



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.1318 OF 2004

RESORT CLUBS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

- 1. FIRST ASSURANCE COMPANY LIMITED.....1ST DEFENDANT/APPLICANT**
- 2. UNITED INSURANCE COMPANY LIMITED...2ND DEFENDANT**

RULING

Before me for determination is the 1st defendant/applicant's application dated 5th August 2011 filed on 26th August 2011 seeking for dismissal of the suit herein for want of prosecution and costs. The application is predicated on the grounds that:

1. There has been inordinate delay on the part of the plaintiff to bring the suit against the 1st defendant to conclusion.
2. The said delay is prejudicial to the 1st defendant's interests as it may not be able to secure the attendance of its witnesses due to lapse of time.
3. The plaintiff's has shown lack of interest in its suit hence the dismissal of the suit will not prejudice its interests.

The application is further supported by the affidavit sworn on 5th August 2011 by Ben Musundi advocate setting out the history of the suit which was filed on 2nd December 2004 as a result of an alleged cause of action which arose on 4th December 1998 and defence filed on 1st February 2005 but that there has been inactivity in the matter which is prejudicial to the 1st defendant hence it should be dismissed with costs.

The plaintiff filed replying affidavit sworn on 22nd September 2014 by Benson Mugo Mukunya, the Managing Director of the plaintiff company, and a further replying affidavit sworn on 11th December 2014 contending that the delay in setting down the suit for hearing has been due to the fact that the 2nd defendant has been under statutory management since 2005 to date with extensions of a moratorium and that the firm of F.N. Wamalwa advocates have refused to receive any process on behalf of the 2nd defendant yet they have also declined to formally cease acting. In their view, the case cannot proceed to hearing without representation of the second defendant and that the plaintiff is not aware of who the statutory manager for the 2nd defendant is even after writing to the Insurance Regulatory Authority on 9th November 2012 seeking to know who the statutory manager and or the liquidating agent is and that to date no reply has been received.

The application was argued orally on 16th November 2015 with the 2nd defendant being absent. Mr Mahoho represented the 1st defendant whereas Mr Mboha represented the plaintiff.

Mr Mahoho submitted, reiterating the contents of the application, grounds and supporting affidavit. He emphasized that since the suit was filed in 2004 no documents have been exchanged to demonstrate interest to have the suit ready for hearing and determination and as at 26th August 2011 when this application, was filed, 7 years had lapsed and is now 11 years since filing of the suit. He maintained that the delay has been inordinate, inexcusable and prejudicial to the 1st defendant. Further, that there is no attempt to explain the delay and that if the plaintiff was unable to proceed against the 2nd defendant for reasons that it was still under statutory management, it should have sought leave to enjoin the statutory manager whose name is not necessary. He relied on the case of **Governors Baloon Safaris Ltd V Skyship Company Ltd & Another HCC 461 of 2008** wherein it was held that failure to conclude a matter expeditiously diminishes legitimate expectation of a defendant that a suit once filed should be determined expeditiously as per Article 159(2) (b) of the Constitution. He also relied on **HCC 876/2001 Anthony Kaburi Kano & 2 Others V Ragati Tea Factory Ltd & Others** where 14 months delay was considered inordinate delay and that there has to be a balance between interests of parties.

In response, Mr Mboha for the plaintiff opposed the application relying on the replying and further replying affidavit sworn by Mr Mugo. He conceded that there had been delay in prosecuting the suit herein but argued that the delay is excusable as reasons had been advanced through the affidavit. Mr Mboha further argued that the plaintiff had been encumbered by the moratorium placed on the second defendant. Further, that the plaintiff was unable to extricate the suit against one defendant as each of the defendants were blaming one another for the default. Mr Mboha stated that they did not know the statutory manager for the 2nd defendant despite inquiring from the Insurance Regulatory Authority in 2012. On the authorities relied on by the applicant, counsel for the plaintiff/respondent contended that the power to dismiss a suit for want of prosecution is discretionary which should not be exercised capriciously but judiciously. Further, that this court should strive to sustain the suit and not to terminate it prematurely where reasons for delay are preferred so that a plaintiff is given an opportunity to ventilate its grievances.

Mr Mboha maintained that no prejudice would be occasioned to the 1st respondent corporate entity as any of its officers can come and testify in the suit on its behalf. Further, that the delay herein is not intentional unlike in HCC 876/2011 where no excuse was given for the delay. He urged the court to dismiss the application with costs to the plaintiff.

