



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 298 OF 2010

SWIFT TRUCKERS LIMITED (IN RECEIVERSHIP).....PLAINTIFF

- VERSUS -

DAMCO GLOBAL LOGISTICS K LIMITED.....DEFENDANT

RULING

1. *Swift Truckers Limited*, the plaintiff, filed this suit against *Damco Global Logistic Kenya Limited*, the defendant, on **11th May 2010**, eight years ago. Pleadings closed in **June 2010**.

2. On **4th May, 2012** both the plaintiff and defendant's learned counsel informed the court that parties had complied with pre-trial and the case was fixed for trial on **19th June 2012**. On **19th June 2012** the plaintiff sought and obtained an adjournment. This matter was variously adjourned for hearing between **11th July 2012** and **7th May 2014**.

3. When the matter was fixed for mention on **26th October, 2015** this is what the learned counsel for the plaintiff informed the court:

“we will fix a date for case management after we comply.”

The court made the following order on that date:

“The parties will fix the case for case management when they are ready.”

4. That was where this matter remained until the defendant filed its Notice of Motion dated **31st July 2018** seeking for the dismissal of this case for want of prosecution. The defendant in its supporting affidavit relies on the delays set out here above.

5. The application was opposed by the plaintiff. The plaintiff set out action taken between the time of filing suit and **24th September 2015** which actions related to preparing for trial and attempts made to fix the case for trial.

6. In respect to the step taken in this matter, that is after **26th October, 2015**, the plaintiff stated that on the court advising counsels to file documents which complied with the practice direction, the plaintiff learned counsel, after filing list of witness statements on **23rd August 2016** wrote a letter to defendant's learned counsel on **9th February, 2017** requesting of approval of issues.

7. The plaintiff by its replying affidavit finally deponed that it is desirous to have this case expedited and that it had not lost interest in the same.

ANALYSIS AND FINDINGS

8. **Order 17 Rule 2(1) of the Civil Procedure Rules (the Rules)** provides:

“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.”

9. Rule 2 (3) of the Order 17 provides that any party may apply for dismissal of the suit as provided under Rule 2 (1).

10. The perimeters to be met for a suit to qualify for dismissal as provided under Rule 2 (1) of Order 17, of the Rules, is that there is no application or step not taken in a suit for one year, and where no cause is not shown to the satisfaction of the court.

11. The first perimeter is indeed met in this case. The suit was last in court on **26th October, 2015**. Since then no action or step was taken by the plaintiff for almost two years. An action or step in a suit is not letter writing, as the plaintiff stated in its replying affidavit. A step referred to in that Rule has received judicial interpretation in two cases. In the case **NEW KENYA CO-OPERATIVE CREMERIES LTD V CITY COUNCIL OF NAIROBI & 2 OTHERS [2012] e KLR Justice P. Nyamweya** held:

“The step envisaged in Civil Procedure Rules is a step taken on the record, as was held in VICTORY CONSTRUCTION V DUGGAL [1962] EA 697. The filing of the Notice of Withdrawal is clearly reflected on the court record having been entered on 30th June 2011, and the same was indeed filed on the same date. The said filing therefore suffices as a step for purpose of Order 17 Rule 2 of the Civil Procedure Rules.”

12. In the case **George Gatere Kibata vs George Kuria Mwaura & another [2017] eKLR** the court stated:

“The legal ramifications of the statutory threshold set out under Order 17 Rule 2 of the Civil Procedure Rules is that a suit qualifies to be dismissed for want of prosecution if no application has been made or step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit.”

13. The next perimeter to consider is whether the plaintiff has shown cause to the satisfaction of this court why no step has been taken in this suit.

14. The plaintiff stated that it filed its documents on **23rd August 2016**. On perusal of the court file I did find that indeed those documents were filed by the plaintiff. However, on filing them in **August, 2016**, the plaintiff failed to take any step in this matter. The period of no activity in this matter is a little shy of two years. The plaintiff did not at all explain the non activity of that period.

15. The plaintiff failed to take any step for more than one year and failed to show cause for that failure. The holding of **Lord Denning M.R.** in the case **FITZPATRICK V BATGER & CO. LTD [1967] 2 ALL ER 657** is as follows:

“...it is the duty of the plaintiff’s adviser to get on with the case. Public policy demands that the business of the court should be conducted with expedition.”

16. The above case emphasizes the responsibility of the plaintiff but more its adviser. It is the plaintiff who filed this case. The defendant does not have a counter claim. The responsibility was upon the plaintiff to initiate action, such as taking trial date, in this matter.

17. The plaintiff from **23rd August, 2016** went to sleep. I would then say that let the **‘sleeping dogs lie’**, borrowing the words of **Salmon LJ** in the case **Fitzpatrick (supra)**.

18. In conclusion therefore, I make the following orders:

a. This suit is hereby dismissed with costs to the defendant for want of prosecution.

b. The cost of the Notice of Motion dated 31st July 2018 are awarded to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of November, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant

MARY KASANGO

JUDGE