



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 907 of 2009

KENYA CANVAS LIMITED PLAINTIFF

VERSUS

TOURISM PROMOTION SERVICES (KENYA) LIMITEDDEFENDANT

R U L I N G

1. On 9 November 2012, the Defendant filed a Notice of Motion brought under the provisions of **Order 17 Rules (2) and (3)** seeking to have the suit filed against the Defendant dismissed for want of prosecution. The grounds in support of the Application were that the suit had last been fixed for hearing on 1 March 2011 and over 20 months have elapsed since then, without the Plaintiff setting it down for hearing again. The Defendant maintained that a fair trial could not be held on account of the delay and that justice delayed was justice denied. The final ground was that the Plaintiff had a duty to prosecute its case expeditiously in order to assist the court in furthering the objectives of **sections 1A and 1B** of the *Civil Procedure Act*.
2. The said Application of the Defendant was supported by the Affidavit of **Paul Ogunde** of the Defendant's advocates firm on record, who gave the history of the suit including the Application for Summary Judgement brought by the Plaintiff, dated 23 February 2010 which was dismissed on 2 July 2010. The deponent noted that the last time the suit had been fixed for hearing was 1 March 2011. Since then, the Plaintiff had taken no steps to prosecute the suit and was obviously not keen on setting it down for hearing. He then repeated what had been detailed in the grounds in support of the Application. One **Eric Kimani Kariuki**, an advocate practising as a partner in the firm of advocates on record for the Plaintiff, swore a Replying Affidavit on 10 December 2012. He maintained that since 1 March 2011 the Plaintiff had made several attempts to locate the court file at the Registry in order to set the matter down for hearing, but to no avail. On the 29 September 2011, after advice received from the Registry staff, the Plaintiff had made an application for reference to Archives in order to ascertain the position with regard to the Court file. The deponent annexed a copy of that application to his said Affidavit. He noted that the inability to set down the matter for hearing had not been due to the intransigence on the Plaintiff's part but to the fact that the Court file was missing at the Registry. He detailed that the Plaintiff was still keen to prosecute its claim and that the Application herein sought to visit an injustice on the Plaintiff's "legitimate expectation to due process".
3. The advocates for the parties agreed to put in written submissions as regards the Application of the Defendant. The Defendant observed that there had been no dispute that, since the Plaintiff had fixed the matter for hearing on 1 March 2011, no further step had been taken in the cause. It submitted that although the Plaintiff's advocates had applied to the Archives to find the Court file on 29 September 2011, there was no recorded complaint that the Court file had been missing for a whole year. The Defendant noted that despite the Plaintiff detailing in the Replying Affidavit, that it was keen to prosecute

this case, there had been no attempt made by it to comply with pre-trial procedures. The Defendant observed that discovery had not been given and that witness statements had not been filed. The Defendant thereafter referred the court to the case of **Eco-bank Ghana Ltd versus Triton Petroleum & Ors HCCC No. 24 of 2009.**

4. In turn, the Plaintiff filed its written submissions as regards the Defendant's Application on 24 January 2013. Apart from maintaining that the Application was misconceived, the Plaintiff submitted that it had always been willing to pursue its claim before the courts. Unfortunately, the impediment to that end was the fact that the file had gone missing from the Registry. The Plaintiff maintained that its application for reference to Archives was evidence that it had made efforts to locate the missing Court file. Finally, the Plaintiff submitted that the step taken by the Defendant to apply for Orders under **Orders 17 and 51** was, at best, premature, as the Defendant had made no attempt to invite or otherwise enquire about the status of the matter. The Plaintiff maintained that the real issues in this suit would remain unresolved should the Orders sought by the Defendant be granted.

5. The **Eco-bank** case as referred to by the Defendant is a Ruling delivered by my learned brother Mutava J. on 21 June 2012. Having made observations as to the Court file in that matter having gone missing the learned judge had this to say at page 4 of his Ruling:

“11. While it is one thing for the Plaintiff to claim that a step was taken within one year by way of attempting to fix the suit for hearing on two occasions, it is quite another to convince this court that the matter was ripe for hearing as to merit the taking of that step. This burden looks to have been hardly discharged as barring the move towards fixing the matter for hearing, the suit is as raw as it was over two years ago. The Plaintiff did completely nothing to progress the suit towards the seat of justice. Attempting to fix the suit for hearing when it was not ready for hearing is to me no step at all and at best amounts to a pre-emptive strike against the fate stipulated in Order 17 Rule 2 (1) and (3) Civil Procedure Rules. This maneuver cannot find favour with this court as it runs contra to the overriding objectives stipulated in Sections 1A, 1B and 3A of the Civil Procedure Act and which courts have affirmed as the quintessential building pillars to expeditious dispensation of justice. In the case of Mugo Mumenya Njogu vs. Elizabeth Wamuyu Kaburu & 3 others [2010] eKLR, Hon. Justice J. G. Nyamu (as he then was) underlined that the considerations of length of delay, chances of appeal and likely prejudice to the Respondent must in addition be seen in the context of the overriding objective and were not an end in themselves. The learned judge added:

‘they should be seen as spokes in the wheel of the overriding objective. Thus I have to pause and ask how do the factors assist me in furthering the overriding objective and its principal aims or whether the application hinders the realization of the objective’.”

