REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS

HCCC CASE NO 876 OF 2001

ANTHONY KABURI KARIO & 2 OTHERS .....PLAINTIFF

Versus

RAGATI TEA FACTORY COMPANY LIMITED & 10 OTHERS .....DEFENDANTS

RULING

Dismissal of suit for want of prosecution

[1] The Motion I should determine in the one dated 21st January, 2014, which is asking the court to dismiss this suit for want of prosecution. The Respondent did not turn up during the hearing of the said application on 17th March, 2014 despite having been served with the application together with the date for its hearing. As at the date for the hearing of the application herein, the Respondent had not filed any responses to the application. The Applicant then sought and was allowed to file written submission on the application.

The Applicant argued...

[2] In the written submissions filed on 24th March, 2014, that the suit by the 2nd and 3rd Plaintiff's was struck out on 18th July 2001 by Philip J. Ransely, Commissioner of Assize. The defendants then filed a notice of motion inter alia seeking costs for two counsels in the matter that was struck out. On 9th November, 2012, the Ibrahim J., (as he then was) ordered the 2nd and 3rd plaintiffs to pay the costs of the two advocates in this suit. Thereafter, the defendants filed their party and party bill of costs as between themselves and the 2nd and 3rd Plaintiffs for the suit that was struck out by Philip J Ransely, Commissioner of Assize. The costs were taxed on 21st July 2013.

[3] According to the Applicant, the suit by the plaintiff should be dismissed for want of prosecution due to the following reasons:-

a) Since the ruling of 9th November, 2012, the plaintiff has never taken any steps whatsoever to prosecute his case against the Defendants. It is now over one year since any steps whatsoever was taken to prosecute this case and over twelve years since the case was filed in court. The continued silence and inactivity on part of the Plaintiff is prejudicial to the interests of the Defendant since they may not be able to avail their witness due to the age of the matter.

b) The Plaintiff is guilty of latches, and has never been serious in prosecuting his suit. He has simply gone to sleep. Further the delay is inordinate and inexcusable.

[4] The Applicant relied on the case of **FITZPATRICK VS BATGER & CO. LTD [1967] 2 ALL ER 657** and particularly on the decision by Lord Denning, which cited his earlier decision in **REGGENTINE VS BEECHOLME BAKERIES LTD [1967] 111 SOL. JO. 216**, that;

> ***"It is duty of plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition …. The delay is far beyond anything we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution"***

[5] The Applicant also relied on Order 17, rule 2(1) of the Civil Procedure Rules (hereafter CPR) which provides:-

> ***"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"***

And Subrule 3 which provides that:

> ***Any party to the suit may apply for dismissal of the suit if cause is not shown to the court why the suit should not be dismissed.***

[6] The Applicant regrets that even after being served with the application, the Respondent did not oppose the application. No excuse has been given for the delay in prosecuting the suit. Therefore, that inactivity or delay on part of the Plaintiff is both inordinate, and a clear manifestation of his lack of interest in this matter. On that basis, the dismissal of this suit will not prejudice the interests of the Respondent in any way.

[7] The Applicant cited more authorities. The case of **GOVERNORS BALLION SAFARIS LTD v SKYSHIP COMPANY LIMITED & COUNTY COUNCIL OF TRANSMARA [2013] eKLR,** where Justice Mabeya cited Dickson J in **NILANI v PATEL (1969) EA PAGE 341** and held that:

> ***"It is only too trite to say that , as in every civil suit, it is the Plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of court towards that end as soon as it is convenient by either applying for its dismissal or setting down the suit for hearing. Delay in these cases is much to be deplored. It is the duty of the plaintiff's advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died, documents have been mislaid, lost, destroyed and the memory tends to fade".***

Further, the Applicant argued that Mabeya J. considered the case of **AGIP (KENYA) LTD. VS. HIGHLANDS TYRES LIMITED (2001) KLR 630,** where Visram J. (as he then was) made succinct pronouncements on the issue of inordinate delay and stated:

> *"**Delay is a matter to be decided on the circumstances of each case where a reason for the delay is offered. The court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit".***

