



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 630 OF 2006

DR DIVYA J PATELPLAINTIFF

VERSUS

GUARDIAN BANK LIMITED.....DEFENDANT

RULING

1. The Defendant's Notice of Motion application dated 7th January 2014 and filed on 10th January 2014 was brought pursuant to the provisions of Order 17 Rule 2(3) and Order 51 Rule 1 of the Civil Procedure Rules. It sought that the suit herein be dismissed with costs for want of prosecution.
2. The application was predicated upon the grounds that the Plaintiff had failed or delayed to set the matter down for hearing since 27th September 2012, which delay was inordinate and inexcusable. It was further contended that the Plaintiff had lost interest in the case and had not taken any steps towards prosecuting the matter for over one (1) year. The application was further supported by the affidavit of Narayana Murithi Sabesan that was sworn on 7th January 2014. In reiterating the grounds in the application, the Defendant further deposed that the continued existence of the suit was oppressive and an abuse of the process (sic) which made the fair trial of the suit difficult and/or impossible.
3. The Plaintiff filed a Replying Affidavit on 6th February 2014. The same was sworn by Njoroge Obadiah Kimani on the same date. He contended that the Plaintiff was desirous to prosecute the suit and that the inadvertent delay was excusable due to election petitions from March 2013 which made the parties unable to fix the matter for hearing.
4. It was further contended that, in any event, the matter was not mature for hearing as the Defendant had not complied with the provisions of Order 11 of the Civil Procedure Rules. It averred that no prejudice or irreparable loss would be occasioned upon the Defendant if the application was granted.
5. The provisions of Order 17 Rule (2) (3) of the Civil Procedure Rules provides that:-

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
6. Under sub-rule (1) aforementioned, the court of its own motion may give notice to the parties to show cause why the suit should not be dismissed for want of prosecution, if either party has for a period of one (1) year failed to take any steps in prosecuting the same, and if no cogent or reasonable cause is shown, may dismiss the suit.

7. In its submissions dated 20th February 2014 and filed on 21st February 2014, the Plaintiff reiterated that the delay in prosecuting its case was not inordinate, it was excusable and would not occasion the Defendant any prejudice. It relied on the case of **Ivita v Kyumbu (1984) KLR 441** where Chesoni, J (as he then was) stated as follows:-

“Thus even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

8. The Defendant was however, of the opinion that the delay in prosecuting of the matter since 27th September 2012 was inordinate, and that the Plaintiff had not given any reasonable explanation for the delay. It stated in its submissions dated 14th February 2014 and filed on 19th February 2014 that the delay was inordinate, inexcusable and went against the rules of the court and amounted to an abuse of the process of the court.

9. It relied on the case of **Civil Suit No 223 of 2002 Trust Bank (In Liquidation) v Kiprono Kittony & 2 Others** in which Odunga, J held;

“It is the duty of the Plaintiff to take the necessary steps to ensure that the matter is fixed for hearing. The defendant’s primary aim is to have the suit dismissed and therefore the defendant cannot be faulted for choosing the route of terminating the suit rather than sustaining it.”

10. Its contention was that the Plaintiff was obligated to take the necessary steps to ensure that the matter was prosecuted expeditiously, or it would be a violation of the overriding objective principles as enunciated under Section 1A (1) of the Civil Procedure Act.

11. Following the careful perusal of the court records, it is evident that this matter was last before Mutava, J on 29th September, 2012 where the learned Judge directed the parties to fix the matter for hearing at the registry. No action was taken by either party to have the matter fixed for hearing. The last invitation was issued to the Defendant by the Plaintiff on 20th June 2012, when the matter was fixed for hearing on 29th September 2012.

12. The court is aware of the fact that indeed election petitions took precedence in being heard and determined during the period of March – October 2013. However, the Plaintiff, being overzealous as he claimed, he ought to have taken steps to ensure his matter was heard expeditiously. As was stated by Odunga, J in **Trust Bank (In Liquidation) v Kiprono Kittony & 2 Others** (Supra), disputes cause anxiety, and to allow for the same to be extended for a long period of time would be prejudicial to the other party if not justified.

13. Having considered the application, the Replying Affidavit, the pleadings and written submissions filed by the parties, the court is in no doubt that indeed there had been a delay in the execution of the suit since 27th September 2012. The Plaintiff was indolent, and it was only after the Defendant had taken steps to dismiss the matter that it was suddenly awoken from its slumber.

14. The suit herein was filed on 6th September 2006 and has not been set down for hearing since then. The period is over eight (8) years, and has been prejudicial to the Defendant for the long delay in having the matter heard.

15. However, as was determined in **Waljee’s (Uganda) Ltd v Ranji Punjabhai Bugerere Tea Estates Ltd (1971) EA 188**, no prejudice would be so great that would not be adequately compensated for an award in costs. The Defendant has not shown what prejudice it had suffered or was likely to suffer if the application herein was granted. In any event, the Defendant had not complied with Order 11 of the Civil Procedure Rules, 2010.

DISPOSITION

16. The upshot of this court's ruling is that the Defendant's Notice of Motion application dated 7th January 2014 and filed on 10th January 2014 is not merited and is hereby dismissed.

17. The court hereby directs that the parties comply with the Practice Directions High Court of Kenya Commercial & Admiralty Division Kenya Gazette Notice No 5179 of 28th July 2014 within thirty (30) days of the date of this ruling.

18. Matter will be mentioned on 14th November 2014 for the case conference to confirm compliance and/or for further orders and/or directions by the court.

19. It is so ordered.

DATED and DELIVERED at NAIROBI this 15th day of October 2014

J. KAMAU

JUDGE