



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 1 OF 2000

VICTORIA PUMPS LIMITED.....PLAINTIFF

VERSUS

(1) KENYA PORTS AUTHORITY

(2) INCHARGE SHIPPING SERVICES KENYA LIMITED

(3) OCEANFREIGH (E.A.) LIMITED

(4) MEDITERRANEAN SHIPPING COMPANY (PTY) LTD.

(5) CONSOLIDATED MARINE SERVICE PVT LIMITED.....DEFENDANTS

RULING

1. The 4th defendant is by his application dated 14/10/2015 seeking an order that the plaintiffs suit against it be dismissed for want of prosecution on the basis that the plaintiff had lost interest demonstrated by failure to take steps to have the matter heard.

2. The application is expressed to be brought under Order 17 Rule 12(1) as well as section 1A, 1B & 3A of the Civil Procedure Act. Order 17 Rule 2(1) provides,

“(1) 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 the cause is not shown to its satisfaction may dismiss the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub rule 1...”

3. The application is supported by the affidavit of SAMUEL SHADRACK OUMA whose effect is to show that the matter was last in court before Mwera J on the 16/7/2012 after which the plaintiff has not taken any steps to have the case heard hence evidence that the plaintiff has lost interest in the matter.

4. To that application no reply was filled with the consequence that under Order 51 Rule 14 (4) the court had the discretion to deem the application unopposed and deal with it *exparte*.

5. My preliminary view is that the time spent on the application on the 21/12/2015 was quite disproportionate to the matter for determination. I say disproportionate because the court spent in excess

of two hours dealing with the matter which only asks this court to establish whether or not the plaintiff or indeed the defendants had within twelve months preceeding the filing of the application on 14.10.2014 taken any steps or filed any application in the matter. That is regrettable but nothing has been lost for I am minded to take, it that parties needed to be heard and the court did afford them the opportunity to be heard.

6. As said before in exercising my discretion to dismiss any matter for want prosecution or to sustain it, the court consider the keenness displayed by the plaintiff and the larger interests of justice in the matter whether, like in this case, the plaintiff shall have been totally rendered remediless.

7. Having refused an adjournment and the subsequent application for stay pending appeal, I allowed Mr.Gikandi for the plaintiff to address the court on points of law only. In his address he made very strong and concerted submissions to the effect that the law obliges the parties, their advocates and even the court to have the matter effectively dealt with and asked the court to consider the provisions of Articles 10, 50 and 159 of the constitution. He urged that the court takes notice that the principles of Natural justice are the cornerstones of administration of justice and that the court should guard against a party walking out of court with the feeling that it was denied his rights under Article 50. Mr. Gikandi then cited to court, the decision of the court of appeal in the case of **PETER N. KABURU -VS- ESTHER WANGARE** to the effect that substantial justice dictate that disputes should be heard on the merits.

8. In my view, the urge for Kenyan to reform the judicial system and the administration of justice was known to everybody concerned. Even before the Constitution was promulgated, parliament had taken the step to amend our procedural statutes being the Civil Procedure Act and Appellate jurisdictions Act and incorporate therein the Overriding Objective of the Court. That objective prescribes the courts mandate to be the facilitation of the just, expeditious, proportionate and affordable resolution of disputes. Having given the court that obligation the law enjoins parties and their advocates to assist the court to further the overriding objectives. That development in the law initiated by parliament was informed by the concern by Kenyans in the way the court systems operated which was viewed by many as pedantic, lethargic and unduly technical far removed from substance. In my view Article 159 is fashioned in the same spirit.

It Provides:-

Article 159 (2) e

(e) the purpose and principles of this constitution shall be protected and promoted.”

9. I am of the persuasion that timely dispatch of court business and indeed any action by any state office or officer is Cardinal Principle of the Constitution. The court of appeal in **JARED OKELO -VS- FREDRICK OUTA & 3 OTHERS** had this to say on the question of timeliness.

“We are therefore, called upon to interpret the Constitution, on the one hand bearing in mind the clear provision of Art 164(3) of the Constitution, that vests in the Court of Appeal jurisdiction to hear and determine appeals from the High Court and the concomitant importance of access of justice, and on the other the uncontested constitutional value in timely resolution of disputes generally and electoral disputes in particular. We must avoid a situation where a continuous and steady stream of election interlocutory appeals would clog the election petition process so completely that the ability of both the High Court and the Court of Appeal to dispense with petitions in their respective stipulated periods of six months would be impossible and thus defeat the constitutional requirement of timely resolution of election disputes.