[8] The Applicant also referred the court to the case of **MSA HCC 20 OF 2007, BANDARI CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED v SEVEN SEAS TECHNOLOGIES LIMITED AND FINETECH LIMITED**. The Applicant then, by way of conclusion, accused the Respondent of failing to bring this suit to a speedy conclusion and without showing any sufficient reason

for the delay of almost 14 months since the ruling of Mohamed Ibrahim J. (as he then was) on 9th November, 2012. That is inordinate delay. They beseeched the court to be guided by Article 159 of the Constitution of Kenya which enjoins the court to determine disputes and render Justice without undue delay, as failure to do so will infringe upon the legitimate expectation of a defendant that a dispute against it will be determined timeously. The court should find that the plaintiff had not given sufficient cause why the suit should not be dismissed and consequently dismiss the suit.

COURT RENDERS ITSELF THUS

[9] The principles upon which a suit may be dismissed for want of prosecution are well settled. I do not think they are in doubt, hence, no need to pretend to re-invent the wheel. There are also copious judicial authorities on the subject which too, I think I should not multiply. Except I will refer to the decisions cited herein and in addition another decision by this court being **UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS v NIC BANK LTD & ANOTHER NBI HCCC NO 32 OF 2010 [2014] eKLR.** The court noted that; whereas dismissal of suit for want of prosecution is a matter for the discretion of the court, a court of law should always avoid acting intuitively on such application or hastily dismiss a suit for want of prosecution, but rather, it should make further enquiries into the matter under the guidance of the now defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act, for it drives the plaintiff away from the judgment-seat. The recognized principles of law which should govern the exercise of the discretion are:

> ***1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;***
>
> ***2) Whether the delay is intentional, contumelious and, therefore, inexcusable;***
>
> ***3) Whether the delay is an abuse of the court process;***
>
> ***4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;***
>
> ***5) What prejudice will the dismissal occasion to the plaintiff?***
>
> ***6) Whether the plaintiff has offered a reasonable explanation for the delay;***
>
> ***7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?***

[10] In sum, the court should ask itself whether there has been inordinate delay which has not been explained and, therefore, inexcusable. There is no precise measure of what amounts to inordinate delay, as what amounts to inordinate delay will differ from case to case depending on the circumstances of each case. But, care should be taken not to apply the word ‘’inordinate’’ in its dictionary meaning; but rather in the sense of excessive as compared to normality. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay herein, I note it is for almost 14 months from the time the last step was taken. In an adversarial system of justice such as ours, the Plaintiff ordinarily should take such appropriate steps to advance his case, and the law has delineated a lapse of one year without any step having been taken in the suit, to be sufficient cause to dismiss a suit for want of prosecution. Except, where reasonable explanation has been given on the delay, the court ought to consider it and often may look at the delay more leniently and excuse it. What about the present case? There has been a delay of 14 months, and no explanation that has been offered by the Respondent/plaintiff. In the absence of an explanation, the delay herein can only be termed as inordinate delay and is, therefore, inexcusable. I wish to state that, where no explanation for the delay has been offered by the Respondent, it would be extremely difficult for the court to assume one or try and offer any excuse for the Respondent’s failure to move the court on his own case. But as I say these

things, the court is well aware of the constitutional desire, particularly under Article 159 of the Constitution of Kenya, and the balance thereof, that, whereas courts of law should be inclined towards serving substantive justice, likewise it must determine disputes and render Justice without undue delay. That is the balance that recognizes that justice entails justice to all the parties, the plaintiff and the defendant. Needless to say, unreasonable delay in concluding a case breeds injustice whether the delay has been occasioned by the plaintiff or by the defendant. Equally, I am alive to the demands of the overriding objective of the law that parties should assist the court to attain an expeditious, proportionate, just and affordable resolution of disputes. The Respondent has acted contrary to the said constitutional desire and has, thus, infringed upon the legitimate expectation of the Applicant that this dispute will be resolved timeously. In the circumstances, the court is not persuaded to exercise its discretion leniently or at all in favour of the Respondent; for such would be a lavish exercise of discretion, and I do not think it is permitted in law. The upshot is that the application dated 21st January, 2014 is allowed. And accordingly, I dismiss the suit in toto with costs to the Applicants.

Dated, signed and delivered in court at Nairobi this 2nd day of May, 2014

F. GIKONYO

JUDGE