



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO.52 OF 2015

KHUNAIF TRADING COMPANY LIMITED.....PLAINTIFF

VERSUS

SPIRE BANK LIMITED.....RESPONDENT

RULING

1. The matter was coming up for hearing of an application dated **17th April, 2019**, which was filed by the Defendant in the main suit dated **16th April, 2016** and the Plaintiff in the Counter-claim in the defence dated **27th March, 2018**.
2. The Defendant's Counsel, **M/S Kemunya** was the only one in attendance. She told court that the Plaintiff had been duly served with the application and hearing notice. She also said that they had filed an affidavit of service to confirm this.
3. The Plaintiff and their Counsel were evidently absent and the Defendant's Counsel proceeded to request the court to allow the application dated **17th April, 2019**, in which the Defendant seeks to have the suit dismissed for want of prosecution. She also went on to apply that the Defendant's Counter-claim in the statement of defence dated **27th March, 2018** and filed on even date be allowed as presented.
4. I have read through the record and established that the Plaintiff filed this suit on **17th April, 2015**. The Defendant then filed the statement of defence and Counter-claim on **27th March, 2018**.
5. The application dated **17th April, 2019** and filed on **2nd May, 2019** seeks for prayers that:
 - a) ***The Plaintiff's suit be dismissed with costs to the Defendants;***
 - b) ***THAT the Defendant's Counter-claim in the statement of defence and Counter-claim filed on 27th August 2018 be allowed as prayed.***
 - c) ***THAT the costs of the application be awarded to the Defendant.***
6. There was a notice of withdrawal of the said application dated **19th July, 2019** but the same was withdrawn and expunged from the record on **29th July, 2019**.
7. Equally important, it is worth noting that vide an application dated **4th April, 2019** the Defendant requested and obtained a Judgment in default of appearance against the Plaintiff and a decree thereof issued on **2nd July, 2019**. However, the said Judgment was set aside *ex-debito justitiae* on **29th July, 2019**.
8. The court record also shows that the Plaintiff has failed to attend court on many occasions and from **9th March, 2018** to date, the Plaintiff's Counsel only attended court on **16th December, 2019**, when the matter came up for hearing of the application dated **17th April, 2010**.
9. **M/S Ikegu** Counsel who appeared on behalf of **Mr. Mawasi**, Counsel for the Plaintiff was granted an adjournment on the account of being indisposed. **M/S Ikegu** also indicated that **Mr. Mawasi** was in the process of filing an application to cease from acting for the reason that he had not received further instructions from the Plaintiff. However, to date, no such application has been filed.
10. With regard to the application dated **17th April, 2019**, the applicable and relevant provision of law under which a suit can be dismissed for want of prosecution is **Order 17 Rule 2(1)** of the **Civil Procedure Rules**, which states:-

“In any suit in which no application had been made or steps 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”.

11. Further, **Order 17 Rule 2(3)** provides that any party to the suit may apply for its dismissal as provided for in sub-rule 1. The guiding criteria to be considered or with regard to whether a case should be dismissed for want of prosecution is *if the delay is prolonged and inexcusable, or if it is, whether justice can still be done despite such delay. The Defendant must also meet the one year threshold of inactivity as stipulated under Order 17 Rule 2 of the Civil Procedure Rules.*

12. With regard to the one year threshold, the record shows that the suit was commenced by a **Plaint** dated **16th April, 2015** and filed on **17th April, 2015**. Since then Plaintiff has never set down the same for hearing. The last time this suit was prosecuted was with regard to hearing of the **Notice of Motion** dated **3rd May, 2017** filed by the Defendant and **Ruling** thereof delivered on **9th March, 2018**. The Plaintiff has never filed a reply to the Counter-claim by the Defendant or moved the court for hearing of this suit. The matter came up before court on **15th May, 2019** at the request by the Defendant for Judgment in default to be entered against the Plaintiff in the Counter-claim.

13. Having taken into account the chronology of events since the filing of this suit, the magnitude of the delay has been demonstrated from the proceedings. It is clear that the Plaintiff is guilty of laches and cannot deny that it has been less than diligent in having the suit prosecuted. Its conduct has been shown to be that of a lethargic litigant not interested in prosecuting its case.

14. I am therefore satisfied that the application dated **17th April, 2019** has met the threshold for dismissal of the suit herein for want of prosecution and is hereby allowed in its entirety.

DELIVERED, DATED and SIGNED VIRTUALLY at MOMBASA this 24th day of MARCH 2021.

D. O. CHEPKWONY

JUDGE

24/3/2021