in engaging another advocate, who would then have moved forward the plaintiff's case.

32. The plaintiff should have placed more information before the court, to help the court fully grasp the circumstances which could justify the delay in the prosecution of the case. However, I find that the explanation tendered is wanting. It is such information as cannot warrant a conclusion that the only person who was blameworthy for the delay was the plaintiff's advocates. Therefore, the plaintiff cannot be exonerated from blame for the failure to prosecute the case expeditiously.

33. Accordingly, there is merit in the application dated 15th November 2013. The plaintiff's suit against the defendant is hereby dismissed for want of prosecution.

34. The costs of the application together with the costs of the suit are awarded to the Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 7th day of May 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Ambala for the Defendant

Collins Odhiambo – Court clerk.