



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**ENVIRONMENT AND LAND COURT**

**CIVIL CASE NO. 34 OF 2011**

**SUSAN ATIENO AYOO.....1ST PLAINTIFF**

**PHILIP OLAGO.....2ND DEFENDANT**

**VERSUS**

**NATIOANL SOCIAL SECURITY FUND ..... DEFENDANT**

**RULING**

1. On 4/6/2014, the defendants- **NATIONAL SOCIAL SECURITY FUND** - filed a Notice of Motion dated 3/6/2014 against the two plaintiffs – **SUSAN ATIENO AYOO** and **PHILIP OLAGO** – seeking two prayers namely:
  - i. **That the suit herein against the defendant be dismissed for want of prosecution.**
  - ii. **That the costs of the application be borne by the plaintiffs.**
2. The application was brought under order 17 rule 2, Order 50 rule 1 of Civil Procedure Rules, 2010, and Section 3A of Civil Procedure Act (cap 21). The grounds advanced stipulated, inter alia, that 12 months have expired since the matter was last listed for hearing and the plaintiffs have not taken steps to have the matter heard; that the delay or failure to take such step is inordinate, inexcusable and an abuse of the court process; and that the plaintiffs have lost interest in the matter.
3. The plaintiffs counsel filed a 16 – paragraph replying affidavit in which he stated, inter alia, that the matter had been listed twice for hearing and that the 1st plaintiff, who is the principal party, resides in Dubai and there was a disconnect in communication. This is said to have hampered the advocate from getting proper instructions.
4. The advocate however said he has since resumed contact with 1st plaintiff and is therefore ready to have the matter heard. He attributed the problem partly to his own mistake and partly to plaintiffs mistake. He asked the court not to visit his mistake on his clients. He said further that the defendant stood to suffer no prejudice if the matter is put down for hearing and further that costs would suffice as adequate compensation.
5. For the determination of the application, written submissions were filed in lieu of oral arguments.
6. The defendants submissions were filed 10/3/2015 and they are, by and large, an amplified restatement of what the application contain. In addition however, the decided case of **Ivita V Kyumbu (1984) KLR 441** was cited to drive home the point that where delay is prolonged and

the plaintiff does not give sufficient reason for the delay, dismissal can ensue. The case of **RAJESH RUGHANI VS FIFTY INVESTMENTS LIMITED & Another: HCC No.3038 of 1996** was cited too to emphasize the plaintiff's duty to urge his counsel to proceed in order to avoid dismissal of the suit.

7. The plaintiffs submissions were filed on 19/2/2015. According to plaintiffs the mistake of an advocate should not be visited on his client. The case of **BANCO ARABE ESPANOL VS BANK OF UGANDA (1999) 2 EA 22, Order JSC**, was cited to make the point. Also cited was **PHILIP CHEMWOLO & Another Vs Augustine Kubede (1982) – 188) KAR 1036**, which made the point that unless there is fraud or intention to averreach on the part of the plaintiff, costs should always be considered as an appropriate alternative.
8. I have considered the application as filed, the response made by the plaintiffs counsel, and the rival submissions. True, there has been delay. The last time the matter was to come uop for hearing was 26/9/2012. But delay perse is not what courts of law are concerned about; rather, it is such of it as is unreasonable and inexcusable. Accordingly, where delay is well explained, courts are always reluctant to opt for dismissal.
9. According to the defendant, the delay in this case is inordiante and inxcusable. The explanation given is not reasonable since (as per defendants counsel ) “in this era of technology, plaintiff and their advocates could have communicated via e-mail and any other reliable means of communication”.
10. But the court takes a different view. The explanation offered is reasonable. If there was failure of communication between the plaintiff and their advocates, not much progress could be made. Even “in this era of technology” people still loose contact. But more importantly in this matter, costs have not been shown to be an inadequate recompense. The plaintiffs have indicated their readiness to proceed. It would be unfair to shut the court doors on them. The defendants can be paid costs.
11. The plaintiffs should not be denied their day in court because of a procedural default which does not appear to have caused prejudice to the defendant. And even if such prejudice were to occur the court is bound to consider whether an award of costs can not compensate it.
12. The application herein is therefore dismissed but the plaintiffs are ordered to pay costs to the defendant.

**HON. A. KANIARU**

**ENVIRONMENT & LAND – JUDGE**

**20/8/2015**