



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 26 OF 2014

TRUE NORTH CONSTRUCTION CO. LTD.....]1ST PLAINTIFF

BENSON MURAMBA SIFUMA.....]2ND PLAINTIFF

DAUDI KIPTUGEN.....]3RD PLAINTIFF

DOROTHY JEMUTAI YATOR.....]4TH PLAINTIFF

VERSUS

ECO BANK KENYA LIMITED.....] 1ST DEFENDANT

GITHUI MURIITHI PETER.....]2ND DEFENDANT

RULING

1. This ruling relates to Notice of Motion application dated 3rd May, 2018 brought under the provisions of Order 17 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act, and all enabling provisions of the law.

2. The 1st Defendant (herein “the Applicant”) is seeking for orders as herebelow:

i. That the Plaintiffs suit against the 1st Defendant be dismissed for want of prosecution.

ii. That the costs of this Application and the suit be borne by the Plaintiffs.

3. The Application is supported by the grounds on the face of it and the Affidavit dated 3rd May, 2018 sworn by Stephen K. Bundotich who has conduct of this matter on behalf of the 1st defendant. He deposed that the Plaintiff(s) (herein “the Respondents”) have not taken steps to prosecute the suit instituted vide a joint plaint dated 23rd January, 2014 and amended plaint on 29th January, 2014.

4. That subsequent to filing the suit, the Plaintiffs filed an Application dated 14th March, 2014 seeking to have the Court set aside, vary or vacate the order made on the 5th day of March, 2014 which had lifted the interim order of injunction issued. The Application was heard inter-parties and dismissed with costs to the Applicant on 31st October, 2014.

5. That it has been over four (4) years since the matter was last in Court. Therefore, the suit is intended to frustrate the Applicant from exercising its statutory power of sale. In that regard, it is in the interest of justice that the suit against the Applicant be dismissed for want of prosecution.

6. The Application was served on the Law firm of M/s Anne Were Maloba & Co. Advocates, who according to Affidavit of Service, filed by Benson Mumbo Masaka accepted service by retaining a copy after acknowledging receipt by stamping and signing the deponents copy. However, on the date of hearing of the matter on 18th June, 2018, the Plaintiffs/Respondents were not before the Court. The Application was therefore heard ex-parte.

7. I have considered the history of the matter and the Court record and the following is revealed. The suit was commenced vide a plaintiff dated 23rd January, 2014 and filed in Court on the same date. It was filed alongside a Notice of Motion Application seeking for an injunction order to restrain the Defendants from disposing off the Plaintiffs’ suit property described in the Plaint. The Application was heard ex-parte in

the first instance and interim orders granted.

8. On 29th January 2013, the Plaintiffs amended their Complaint and on 30th January 2014, the firm M/S Kale Maina & Bundotich Advocates, on behalf of the Applicant filed a Notice of Appointment. The Summons to enter appearance were signed on 21st February, 2014. On 28th February 2014 a Chamber Summons Application was filed by the firm of M/S Dulo & Co. Advocates, as appearing for 1st defendants/Applicants seeking that the suit be stayed pending the referral of the matter to Arbitration, and on 17th March 2014, the firm of M/S Amolo Kibanya Advocates filed a Notice of Change of Advocates coming on record for the Plaintiffs/Respondents. On the same date, they filed a Notice of Motion Application seeking to set aside, vary or vacate an order made on 5th March, 2014 which lifted the interim order of injunction. In the meantime, the Applicant filed its Statement of Defence on 24th March, 2014.

9. On 27th March, 2014, the Court gave an order reinstating the interim temporary injunction. On 26th May 2014, the Plaintiffs changed their Legal Counsel, whereupon the firm of M/S Anne Were Maloba filed a Notice of Change of Advocates, taking over the matter from the firm of M/S Amolo Kibanya Advocates. On 31st October, 2014, the Court delivered a ruling on the Chamber Summons Application dated 19th February 2014, and a Notice of Motion dated 20th March 2014 and declined to set aside its orders made on 5th March 2014, thus dismissing the Application dated 14th March 2014 with costs in favour of the Applicant. Thereafter, no other Application was filed in the matter and/or any action taken from then until the 7th May 2018 when this Application under consideration was filed.

10. I note that this Application is premised under Order 17 Rule 3 of the Civil Procedure Rules 2010. These provisions stipulate that any party to the suit may apply for dismissal as provided in sub-rule 1. Sub rule 1 provides that “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 should not be dismissed, and if cause is not shown to its satisfaction, the Court may dismiss the suit”.

11. As stated herein, the matter was last in Court on 31st October 2014. That is a period of three and a half (3 ½) years ago. This is way out of the twelve (12) months period provided for under order 17 Rule 2 of the Civil Procedure Act. It does occur that the Plaintiff lost interest in the matter after the Application for an injunction Order was dismissed. It is also clear that they have not appeared to defend this Application for dismissal of the suit. As the old adage states, “justice delayed is justice denied.” In the circumstances, I find that the application herein has merit and I allow it as prayed.

12. It is so ordered.

Dated, delivered and signed on this 20th day of June, 2018 in Open Court, Nairobi.

G. L. NZIOKA

JUDGE

In the presence of:

No appearance for the 1st Plaintiff/Respondent

No appearance for the 2nd Plaintiff/Respondent

No appearance for the 3rd Plaintiff/Respondent

No appearance for the 4th Plaintiff/Respondent

Mr. Bundotich for the 1st Defendant/Applicant

No appearance for the 2nd Defendant/Applicant

Fred: Court Assistance