



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NUMBER 482 OF 2008

ANNE NANYU KILELE.....PLAINTIFF

VERSUS

STINGRAY LIMITED.....1ST DEFENDANT

KIRIT KUMAR NATUBHAI PATEL..... 2ND DEFENDANT

ANJANA KIRIT KUMAR PATEL.....3RD DEFENDANT

THE STATUTORY MANAGER.....4TH DEFENDANT

RULING

1. Prior to the filing of the Notice of Motion dated 24th May 2017, the last Court attendance in this matter was on 30th September 2014. The 1st, 3rd and 4th Defendants have now moved the Court in that motion, brought under the provisions of Order 17 of the Civil Procedure Rules, for an order that the Plaintiff's suit be dismissed for Want of Prosecution.

2. On that last attendance, the Plaintiff's Counsel sought an adjournment on the grounds that the 2nd and 3rd Defendants had passed on (although it would seem that it is only the 2nd Defendant who is deceased) and that she needed to file a relevant application for substitution.

3. After hearing objections from the Defence, Hon. Gikonyo J ruled:-

"I reluctantly adjourn case. However, I think the plaintiff has not been diligent enough in pursuing this case. For that reason, I will order that the plaintiff still pay today's costs to the Defendants including witnesses expenses, if any, to be agreed or taxed. He should also pay court adjournment fees. All these costs shall be paid before action is taken in this case. No date should be assigned to this matter unless and until the costs ordered herein have been paid."

4. In an Affidavit sworn on 24th May 2017, in support of the motion, Jane Githinji, Counsel for the 1st, 2nd, 3rd and 4th Defendants informs Court that the 2nd Defendant is deceased while the 3rd Defendant has relocated from Kenya.

5. The Plaintiff chose to reply through her Counsel Wanja Wambugu who swore an Affidavit on 14th July 2017. The plaintiff, through Counsel, blames the delay in prosecution of the matter on the failure of the Defendants to substitute the 2nd Defendant with his personal representative.

6. Order 17 Rule 2 of the Civil Procedure Rules reads:

(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 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.

7. It is common ground that more than one year has lapsed (prior to the filing of the motion for dismissal) since an Application has been made or a step has been taken by either side in this matter. Indeed there has been a lull for about 31 months.

8. On my reading of the response by the plaintiff's Counsel, and her submissions, this Court has no doubt that the delay is not excusable. In the replying affidavit, the plaintiff blames the Defendant for failing to substitute the now Deceased 2nd Defendant. There is then a shift in position in the submissions in which she says;

“Defendants.....caused the delay in that they have not computed the costs neither have they been assessed and if they had, the plaintiffs could have duly paid the same.”

9. This shifting of position is by itself a demonstration that the plaintiff does not have a good explanation for the indolence in prosecuting this old matter (filed in the year 2008). When the Plaintiff's Counsel addressed Court on 30th September 2014, it was clear to the plaintiff that prosecution of her claim would not be at the mercy of the Defendants. In seeking substitution of the Deceased Defendant, Counsel remarked;

“Order 24 Rule 4 is clear. We cannot wait until they take out letters. We are willing to act if they fail to act. We shall apply for substitution.”.

10. As to the failure to pay costs, the Plaintiff has not shown that she took steps to bespeak the quantum of costs so as to settle them. If there was delay on the part of the Defendants (which has not been demonstrated) then a diligent Plaintiff would have sought the intervention of the Court.

11. Up to there, it is evident that the delay was both prolonged (31 months) and without excuse. Up to there, the application for dismissal would be deserved.

12. However, an order for Dismissal of a suit is invariably a drastic one and the Court should be satisfied that there can be no reason for the indolent party to deserve a further chance to advance his/her case.

13. The history of the matter shows that on 10th July 2012, the plaintiff was ready to proceed with the hearing but the court could not reach the matter.

14. On 19th December 2012, the plaintiff was again ready to proceed but the Defence sought an adjournment on account of death of a witness. This was to be later corrected as it was 2nd Defendant who had passed on.

15. The matter was again to suffer the fate of not being reached on 8th May 2013 notwithstanding that both sides appeared ready.

16. On 19th November 2013, the plaintiff was ready to proceed but the Defence sought an adjournment as Counsel Ondieki was indisposed. The next hearing was the 30th September 2014.

17. Prior to 30th September 2014, the Plaintiff actively sought to prosecute her claim. The record set out above shows the Plaintiff as a litigant keen to have her matter resolved. This is of course in contrast with the conduct after 30th September 2014. For this reason only the court would be willing to take a benign view of her conduct post 2014.

18. Yet before doing so it must be clear to the Court that the prolonged and inexcusable delay has not caused grave injustice to the Defendants.

19. The Defendants elected to have their application supported by an affidavit sworn by their counsel. It is not alleged that the delay affected the ability of the Defendants to mount their defence. It is not said that witnesses are unavailable for one reason or another or that something has hampered the ability of witnesses to recollect the events that constitute the dispute.

20. The Court exercises its discretion in favour of the Plaintiff because of her alertness pre 2014 and because the Defendants have not demonstrated prejudice that the delay has caused.

21. That said, the Plaintiff has failed to pay the costs ordered by Court on 30th September 2014 and so the court will allow this matter to survive the current application but on terms.

22. The Court makes the following final orders:-

i. The Notice of Motion of 24th May 2017 is dismissed with costs to the Defendants in any event.

ii. The costs of the just dismissed application and the costs ordered on 30th September 2014 to be agreed or taxed within 14 days hereof and to be paid within 7 days of agreement or taxation.

iii. The Plaintiff to take steps towards prosecution of this suit within 30 days hereof

iv. In default of the conditions set out in (ii) and (iii) above, the suit shall stand dismissed without need for any formal motions.

Dated, Signed and Delivered in Court at Nairobi this 8th day of March 2018.

F. TUIYOTT

JUDGE

PRESENT:

Wambugu for Plaintiff

N/a for Defendant

Nixion- Court clerk