



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO 73 OF 2014

B & K DESIGN LIMITED.....PLAINTIFF

VERSUS

EMMACULATE MWAURA NJERI.....1ST DEFENDANT

CHASE BANK (KENYA) LIMITED.....2ND DEFENDANT

RULING

1. The 2nd Defendant/Applicant **CHASE BANK KENYA LIMITED** through an application dated 7th June 2018 filed 12th June 2018 seeks for the following orders:-

1. THAT the Plaintiff suit against the 2nd Defendant herein be dismissed for want of prosecution.

2. THAT the costs of this application and of the suit be borne by the Plaintiff.

2. The application is based on the following grounds on the face of the application:-

a. THAT since the Defendants entered appearance and filed their Defences on 23rd May 2016 and 10th December 2015 respectively the Plaintiff has not taken any steps to prosecute the suit against the Defendants.

b. THAT the continuing inaction and undue delay on the part of the Plaintiff is prejudicial to the 2nd Defendants and in contravention with the provisions of Order 17 Rule 2(1) of the Revised Civil Procedure Rules 2010 as contained in the Civil Procedure Act (Cap 21 of the Laws of Kenya).

c. THAT it will be in the interests of justice and principles of equity to have this suit against the 2nd Defendants dismissed by this Honourable Court.

3. The application is further supported by an affidavit deposed upon by Eunice Mwangi, an Advocate of the Applicant High Court of Kenya, which has the conduct of this matter on behalf of the 2nd Defendant/Applicant, in which it is averred; that this suit was commenced on 1/9/2015; that since defendants entered appearance and filed their defences as of 23rd May 2015 and 10th December 2015 respectively, the plaintiff has not taken any steps to prosecute this suit against the defendants; that it is over 24 months without action and it is therefore clear that the plaintiff has no interest in and has no intention of prosecuting the suit, and that it is fair and just that the suit is dismissed for want of prosecution.

4. The application is opposed. The Plaintiff/Respondent relies on replying affidavit dated 24th July 2018 drawn by Jamlick Simiyu, a director of the plaintiff company who avers; that the plaintiff Advocate through a letter dated 30th March 2016, sent their draft list of issues to both the 1st and 2nd defendants who are to respond to the same (*annextures JB-1 and JB-2*); that it is shown the plaintiff has intention to pursue the claim against the 2nd defendant; that the suit is ready and plaintiff pray for opportunity to prosecute the case to its logical conclusion; that the 2nd defendant was placed under Receivership on 7th April 2016 and can't be said they suffered any prejudice by the suit being heard as the receivership period allowed them to restructure their bank.

5. At the hearing of the application Miss Mwangi, learned Advocate, appeared for the 2nd Applicant/Defendant while Miss Maina, learned Advocate, appeared for the Plaintiff/Respondent. Both counsel relied on the contents of the affidavits in support of their rival position, urging the court to grant the prayers sought by their respective clients.

6. **Order 17 Rule 2(1) of the Civil Procedure Rules**, relied upon by the Applicant in support of its application dated 7th June 2018 provides:-

"(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 should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."

Under the aforesaid Rule, in any suit where no step has been taken by either party for one year, it is the court which may give notice in writing to the parties to show cause why the suit should not be dismissed and only if no cause is shown the court may dismiss the suit. However the party to the suit may apply for dismissal of the suit under order 17 Rule 1(3) of Civil Procedure Rules.

7. In the instant case the suit was last before court on 27th July 2015 when court allowed plaintiff's application to enjoin the 2nd defendant as a party. That since 27th July 2015 a period of over 34 months no action has been taken in this matter. The plaintiff has clearly not shown any interest to prosecute this matter and has done nothing to have his suit proceed to hearing. The drafting list of issues and forwarding the same to the defendants on 30th March 2016 do not demonstrate interest in this matter as there was no follow up nor were they filed in court file.

8. In view of the above I find that the 2nd Defendant/Applicant has demonstrated that since the close of the pleadings, it is over 1 year and the plaintiff has not taken any steps to set this suit down for hearing and indeed I find no party has taken steps to have the suit set down for hearing. I accordingly find the 2nd Defendant/Applicant application meritorious and allow the same.

9. The suit against the 2nd defendant is accordingly dismissed for want of prosecution. Costs to the 2nd Defendant/Applicant.

Dated, signed and delivered at Nairobi this 18th day of October, 2018.

.....

J .A. MAKAU

JUDGE