



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO 465 OF 2009

JARIBU CREDIT TRADERS LTD.....PLAINTIFF

• VERSUS –

MUMIAS SUGAR COMPANY LTDDEFENDANT

RULING

1. The plaintiff filed this suit nearly six years ago. To be more precise, on 1st July 2009. The defendant filed its statement of defence on 19th August 2009. The pleadings thus closed a long time ago. The main suit has never been heard. Some time back, on 27th September 2010, the plaintiff filed a motion for summary judgment. It withdrew it by a formal notice filed on 5th July 2011. As a corollary, the plaintiff was then expected to list down the main suit for hearing. It was not to be.
2. The defendant has thus presented a notice of motion dated 22nd February 2013 praying that the suit be dismissed for want of prosecution. The application is expressed to be brought under order 17 rule 2 (3) of the Civil Procedure Rules 2010 and sections 1B and 3A of the Civil Procedure Act.
3. The pith of the motion is that the plaintiff has lost interest in prosecuting the suit. It is averred that the suit was slated for hearing on 15th February 2010. The matter did not appear on the cause list for the day. The plaintiff subsequently filed the motion for summary judgment which it withdrew on 5th July 2010. The matter was last in court on 23rd June 2011 for hearing of the ill-fated motion for summary judgment. The plaintiff took the matter out of the cause list and followed it with the notice of withdrawal. The defendant avers that it is now well over a year. It is the defendant's case that the plaintiff is disinterested in the suit and that it should be dismissed.
4. The plaintiff opposes the application. There is a replying affidavit sworn by Dominic Mbigi, learned counsel for the plaintiff. He deposes that after the court session on 23rd June 2011, he could not get a date. He says the court diary was full. His clerk subsequently invited the defendant to take dates on 19th January 2012 but the court file could not be traced. The plaintiff wrote to the Deputy Registrar to complain about the missing file. On 23rd February 2012 the Deputy Registrar informed the plaintiff that the file was not missing or lost. The plaintiff then invited the defendant to take dates on 26th June 2012. That was another four months. Its counsel says his clerk informed him the file, yet again, could not be traced. The plaintiff's case is that it is then not to blame for the delays and that it is keen on prosecuting the suit.
5. The position taken by the plaintiff is challenged by the defendant. The rebuttal is found in a supplementary affidavit sworn by Gordon Awino, a clerk with the defendant's law firm. In a nutshell, he says that on the occasions the plaintiff invited them to take dates, no date could be

- given. The reasons are two: either the plaintiff's representative failed to turn up at the registry at the appointed hour; or, the plaintiff's lawyers failed to deliver an advance notice to the court registry.
6. I have heard the rival arguments. I have also paid due regard to the records before me, the pleadings, depositions and the written submissions filed on 1st October 2013 by the plaintiff's learned counsel. I am of the following considered opinion.
 7. Under Order 17 rules 2 (1), (2) and (3), if no step is taken in any suit by either party for one year, any party may apply to the court for dismissal of the suit. In the instant case, the suit was filed nearly 6 years ago on 1st July 2009. It is common ground that it was last in court on 23rd June 2011. That was for hearing of the motion for summary judgment. The plaintiff took out the matter. He later, by a *written notice*, withdrew that motion. So a period of *over* one year had passed before presentation of the motion for dismissal. The application is thus well anchored on order 17 rule 2 (3) and properly before the Court.
 8. The test in a matter of this nature was well laid out in *Ivita Vs Kyumbu* [1984] KLR 441. It is whether the delay is prolonged and inexcusable, and if it is, whether justice can still be done. In that event instead of dismissal, the court may exercise its discretion to set the suit down for hearing.
 9. I have studied the record of the court. Facts can be very stubborn. The truth of the matter is that the plaintiff has *not* taken any *serious* steps to set down the matter for hearing since 23rd June 2011. True, there were attempts to take dates on at least two occasions. I will spend some time there to see whether the delay is excusable. Paraphrased, was the plaintiff to blame for failure to take dates?
 10. I accept that the court diary for year 2011 may have been closed by the time the parties left court after the interlocutory hearing on 23rd June 2011. The year 2012 is then largely the *crux* of the matter. No dates were taken for the entire year. The plaintiff proffers the following explanation: that the first attempt on 26th January 2012 failed because the file was *lost or misplaced*. That does not impress me for two reasons. First, on 23rd February 2012, the Deputy Registrar confirmed in writing of the availability of the file. Secondly, Gordon Awino, the clerk from the defendant's law firm deposes as follows at paragraph 5:

“That the plaintiff did serve us with various invitation letters requiring us to attend court on 18.11.2011, 2.12.2011, 26.1.2012, and 22.3. 2012, and despite attending court on all these occasions, it was not possible to take a date as the plaintiff had not presented the invitation letter in advance therefore the file was not availed for purposes of taking a hearing date”

