



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 431 OF 2011

CAPWELL INDUSTRIES LTD. PLAINTIFF

VERSUS

NATIONAL IRRIGATION BOARD. DEFENDANT

R U L I N G

The application before the court is the one dated 1st July, 2014 by the Defendant by way of a Notice of Motion. The Application seeks the following orders: -

- a) That the suit be dismissed for want of prosecution.
- b) Costs of the suit be awarded to the Defendant.

The Application is brought under Order 17 Rule 2(3) of the Civil Procedure Rules 2010 and it is premised on the grounds set out on the body of the Application and on the annexed Affidavit of Lilian Gathoni Kimani Advocate.

In summary, the Defendant is seeking for the dismissal of the suit on grounds that, for a period exceeding one year, the Plaintiff has not brought an Application to court or acted in any way to prosecute the suit and that the plaintiff does not show any intention to follow up the matter.

That the matter was to come up in court on the 18th October, 2012 but it was not confirmed for hearing and as the time the Application herein was filed, the last time any document was filed in court was on 3rd November, 2011 when defence and counter-claim was filed. Since then no other document has been filed or appearance made in court.

That though the Plaintiff's Advocate has written several letters of invitation for fixing the matter for hearing, no dates have been taken since the year 2012 yet court diaries have been opened every other year including the year 2014.

In her submissions, the counsel for the Defendant/Applicant submitted that it is inconceivable that the diary of the court for those three years was not open to allow the Plaintiff's advocate take a hearing date for the case. It was her submission that the Plaintiff is not interested in the suit and the same should be dismissed with costs. In her further submission, she told the court that though many documents have been filed as late as 11th May, 2015 which includes the Plaintiff's list of documents and witness statements, the same were filed without the leave of the court and there is no reason why they were not filed earlier. Filing of the same must have been an afterthought on the part of the Plaintiff's Advocate.

The Application is opposed vide a Replying Affidavit filed on the 11th May, 2012 sworn by one Rajan D. Shah who describes himself as the Managing Director of the Plaintiff. In it, it is admitted that the last pleading was filed in court on 16th November, 2011 when the Plaintiff filed a reply to defence and defence to counter-claim. The counsel for the plaintiff in his submission urged the court to consider if there was inordinate delay. He told the court that they have severally tried to fix the matter for hearing but they were informed there are no dates.

That the Plaintiff required more time to procure evidence to support his claim following a counter-claim to the suit. There were matters which the Plaintiff had to address that were raised in the counter-claim to the suit which called for procuring of additional evidence on the part of the Plaintiff. He further submitted that the Plaintiff needed time to procure witnesses who were not willing to testify. He urged the court to consider the delay and that the Defendant did not adduce any evidence to show that the delay has caused him prejudice or hardships and in any event the Defendant can be compensated by way of damages. He prayed for the dismissal of the Application.

I have carefully considered the Application, the Affidavits on record and the submissions by both counsels in support of and in opposition to the Application.

The law on dismissal of suits for want of prosecution is founded under the inherent powers of the court. If a Plaintiff is guilty of inexcusable and inordinate delay in prosecuting his claim then the court may dismiss the suit.

Order 17(2) (1) of the Civil Procedure Act provides that: -

***“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.*”**

While Order 17(2) (3) provides: -

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

It is all about the court’s discretion which is exercised on the basis that it is in public interest that once an action is commenced in court it ought to be prosecuted as soon as practically possible. In this regard, the courts have pronounced themselves in various authorities like the case of **Mukisa Biscuit Manufacturing Company Ltd Vs West End Distributors Ltd (1969) E.A. 696** and also in the case of **Ivita Vs Kyumba (1984) KLR 441**.

In exercising its jurisdiction, the court should be guided by the principles that were set out in the case of **Allen Vs Sir Alfred Mc Alpine & Sons Limited (1968) I ALL ER 543**, where Salmon L. J. stated as follows: -

“In order for an Application to dismiss the suit for want of prosecution to succeed, the Defendant must show: -

a) There has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. This varies indefinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.

b) That this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

c) That the defendant is likely to be prejudiced by the delay. They may be prejudiced at the trial of issues between themselves and the Plaintiff. In addition to any inference that may properly be

drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.”

The above principles have been followed in the Kenyan case of **Inter Vs Kyumba (1984)** KLR 441 where it was held: -

“The test applied by the courts in an Application 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 in the discretion of the court.”

In the case before the court, the reason given by the Plaintiff’s counsel for the delay is that they have severally tried to fix the matter for hearing but every time they invite, they are informed that there are no dates. The other reason given was that the Plaintiff required some time to procure more evidence to support his claim following filing of a counter-claim to the suit.

I note that the Plaintiff has not annexed any such letters inviting the Defendant to fix a date for hearing.

Though the Defendant in the Supporting Affidavit has annexed some letters where the firm of L. G. Kimani was invited for fixing of a hearing date, it is worth noting that, on three such occasions, the invitations were done very late in the year as late as August and September and no reason was given why they had not been done earlier.

In the case of **Allen (supra)** the principle that pervades the decision is that the court has to be satisfied that the inordinate delay is excusable and if not satisfied, then the court has to consider whether justice can still be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can be done, then it will, in the exercise of its discretion, refuse the Application for dismissal for want of prosecution. It follows that if the court is not satisfied that inordinate delay is excusable, then it will, again in its discretion, allow the Application and dismiss the suit for want of prosecution.

In my view, the reasons given by the Plaintiff for the delay in prosecuting the case are not convincing. It cannot be true that for four years, the Plaintiff could not get a date at the registry.

The other reason given that it required sometime to procure more evidence following a counter-claim by the Defendant is also not a valid reason. The defence and counter-claim were filed way back in November, 2011 and the present Application was filed on 25th February, 2015. It could not have taken the Plaintiff more than four years to procure the evidence yet the counter-claim arises from the same transaction as the suit herein. In the case of **Salkas Contractors Limited Vs Kenya Petroleum Refineries Limited Civil Appeal No. 250/2003**, the Court of Appeal in dismissing the Appeal observed that the reason given for the delay in the lower court which was that the Appellant was tracing relevant documents in support of the claim was not a reason good enough for the delay in prosecuting the case.

For the foregoing reasons, I would not hesitate to have the suit dismissed for want of prosecution and I hereby do so.

Having considered the suit, does the Counter-claim survive? Like a Plaintiff, the Defendant with a counter-claim, is also obligated to be vigilant. It certainly is not open to the Defendant with a counter-claim to sit back and do nothing about his counter-claim as is likely to prejudice the Plaintiff the same way the dormant suit would have prejudiced the Defendant, unless the Defendant shows that it had attempted to prosecute the counter-claim. In the instant case, the Defendant has not shown any attempt to do so and therefore, it is equally guilty of inordinate delay in prosecuting its counter-claim. It would be erroneous exercises of court’s discretion if the counter-claim is not dismissed vide the inherent powers of the court.

In the upshot, I dismiss the suit as well as the counter-claim for want of prosecution. Each party will bear their respective costs.

Orders accordingly.

Dated and delivered at Nairobi this 3rd day of December, 2015.

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L. NJUGUNA

JUDGE

In the presence of

..... for the Plaintiff.

..... for the Defendant.