In a brief rejoinder Mr Mahoho contended that Order 9 of the Civil Procedure Rules is clear on the issue of an advocate on record and when he can cease acting and there was no order on record stopping the claim from proceeding against the statutory manager hence the excuse for the delay was not credible. He urged this court to exercise its discretion and dismiss the suit against the 1st defendant with costs.

In deciding the fate of this application by the 1st defendant, I must give a brief background of this case. By a plaint dated 22nd November 2004 signed by Mugo Mukunya, Managing Director of the plaintiff Company, and filed on 2nd December 2004, the plaintiff claimed that it was the registered proprietor of business premises on LR 12715/208 North West of Arthi River Township which was insured against a fire policy No. 98/05/302/58 and 98/05/302/59 with the 1st defendant First Assurance Company Ltd and a second fire policy No. 94/5/F/4406 insured with the 2nd defendant United Insurance Company Ltd of the same premises together with the Casino Equipment, against fire and other perils.

That on 4th December 1998 a fire occurred on the said premises destroying the building, business and the equipment and despite demand; the defendants had refused to compensate the plaintiff for the loss. The plaintiff sued for compensation for the value of the destroyed property by fire, assessment of the

quantum, interests and costs.

Both defendants entered appearance filed defences on 1st February 2005 and 30th December 2004 respectively, denying the claim. The 2nd defendant averred that the policy issued by the 1st defendant covered the plaintiff's claim upto a maximum of kshs 40,000,000 vis a vis a maximum of kshs 30,000,000 insured by the 2nd defendant and that it could only be responsible after exhaustion by the 1st defendant. The 2nd defendant further contended that Mugo Mukunya lacked capacity to institute proceedings for and on behalf of the plaintiff company hence the suit was incompetent and incurably defective. The 1st defendant contended that the plaintiff had failed to disclose material facts related to the risk to be covered by the 1st defendant, was guilty of breach of policy terms and that the plaintiff had fraudulently started the fire with the intention of seeking insurance compensation. On 29th April 2008 the 1st defendant filed and delivered interrogations which were responded to on 22nd April 2010 and from thence, no action was taken by the plaintiff to set down the suit for hearing until this application was filed on 26th August 2011, which was over one year and 4 months.

I have carefully considered the matter. The plaintiff's main defence to the application for dismissal of this suit for want of prosecution is that the 2nd defendant was placed under statutory management in 2005; is under moratorium since then to date; and that it does not know the name of the statutory manager. In addition, that the 2nd defendant's advocates on record F.M. Wamalwa and Company have refused to appear on behalf of the 2nd defendant while at the same time they have refused to formally cease acting. In their view, the 2nd defendant's position has hindered the plaintiff from prosecuting the suit, which suit cannot proceed against the 1st defendant alone as the 2nd defendant contends in its defence that the 1st defendant is liable in the 1st instance, to compensate the plaintiff which claim must be exhausted before resorting to the 2nd defendant for compensation.

The 1st defendant on the other hand maintains that no good reason has been advanced for the delay in having the suit determined and that the plaintiff need not know the name of the statutory manager before enjoining him/her to the suit to take the place of the 2nd defendant since the position is a statutory one. Further, that nothing prevented the plaintiff from enjoining the 2nd defendant's statutory manager. In addition, the defendant maintains that it will suffer prejudice due to the delay as its witnesses may not be able to attend to the suit due to lapse of time.

The applicable law for dismissal of suit for want of prosecution is found in Order 17 Rule 2 of the Civil Procedure Rules which enact:

“ Where 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 be dismissed and if cause is not shown to its satisfaction, the court may dismiss the suit.

2(3) a party to the suit may also apply for dismissal of the suit for want of prosecution if no steps have been taken to prosecute the suit for a period of one year.”

The court's discretion to dismiss suit under Order 17 of the Civil Procedure Rules must however be exercised on the basis that it is in the interest of justice regard being had to whether the court is satisfied that the party instituting suit has lost interest in it; that the default has been inordinate intentional, unreasonable and contumelious, or inexcusable; and is likely to cause serious prejudice to the defendant on account of that delay, either as between the defendant and plaintiff or between each other or between them and a third party. See **Halsbury's Law of England VOL. 37 paragraph 448**. In **Ivita Vs Kyumba [1984] KLR 441** the court was categorical that:

