



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO. 8 OF 2017

1. BERNARD KARIUKI MUGNAI

2. GRACE WAITHERERO KARIUKI

3. CROTON HERBS CO. LTD.....PLAINTIFFS

VS.

FAMILY BANK LIMITED.....DEFENDANT

RULING

1. Before court is a Notice of Motion application dated 20th November, 2019. It is filed by **FAMILY BANK LIMITED**, the defendant. The defendant seeks an order for the dismissal of this suit for want of prosecution.

2. No action has been taken by the plaintiffs in this case since it was adjourned on 19th November, 2018. Prior to that, the plaintiffs' application dated 29th March, 2017 for interlocutory injunction was dismissed through a ruling dated 5th September, 2017. Thereafter the plaintiffs fixed a pre-trial hearing and the main suit was fixed for hearing on 19th November, 2018. On that date, the plaintiffs' learned counsel informed the court that parties wished to engage in negotiation. Since that date, the plaintiffs have not taken any further steps to fix this case for hearing. Indeed, the defendant in the affidavit in support of the present application stated that since the dismissal of the plaintiffs' injunction the plaintiffs have taken no initiative to fix a further hearing date in this matter.

3. The defendant served the present application on the plaintiffs' learned advocate but at the hearing of the same, on 20th April, 2021, the plaintiff failed to attend court to defend the application. It becomes clear then, that the plaintiffs have entirely lost interest in prosecuting of this suit. The delay in prosecuting this suit has been inordinate. The plaintiffs though served have not offered any explanation for the delay. No doubt the delay is prejudicial to the defendant who since 2017 has had to retain a counsel yet no action has been taken by the plaintiff to fix this matter for hearing. The delay by the plaintiffs in prosecution of this case is contrary to the overriding objective of the **Civil Procedure Act, Cap 21** for just speedy and inexpensive determination of a case on merit. The inactivity on the part of the plaintiffs calls out on this Court's finding that there is indeed want of prosecution. A persuasive case that comes to mind is an Australian case **BEVERAGE BOTTLERS (SA) LTD (In Liquidation) & ANOR VS. ABODE ENTERPRISES PTY LET (2009) SAS 272** as follows:-

“There must come a time when the party has so conducted the litigation that it would be appropriate to shut that party out of that party's litigation even if the point is arguable. Justice delayed can be justice denied. Both the Plaintiff and the Defendant are entitled to justice.

If the Plaintiff has conducted his or her case so that the Defendant has suffered prejudice or will suffer injustice in defending the case then the Defendant is entitled to justice, and justice can only be achieved by shutting the Plaintiff out of his or her case.”

There comes a time when (the Defendant) is entitled to have some piece of mind and to regard the incident as closed.

The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.”

4. In the end I find there is merit in the defendant's application dated 20th November, 2019 and accordingly I grant the following orders:-

(a) This suit is hereby dismissed with costs for want of prosecution.

(b) The costs of the Notice of Motion dated 20th November, 2019 are awarded to the defendant.

RULING DATED, SIGNED AND DELIVERED AT KIAMBU THIS 27TH DAY OF MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant.....Ndege

For plaintiffs:No appearance

For defendant:Ms. Onsare

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE