



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI COMMERCIAL COURTS

HCCC NO. 1361 OF 1999

AFRICAN AIRLINE INTERNATIONAL LIMITEDPLAINTIFF

VS.

EASTERN AND SOUTHERN bb

AFRICAN DEVELOPMENT BANK DEFENDANT

RULING

1. The Plaintiff herein has time and time again failed to comply with timelines given for compliance of pre-trial motions and so suffered the consequence of an unless order. The result is that the suit was dismissed on or about 5th April 2015.
2. The Plaintiff has not given up on the suit and has in a Notice of Motion dated 6th June 2019 sought the following orders:-
 1. The limitation of time imposed by the Court on the 5th March 2019 upon the Plaintiff to comply with Order II of the Civil Procedure Rules is set aside.
 2. The time limited to the Plaintiff to comply with Order II of the Civil Procedure Rules by the directions issued on the 5th March 2019 is extended to the 6th June 2019.
3. In a supporting affidavit dated 6th June 2019 Advocate Stephen Musalia Mwenesi, for the Applicant, owns up to the mistake of failing to keep the deadlines.
4. The history of lethargy on the part of the Plaintiff has been ably set out by James Wambugu in his affidavit sworn on 19th July 2019. This is a case filed in 1999, about 21 years ago! So old is the matter that the presiding Judge of the Commercial Division of this Court had identified it as one of the cases that needs to be fast tracked and disposed of in a service week.
5. On 31st October 2018 this matter came before me when I fixed the case for hearing on 4th and 5th March 2019. Case Management Conference was slated for 7th February 2019. On 25th January 2019 counsel for the Defendant wrote to counsel for the Plaintiff reminding him that he ought to have filed witness statements and bundle of documents in the month of December 2018 to enable them meet the timeline for hearing due for 4th and 5th March 2019.
6. Notwithstanding the reminder, the Plaintiff did not comply by 7th February 2019 and the Court granted the Plaintiff 14 more days and confirmed hearing for 5th March 2019, having vacated the date of 4th March 2019. The Court made it clear that the times granted would not be extended.
7. Come 5th March 2019, the Plaintiff again had not complied and Mr. Muchiri who appears for the Defendant asked that the suit be dismissed in accordance with Order 12 Rule 3 of the Civil Procedure Rules. However, and graciously, Mr. Muchiri was willing to accommodate the Plaintiff by another 30 days but on condition that an “unless order” be made. It needs to be noted that Mr. Muchiri was most accommodative as counsel for the Plaintiff was not even present in Court.
8. So, the Court made the following order:-

“The Plaintiff is granted the last opportunity to comply with Court’s Order of 7.2.2019, this shall be done within 30 days failing which the suit shall stand dismissed. Mention on 10th May 2019. This order and a hearing notice to be served on Plaintiff’s counsel”.

9. Promptly on the same day counsel Muchiri, through e-mail, informed counsel Mwenesi of what had transpired in Court on that day and orders made.

10. Again 30 days lapsed and still no compliance.

11. It is not until 6th June 2019 that the Plaintiff filed the witness statement of Captain Musa Hassan Bulhan. But first, Counsel Mwenesi apologized for not attending Court on 5th March 2019 blaming it on his overcrowded diary. Hardly a good reason for not even sending another counsel to inform Court of his predicament.

12. On non-compliance, he states that his client’s witness Captain Bulhan has been out of the country for business engagements.

13. This Court has considered the history of this matter and the submissions made by counsel and authorities cited to Court. There is no doubt whatsoever that the Plaintiff’s conduct of its own case has been less than vigilant. The Plaintiff has time and time again failed to keep deadlines given by Court.

14. Order 11 Rule 7(3) of the Civil Procedure Rules have been cited to the Court. The provisions reads:-

“Any party or his advocate who wilfully fails or omits to comply with the provisions of this Order shall be deemed to have violated the overriding objective as stipulated in Section 1A and 1B of the Act and the court may order costs against the defaulting party unless for reasons to be recorded, the court orders otherwise”.

15. A persistent failure by a party to comply with pre-trials without good reason amounts to willful failure or omission. It cannot be good reason that the Plaintiff’s witness has been unable over the many years to prepare its witness statement and bundle of documents. There has been willful omission on the part of the Plaintiff to comply and this Court may have good reason to disallow the application.

16. Yet because the witness statement is now ready (albeit without some documents) and the Defendants does not allege that non-compliance upto now handicaps its defence, the Court once more accommodates the Plaintiff. This Court does so only because substantive justice is better served when matters are determined on merit.

17. That said this is an old matter and must be disposed of without further delay and this Court shall at the end of this Ruling be giving a priority date for hearing.

18. I know that the Plaintiff did not seek reinstatement of this suit which stood automatically dismissed on or about 4th March 2019 and so the argument by the Defendant that this Court cannot grant an order which is not sought is with merit. However, to grant the extension sought by Applicant could well mean a revival of the suit. On this occasion, and again for the sake of a merit based determination of the suit, this Court overlooks that infraction by the Applicant.

19. But in granting this further accommodation to Plaintiff, the Defendant must have some compensation in costs. Indeed, Order 11 Rule 7(3) of the Civil Procedure Rules empowers the Court to order costs against a party who violates the overriding objective stipulated in Sections 1A and B of the Act.

20. The application dated 6th June 2019 is allowed as follows:-

a) The suit is hereby reinstated.

b) The Plaintiff to file and serve its witnesses statements and Bundle of documents within 14 days hereof.

c) The Plaintiff to pay Kshs.30,000/= (thirty thousand) to the Defendant within 14 days hereof.

d) Should the Plaintiff default in orders (b) and (c) above, this suit stands dismissed without need for a further Court order.

e) The Court shall proceed to give a hearing date.

Dated, Signed and Delivered in Court at Nairobi this 21st Day of February 2020

F. TUIYOTT

JUDGE

PRESENT:

Muchiri for Defendant

Sakima for Mwenesi for Plaintiff

Court Assistant: Nixon