“ The test applicable for dismissal of a suit for want of prosecution is whether the delay is

prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

Applying the above principles to this case and from the background that I have provided to this suit, it is not in dispute that over 1 year and 4 months had lapsed between the last action of the plaintiff answering to the interrogatories and the filing of this application in 2011. As at 2010, the plaintiff was no doubt aware by Mr Mugo Mukunya's own affidavit that the 2nd defendant had been placed under statutory management from 2005. In my view that act in itself of placing the 2nd defendant under statutory management changed the status of the 2nd defendant and it was therefore entirely upon the plaintiff to act as appropriate to substitute the 2nd defendant with the statutory manager, as indeed, no proceedings could have continued against it without leave of court and without a substitution with the statutory manager. It is ironical for the plaintiff to claim that it did not know the name of the statutory manager and that it wrote to the Insurance Regulatory Authority in 2012 seeking to know the name thereof but that it has not received any reply to date.

I say ironical because the position of statutory manager is a statutory one and any search at the Registrar of Companies or a visit to the Liquidated company premises would reveal who that statutory manager gazetted to manage the affairs of the company is. In any event, the plaintiff did not require the actual name of the statutory manager in order to have (him) substituted or enjoined to these proceedings as there is no such legal requirement for the name of the statutory manager. In the Court of Appeal case of **Lochab Brothers V Kenya Furfural Company Ltd [1983] KLR** Madan, Khella and Chesoni JJA held:

"A receiver cannot sue in his own name as a receiver since he has no property vested in him and so acquires no right of action by (his) appointment. Nor can the court give a receiver leave to sue as receiver. The receiver's duty is to take care of and receive the property which is put under (his) charge and (he) is not at liberty and is not entitled to bring an action in his own name. Thus the second respondents had no locus standi and they could bring proceedings only in the name of the company whose agents they were."

Thus, the plaintiff in this case did not require the name of the statutory manager to substitute the 2nd defendant in this matter since learning of its placement under statutory management. In addition, it took this court, in the process of writing this ruling, less than one minute to establish the statutory manager for United Insurance, by simply undertaking an internet search for information that is readily available. Therefore, in my view, no party with an interest in a matter of this nature could have waited since 2005 to get to know the name of the statutory manager of United Insurance Company by feigning ignorance of who the statutory manager of the said company (under statutory management is and moreso when the deponent of the plaintiff's affidavit I reply is an advocate of the High Court of Kenya who appears before this court very often.

Further and in addition, the plaintiff's replying affidavit filed on 12th June 2009 annexed exhibit "BMM2" which is a declaration of extension of moratorium dated 5th April 2012. The said declaration states:

" Notice is given that in exercise of the powers vested under Section 67 C(3) of the Insurance Act, the High Court of Kenya sitting at Nairobi pursuant to an order made on the 28th March 2012 extended the appointment of Kenya Reinsurance Corporation Limited as statutory manager of United Insurance Company Ltd with effect from 28th March 2012.

TAKE FURTHER NOTICE that in exercise of the powers conferred by Section 67 C(10) of the Insurance Act, the statutory manager of United Insurance Company Ltd declares an extension of the moratorium on the payment of the said insurer of its policy holders and all other creditors for a further period of six (6) months with effect from the date of this notice.

Dated the 28th March 2012

KENYA REINSURANCE CORPORATION LTD: STATUTORY MANAGER.”

The above document is the plaintiff's own exhibit, yet it claims to lack knowledge/information on who the statutory manager for United Insurance Company is or was and that it wrote to the Insurance Regulatory Authority as per annexure "BMM3" a letter to Insurance Regulatory Authority dated 9th November 2012 seeking information when United Insurance Company was placed under receivership and who their receiver manager or liquidating agent is. This was barely 9 months after the notice of 28th March 2012 extending the moratorium.

Again, Annexure 'BMM1' annexed to the further replying affidavit sworn on 11th November 2014 shows another declaration of a moratorium and the statutory manager is named as **Mr Evanson Munene Waruhiu**, giving the contact address as **Kenya Re Towers, Ragati Road**, with a telephone and email contact just like the other Declaration of 28th March 2012.

It is the plaintiff who had instituted suit against the 1st defendants, who had no legal or equitable counterclaim suit against it. It was therefore incumbent upon the plaintiff to seek leave of court to enjoin the statutory manager of the 2nd defendant, and not to wait for the statutory manager to locate suits pending against the Insurance Company. This court also declines to accept the explanation that the plaintiff was unable to proceed with the suit because the 2nd defendant's advocates F.N. Wamalwa & Company refused to accept service of court process on its behalf and or to cease acting for the 2nd defendant company which is under statutory management. The record is clear that F.N. Wamalwa Advocates were instructed by the 2nd defendant when it was in sound state but following the placing of the 2nd defendant under statutory management, it cannot be expected that the said advocates retained instructions unless retained by the statutory manager since the company in liquidation had no capacity on its own accord to retain the advocate. It was therefore expected that the plaintiff effects service of all relevant court documents on the statutory manager and not the firm of F.N. Wamalwa & Company Advocates.