In the following paragraph of his Ruling, Mutava J. took cognizance of the case of **Ari Credit and Finance Ltd versus Trans-National Bank Ltd (2005) eKLR** in which it was held that:

“the court should be slow to dismiss the case for want of prosecution where the suit can be heard without further delay or where the defendant will suffer no hardship and where there has been no flagrant and comfortable inactivity on the part of the plaintiff”.

In my opinion, looking at the two differing positions as regards the two authorities quoted, this court has complete discretion as to whether to dismiss the Plaintiff's suit for want of prosecution or allow it to proceed to hearing and a logical determination/ conclusion.

6. **Order 17 rule 2 Civil Procedure Rules** reads as follows:

“17. 2. (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 cause is not shown to its satisfaction, may dismiss the suit.

- (2) **If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**
- (3) **Any party to the suit may apply for its dismissal as provided in sub-rule 1.**
- (4) **The court may dismiss the suit for non-compliance with any direction given under this Order.**

It seems to me quite clear that there has been no application as referred to in sub-rule (1) above made by the Plaintiff herein for one year. However, can the application for reference to Archives made by the Plaintiff on 29 September 2011 be interpreted as a “step taken”? It certainly was a step taken by the Plaintiff to find that the Court file. What history and indeed the Replying Affidavit does not relate, is precisely when was the Court file found and, once found, what did the Plaintiff do about taking a step or filing an application? As far as the Court file is concerned, the record shows no step to have been taken until 9 November 2012 when the Defendant’s Notice of Motion before court was filed.

7. The other complaint put forward by the Defendant in support of its Application was that the Plaintiff had not complied with the provisions of **Order 11** which by **rule 2** details that after the close of pleadings parties shall within 10 days complete, file and serve the pre-trial questionnaire. Such has not been done in relation to this file by either party. Admittedly, the court has not within 30 days after the close of the pleadings herein convened a case conference in accordance with the provisions of **Rule 3 of Order 11**. However, in my view, **Order 11** encompasses all parties to a suit not just the Plaintiff. There is little doubt that in court practice, advocates have tended to expect the Plaintiff to make the running so far as progressing a suit forward. Where the Plaintiff is caught by the Rules is under **Order 3 rule 2**. That rule requires that all suits filed under **Order 3 rule 1 (1)** shall be accompanied by a verifying affidavit, a list of witnesses to be called at the trial, written statements signed by the witnesses (excluding expert witnesses) and copies of documents to be relied on at the trial including a demand letter before action. On my perusal of the court file, the Plaintiff was filed herein on the 16 December 2009 and is accompanied by a Verifying Affidavit sworn by one Rameshchandra Meghji Shah. However, there are no lists or copies of documents filed or, indeed, a list of witnesses and signed witness statements.

8. Of course, it was this sort of inaction on the part of the plaintiff that my learned brother Mutava J. seized upon in the **Eco-bank** case (supra). The penultimate paragraph in his Ruling read as follows:

“14. Ultimately, it may as well be customary that courts should in the interest of justice lean towards according parties to litigation the opportunity to ventilate their cases before eventual determination as opposed to what has been termed as “draconian” the move to dismiss suits precipitously. However, in the face of a Constitution that expressly advocates for justice to all and which must be dispensed without delay, and in the face of the overriding principles alluded to above, the time for change of the customary mindset is here. Litigants should therefore stand guided that they must brace themselves to up the gear for speed and vigilance will not be the trend. The wheels of justice will no longer be turning on the thrust of a steam engine”.

9. I have no hesitation in adopting this reasoning of Justice Mutava in the above case. The Plaintiff herein has avoided or ignored taking mandatory steps to prosecute its case. In my view, not even the provisions of the Constitution in relation to courts overlooking technical objections can assist an indolent or indifferent Plaintiff. Further and in relation to **Order 17 rule 2**, the Plaintiff herein has not shown to my satisfaction sufficient cause as to why this suit should not be dismissed. Accordingly, I allow the Defendant’s Notice of Motion dated 8 November 2012 with costs.

DATED and delivered at Nairobi this 27th day of February 2013.

**J. B.HAVELOCK
JUDGE**