11. I have then studied the averments of Gordon Awino at paragraph 6 of his deposition. He states as follows:

“That on 26.6.2012, I was at the court registry at 10.00 am ready to take the date and I even called the plaintiff's office landline two times to enquire if they were coming but despite their assurance that their officer/clerk was on their way, the plaintiff's representative still failed to turn up; at around 11.20 am, I left”

12. I have also perused the invitation letter marked 'DNM1'. It stated clearly the date was to be taken at 10.00 am. The plaintiff's clerk did not attend the registry at the appointed hour. The averments of Gordon Awino have not been controverted. When I juxtapose them against the Deputy Registrar's letter, I draw this inescapable conclusion: the file was not missing and the plaintiff's representative did not attend the registry at the appointed hour to take a hearing date. The plaintiff's version of events is self-serving, not entirely candid and unsupported by empirical evidence. I blame the plaintiff for the failure to take a date up to that point. From 23rd February 2012, the plaintiff did not attempt to take another date until four months later on 26th June 2012. It is averred that the court file was missing again. A letter was not done to the Registrar to enquire about the “missing” court file until 21st August 2012. The clerk from the opposite law firm

- deposes at paragraphs 5, 6, 7 and 8 that the plaintiff's law firm had not notified the registry of the invitation to take a date as required and that in any event, the plaintiff's representative did not attend the registry to take a date. Those averments in the supplementary affidavit have not been rebutted by the plaintiff.
13. It is apparent that the blame for failure to progress the suit for the last six years, and at any rate since 23rd June 2011, rests at the plaintiff's doorstep. Inordinate delay by the plaintiff has thus been established. The delay has not been well explained. It is thus inexcusable. *Ivita Vs Kyumbu* [1984] KLR 441, *Allen Vs McAlpine* [1968] 1 ALL ER 543, *Ramuka Agencies Ltd vs Esther Wanjira Maina and another* Nairobi, High Court ELC 1187 of 2007 [2012] eKLR.
14. In *Fitzpatrick Vs Batger & Co. Ltd* [1967] 2 ALL ER 657 Lord Denning, citing his decision in *Reggentine Vs Beecholme Bakeries Ltd* [1967] 111 Sol. Jo. 216, said as follows;

“It is the duty of the 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”.

15. The court has inherent power to strike out such a dormant suit. The power was well explained in *Mukisa Biscuit Manufacturing Company Vs West End Distributors Ltd* [1969] EA 696. It is not enough to simply write letters to the other party to take dates and then not show up at the registry. It is not the kind of step contemplated by order 17: the plaintiff has to take *actual* and *solid* steps to set down the suit for hearing. Sadly, I have not seen any compelling evidence that the plaintiff did so. Discovery has not even been done. Instead, a portrait of a sluggish and disinterested litigant emerges.
16. With the overriding objective to do justice to the parties, it is also in the interests of a fair trial to determine a suit expeditiously. The defendant here is obviously prejudiced by the existence of a stagnant suit. There are costs that go with it. In *Mugo Njogu Vs Mary Githinji* [2010] e KLR the Court was of the view, and I agree, that the plaintiff's counsel must take full responsibility for such delay. The court went further to say that *“counsel have a role and duty to assist the court in realizing the overriding objective and incompetency or lapses of counsel derogate from the objective”*.
17. Lastly in *Nilam Doshi Vs Credit Agricole Indosuez Limited and 3 others* Nairobi HCCC No. 802 of 2002 (as consolidated with HCCC Nos. 803 & 804 of 2002) (unreported), I observed that the dictates of justice and the inherent power of the court require, in circumstances such as these ones, to free the defendant from the hold of the plaintiff's inert grip.
18. For all the above reasons, this is a perfect case of a disinterested plaintiff; one who has completely slept on its rights. That, inspite lodging a commercial suit claiming the sum Kshs 9,081,000, I would then have expected the plaintiff to be a little more diligent in seeking a decree. I commiserate with the plaintiff for the predicament it now faces. But it is not without other remedies. But granted the circumstances, the suit cannot be sustained any longer against the defendant. Justice is a two way street. The defendant as I have stated is prejudiced by the lethargic pace and inordinate delay by the plaintiff in prosecuting its case. In the result, I order that the plaintiff's suit be and is hereby dismissed with costs to the defendant.

It is so ordered.

DATED and DELIVERED at NAIROBI this 3rd day of October 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of:

Ms Kahindi for Mr. Mbigi for the plaintiff.

No appearance for the defendant.

Mr. C. Odhiambo, Court Clerk.