



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 501 OF 2013

MANYOTA LIMITED.....PLAINTIFF

-VERSUS-

PROTECTIVE CUSTODY LIMITED.....1ST DEFENDANT

JOASH SHIRANDULA.....2ND DEFENDANT

RULING

1. This Ruling seeks to determine the application dated 27/11/2017 by the Defendants (the “**Applicant**”) brought under the provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules seeking to have the suit instituted by the Plaintiff dismissed for want of prosecution and that costs of the application and the suit be borne by the Plaintiff. The Application is supported by the Affidavit of even date sworn by the 2nd Defendant.

2. The Application is premised on the grounds that it is more than a year since the last time the matter was in court and that the plaintiff has taken no step to set down the suit for hearing. It is deponed that the defendants have been keen to defend the suit and have already complied with the pre-trial requirements. The Defendants also deponed that on 12th January, 2016, they invited the Plaintiff’s Advocates to send a representative at the registry to fix a hearing date but the Plaintiff failed to attend and an ex parte date was taken for 22nd February, 2016 on which date the Plaintiff failed to appear in court. That the parties were directed to fix a date at the registry but up to date the Plaintiff has never taken any step to set the matter down for hearing.

3. The Plaintiff filed a Replying Affidavit dated 25th April, 2018 sworn by JAMES NJUKIA IHURA. In the said affidavit he blames their previous advocates Mbichire & Co. Advocates for failing to update them on the happenings of the matter since August, 2017 when they were informed that the advocates were waiting for the court diary to be opened to enable them fix a hearing date. That they learnt of the present application on 13th April, 2018 and immediately decided to enlist the services of the current advocate in place of the previous one. It is further deponed that the Plaintiff is very keen to have the suit determined and is willing to abide by any directions the court may give regarding timelines of hearing the matter.

4. When the Application came up for hearing, the parties in their submissions, expounded on the averments contained in their respective Affidavits, which I have considered. Dismissal of Suits for want of prosecution is governed by **Order 17 Rule 2** of the Civil Procedure Rules. Sub rule 3 of Order 17 Rule 2 provides that “*Any party to the suit may apply for its dismissal as provided in sub-rule 1.*”

And 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, may dismiss the suit.*”

5. The last time this matter was in court was on 22nd February, 2016 for a mention. Since then a period of 22 months has lapsed with no step taken to prosecute the suit. A suit ought to be prosecuted while facts and evidence are still fresh in the memories of the witnesses.

6. The test for dismissal of a suit for want of prosecution is stated in the case of **Ivita -v- Kyumbu (1984) KLR 441**. The test was expressed as follows:

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.”

7. On whether the delay was prolonged and inexcusable and whether justice can still be done despite the delay, I am of the considered view that justice can still be done. In the premises, I decline to grant the application and hereby dismiss the same. However, I note that it is an old matter and the same is ready for hearing, the parties having complied with Order 11. I further order that the matter be prosecuted within 120 days failing which the same shall stand dismissed.

No orders as to costs.

Dated, Signed and Delivered at Nairobi this 14th day of June 2018

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L. NJUGUNA

JUDGE

In the presence of:

.....For the Plaintiff

.....For the Defendant