I have perused the record and seen several notices of hearing served upon F.N. Wamalwa and Company Advocates by the plaintiff's advocate on behalf of the 2nd defendant and which notices were all received under protest ever since the company was placed under statutory management, advising the plaintiff's counsel that the advocates have no instructions. There is therefore no ground upon which the plaintiff should insist that the firm of F.N. Wamalwa & Company should receive court process on behalf of the second defendant or that it formally apply to cease acting for the 2nd defendant. The act of ceasing to act is a procedural issue which in my view does not bar the plaintiff from serving the statutory manager with appropriate documents relating to this suit. It therefore behoves this court to learn that the plaintiff has continued to drown into the sea of ignorance and desperation as to what to do with its suit, which ignorance cannot serve as a defence for the delayed prosecution of this suit.

I reiterate that the plaintiff has not made any efforts to enjoin the statutory manager of the 2nd defendant to this suit which was commenced in 2004 before the 2nd defendant was placed under statutory management in 2005, I accept the 1st defendant's submission that under such circumstances, the reason for the delay preferred by the plaintiff are not plausible and I do not accept those reasons. The plaintiff appears to have lost interest in this suit, which delay, in my view, is prejudicial to the 1st defendant. As pointed out, a suit whose cause of action arose in 1998, it is possible that witnesses may be unavailable and documents may also not be found to support the defence case. Employees of companies come and go and or die. The plaintiff had options for disposing of this suit, by either proceeding against the 1st defendant alone or seeking leave of court to enjoin the statutory manager since 2004 but has not attempted either of the options. Delay defeats equity and the provisions of Article 159 (2) are clear that justice shall not be delayed.

As there has been delay in seeking to have this suit prosecuted with the plaintiff clearly not being keen

to proceed with the case against any of the defendants, this court rejects the submission that it should lean towards sustaining suits rather than terminating them prematurely. The plaintiff has not demonstrated interest in amending the proceedings, which amendments the court would be inclined to examine and determine on merits, removing the party who may stall justice. In its submissions, it still wishes to archive this suit perpetually or until the 2nd defendant is revived. It is not known when the 2nd defendant will be resurrected. That delay denies justice to the 1st defendant who is anxious to have the suit out of its way. The 1st defendant has, in my view, waited long enough. This suit has been sterile since 2010 and looking back to the reason given by the plaintiff for the delayed prosecution, from 2005 when the 2nd defendant was placed under statutory management since, according to the plaintiff, it could not prosecute the suit against the 2nd defendant and therefore did nothing to have the suit prosecuted.

It is for those reasons, that I find this application meritorious and grant it, dismissing the plaintiffs suit against the 1st defendant . As against the 2nd defendant, it is clear that the 2nd defendant is unrepresented having been placed under statutory management since 2005 hence there has been no legal representation on its behalf and the statutory manager has never been notified of this pending suit inviting it to seek leave to be enjoined or the plaintiff seeking leave to enjoin it to these proceedings. I would therefore hesitate to dismiss the suit against the 2nd defendant as no application is before me seeking orders of dismissal. This court has the under Section 3A , 63(e) of the Civil Procedure Act and Article 159 (2) (b) of the Constitution, to make such orders as may be expedient for the ends of justice to prevent abuse of its process, and to salvage justice from defeat.

Albeit the plaintiff alleges that it shall be prejudiced if the suit is dismissed since its claim against the defendants is inseparable, I have carefully perused the pleadings in the lower court and the documents on record. There is no evidence that the defendants jointly insured the plaintiff's property and that therefore the claims herein against them are inseparable. The allegation that each of the defendants refused to settle the claim by each shifting the plaintiff to be compensated by the other does not in itself show the joint policy. The plaint as filed is clear that the insurance policies were separate and the contracts of insurance made independently at different times. The plaintiff can therefore still pursue its claim separately and obtain a remedy against either of the defendants independently. Having dismissed the plaintiff's suit against the 1st defendant, I proceed and award costs of the application and of the dismissed suit to the 1st defendant.

Dated, signed and delivered in open court at Nairobi this 7th day of October 2015.

R.E. ABURILI

JUDGE