



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION

HCCC NO. 11 OF 2016

**AMBROSE RACHIER, OKOME ARWA, FRANCIS OLALO &
STEPHEN LIGUNYA**

T/A RACHIER & OMOLO ADVOCATESPLAINTIFFS

VERSUS

DEVELOPMENT BANK OF KENYADEFENDANT

RULING

1. The Ruling relates to a Notice to Show Cause (NTSC) why the suit herein should not be dismissed to want for prosecution. The NTSC was served upon the parties by the registry. In response to it, the Plaintiffs filed an Affidavit by one Mark Okinda, a licenced Court Process Working with the Plaintiffs' law firm sworn on 17th May, 2021.

2. In response to the NTSC, learned counsel for the Plaintiffs, Mr. Evans submitted that they wrote twice to the Deputy Registrar requesting for a date for Pre-trial Conference and filing a check list for Case Management Conference. That however, the hearing on Case Management could not proceed because there was on record an application by the Defendant to have the case dismissed for want of prosecution on which a ruling was delivered on 29th April, 2020. He submitted that the Plaintiffs were ready to be heard on the suit and requested for a date for case management.

3. On behalf of the Defendant was learned counsel, Mr. Achieng who supported the dismissal of the suit. He opined that the reasons advanced by the Plaintiffs against the NTSC were not satisfactory. It was his submission that it was the second time that the matter was coming up for dismissal. That since the delivery of the ruling against an application for dismissal of the suit on 29th April, 2020, no action had been taken to prosecute the suit.

4. Counsel submitted that although the letters attached to the response affidavit are dated February and April, 2021 respectively, they were not served upon them until 10th May, 2021 when the NTSC was served. As such, it was the counsel's view that the letters were a fabrication.

5. Finally, Mr. Achieng submitted that the Hon. Chief Justice gave directions on how matters should proceed during the Covid-19 pandemic, which the Plaintiffs did not follow. He urged the court to consequently dismiss the suit for want of prosecution.

6. In rejoinder, Mr. Evans disagreed that it was the second time that the suit was set for dismissal for want of prosecution as in the ruling of 29.4.2020, the court found that the file had been active. Further that although directions on how to hear matter during the Covid-19 pandemic were issued, the court file could not be traced as the Plaintiffs' counsel had tried logging into the e-system requesting for a hearing date in vain. And that, in any case, when parties are ready to proceed with the hearing, a dismissal of a suit should be undertaken as a last resort.

Determination

7. I have accordingly considered the respective rival submissions. It is notable that this is the second time that the suit has been placed on spot for non-prosecution. I say so because, even if the first application was dismissed, the application remains a matter of record. The latter application was initiated by the Defendant by way of a formal application dated 31st October, 2019. A ruling dismissing the application was rendered on 29.4.2020. A summary of the pleadings and applications the respective parties had filed and their positions were noted in the court's ruling and I therefore need not restate in this ruling.

8. Also notable is that, the court in this ruling would not consider the period since the filing of the suit to the date of the afore stated ruling of 29.4.2020 as that was catered for in the ruling.

9. The said ruling having been delivered on 29.4.2021 implies that the suit is ripe for canvassing this NTSC pursuant to Order 17 Rule 2(3) of the Civil Procedure Rules which provides that:

“Any party to the suit may apply for its dismissal as provided in sub-rule.”

10. Hence sub-rule (3) is subject to sub-rule (1) which reads”

“In any suit in which no application has been or no 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.”

11. I then have to grapple with the question of whether the reasons advanced by the Plaintiffs for not prosecuting the suit are plausible.

12. To start with is the submission that they have not been able get dates for Case Management Conference. What is not convincing is that the letters requesting for dates were not sent on real time. The questions arising are; why would letters written in February and April, 2021 be sent to the Defendant’s counsel after the service of the NTSC? What precipitated the delay in dispatching the letters?

13. I note however that the letters alluded to are dated 18th January, 2021 and 22nd April, 2021 respectively. The letters were clearly received by the Defendant’s counsel on 10th May, 2021. No explanation was offered to these questions by the Plaintiffs. I arrive at the conclusion that they were letters written in a panic mood and were served in a haste to salvage the NTSC. The court would not rely on them as a plausible ground that dates for the Case Management were requested for.

14. Be that as it may, the court is well aware of the difficulties the courts are facing in this Covid-19 pandemic situation hindering the of hearing of as many matters as would be expected in normal situations. All the same, the Plaintiffs on acknowledging the age of the matter ought to have done more to set the suit for hearing. The driver to do so should be on the realization that this is the second attempt to dismiss the suit for want of prosecution and a risk abounds for losing the chance to ventilate their case.

15. It is not just sufficient to say that a party is ready to be heard. Such readiness must be demonstrated by action. The action is what is lacking on the part of the Plaintiffs.

16. The court will consequently give them a last opportunity to have the suit prosecuted. Ensuring a just and expeditious disposal of matters is a key mandate of the court. Parties must be catalysts in facilitating this objective. That is what the Plaintiffs are called to do.

17. In the result, I dismiss the NTSC with orders that the Parties do appear before the Hon. Deputy Registrar for Case Management Conference on 15th June, 2021. Parties must ensure that the Documents filed are well paginated and indexed. Once the Case Management is completed, and which must be done within 45 days, the Hon. Deputy Registrar shall refer the matter to the judge for fixing of a hearing date.

18. The costs of court attendance in hearing the NTSC set at Ksh. 7500/ shall be borne by the Plaintiffs.

DATED AND DELIVERED AT NAIROBI THIS 31ST May, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Evans ochieng for the Plaintiffs.*
2. *Ms. Achieng h/b Mr. Ojiambo for the Defendant.*