10. It has bothered me whether the provisions of Article 159 (2) (d) has the effect of indeed should be interpreted to mean that all our procedural laws including those provisions that promote case management for the efficient administration of justice have become Otiose. I have also asked myself whether the same Article in itself is so supreme as to overshadow and override all else including other provisions in the Constitution in particular the principle of timeliness in dispatch of public duty. I am unable to be so persuaded. Our Constitution, as radical as it is fashioned, must be regarded for what it is; The

architecture for social engineering, purely intended to modernise our way of transacting public affairs with in-built value systems that must not be lost sight of. Some of those values are enacted at Article 10 and include good governance and sustainable development. I have picked those two values as objects and purposes of the Constitution to underscore my view that timeliness is a critical value and principle of the constitution. I say so with a conviction, that lethargy, dilatoriness, indolence and dexterity are not virtue that this court or indeed any public body should condone, encourage or nurture. They are just abhonable vices that should and must be discouraged. It would be unfortunate, detestable as being inequitable and unconscionable to allow party to be dragged into court and while there be kept in the dark as to his fate in the litigation by a lackluster approach and indolence on the part of the plaintiff on the basis of his right to be heard and take an advocate of his choice even if the change of advocate is to circumvent an accrued right.

11. During the arguments on adjournment Mr.Gikandi hinted to court that ought to have been dealt with during that process called justice at last at Mombasa during the month of July 2015.

12. I have read the file and noted that after the 16/12/2012, it was the 4th Defendant/applicant who resuscitated this matter from its slumber when on the 22.10.2014 it filed the application under consideration and attended court on 18/1/2015 to fix a hearing date. As a result of that action this matter by dint of order 17(2) 1 could not be listed for dismissal for want of prosecution in July because the one year delay threshold had not been met.

13. I have said more than enough to stress the point that all are bound to ensure that court business is administered with promptitude and expeditiously. I am also reiterating that the Constitution of Kenya 2010 did not render all other laws irrelevant and ineffective. As is well known the constitution as the Grundnorm address the general principles of governance and leave the detailed application of such norms to be governed and addressed by statutes as well as subsidiary legislation like the Civil Procedure Act and the Rules. Such legislation so long as they confirm to Article 2 of the constitution must at all times be regarded as supplements and additives to the constitution and cogs to the wheels of the implementation, furtherance and realisation of the constitutional norms, ethos and principles.

14. Asike Makhandia J, as he then was, in Kisii H.C. Petition No. 3 of 2010 addressed this point and succinctly said.

“Yes the constitution has provided that justice shall be administered without undue regard to procedural technicalities. However I do not understand this as ousting all the rules of engagement as we know them in Civil and Criminal Proceedings... if we do not have basic rules of engagement, of what use will constitutional petitions on references if they are formed into panaceas of all legal problems that the citizens of this country may have or imagine? I do not think that the Constitution was meant to replace statutes that provide remedies to those concerned”

15. Back to the determination on whether or not the suit against the 4th defendant should be dismissed for want of prosecutions, even without the applicants prompting, the court is clothed with powers under order 17 (2) to act and consider the facts of the suit. The only caution is that the plaintiff must be given his right to show cause.

16. In the instant case the 4th Defendant took the step, filed an application supported by an affidavit, clearly demonstrating that there has been apathy on the part of the plaintiff. It has not been alleged that application was not served in time or at all. In spite of that service no response was ever filed and in his submissions before me no attempt was made to justify the delay in prosecuting the matter.

17. Mr.Gikandi did very well in his usual candor and eloquence in opposing the application on the plaintiff's inalienable right to a fair hearing. I am however of the view that the right to be heard is a right that is vested upon an individual. He has the right to choose to be heard or not be heard. In this matter, I set aside time to hear the plaintiff or his reasons for inaction but none came forth. In that scenario therefore no case has been shown to the satisfaction of the court why the suit should not be dismissed and

the application thus succeeds and is allowed with costs for both the application and the suit.

18. I have hinted that it would be part of the consideration of the court whether the plaintiff would be rendered remediless. The suit as framed sought the release of containers and general damages. The release of the containers was ordered way back in September 2002. What is now outstanding is the prayer for general damages sought against the defendants jointly and severally. The suit against the 4th defendant is discernible by the pleadings at paragraph 13 of the amended plaint to the effect that the 5th defendant delivered the good to Durban and necessitated the 3rd & 4th defendants to deliver same to Mombasa. Without going to the merits of the matter, the plaintiff still has his remedies against the remaining defendants which he has the right to prosecute provided he meets his obligations under the law.

19. The upshot is that the application dated 14th October, 2015 is allowed, the plaintiff suit against the 4th defendant is dismissed with costs for the 4th defendant.

Dated and Delivered at Mombasa this 4th December, 2015.

In the presence of :

No appearance for the plaintiff.

No appearance for the 1st, 2nd, 3rd & 4th Defendant.

P.J.O. OTIENO

JUDGE