



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 3 OF 2010

FRANCIS OYATSI.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED.....DEFENDANT

RULING

1. The court record reveals that on 3rd September 2018, this court issued a notice directing the parties herein to show cause why the suit instituted by the plaintiff against the defendant on 7th January 2010 should not be dismissed for want of prosecution. It was alleged in the notice that since 6th July 2017, none of the parties had taken any steps towards prosecution of the suit.

2. In an affidavit sworn on 26th September 2018 by *Mr. Desterio Oyatsi*, learned counsel for the plaintiff, it was contended that the delay in prosecuting the case had been occasioned by the defendant as explained in the replying affidavit sworn in opposition to the motion filed by the defendant on 7th February 2017 seeking dismissal of the suit for want of prosecution; that this fact was admitted by the defendant and subsequently, a consent was recorded to remove the bottlenecks the defendant had placed which prevented the plaintiff from moving the matter forward.

3. Counsel further deposed that the court diary for 2018 for the civil registry closed in June 2018 before they could obtain a hearing date but that they are currently in the process of fixing a hearing date in the year 2019. For the reasons aforesaid, the plaintiff urged the court to save the suit from dismissal as contemplated in the notice to show cause.

4. When the notice to show cause came up for hearing on 9th October 2018, the defendant sought and obtained leave to file an affidavit in reply to *Mr. Oyatsi's* replying affidavit. On 24th October 2018, the defendant filed an affidavit sworn by *Mr. Mwarabu Fidelis Limo*, an advocate practicing in the firm of Ochieng, Onyango, Kibet and Ohaga which has the conduct of the suit on behalf of the defendant.

5. In the affidavit, learned counsel *Mr. Limo* invited the court to note that the plaintiff has not demonstrated any seriousness in facilitating prosecution of the suit since no evidence in the form of a letter to the deputy Registrar was annexed to the replying affidavit to prove that any attempt was made to secure a hearing date from 7th July 2017 to date and no invitation letter has been sent to the defendant inviting its advocates to fix a hearing date in 2019. Counsel further deposed that the delay in prosecuting the suit has caused the defendant untold financial loss and that if the suit is sustained, the defendant will be greatly prejudiced as it will not be able to secure the attendance of its witnesses who have since left its employment.

6. I have carefully considered the depositions in the affidavits filed herein both in support and in opposition to the notice to show cause. I have also perused the court record. I find that though the suit was filed on 7th January 2010, the plaintiff's claim that the defendant was largely to blame for the delay in prosecuting the suit is credible and probably true given the record of proceedings on 5th June 2017. The proceedings show that when the application dated 31st January 2017 which sought dismissal of the suit for want of prosecution came up for hearing, the defendant's counsel opted to withdraw the same after apparently admitting the plaintiff's claim in the replying affidavit that their failure to execute a consent meant to formalize the filing of the amended plaint was responsible for the delay in prosecuting the suit.

7. The court record also shows that following the withdrawal of the application, parties filed a consent dated 23rd June 2017 in which they agreed that the amended plaint filed on 16th October 2015 be deemed as duly filed. The said consent was adopted as an order of the court of 6th July 2017.

8. I wholly agree with the position taken by the defendant that though the plaintiff has made an attempt to explain why he did not fix the suit for hearing in the year 2018, no explanation has been given for failure to take any step to facilitate prosecution of the suit between 7th July 2017 and June 2018 when the court diary closed. The plaintiff has also not availed any evidence to prove that indeed any attempts were

made to fix the suit for hearing in the year 2018.

9. I am therefore not entirely satisfied that the plaintiff has been vigilant in this matter and that he was prevented by circumstances beyond his control from taking steps that would have progressed the hearing and disposal of the suit. However, given the nature of the suit and the fact that the plaintiff has demonstrated his interest in pursuing his claim by responding to the notice to show cause and considering also the plaintiff's claim that he is currently taking steps to fix a hearing date in the year 2019, I am persuaded to find that it would be in the interest of justice to give the plaintiff an opportunity to prosecute his suit so that it can be heard and determined on merit.

10. In view of the foregoing and considering the age of the case and having weighed the competing interests of the parties as stated in the affidavits sworn on their behalf, I decline to dismiss the suit on terms that the plaintiff shall ensure that it is prosecuted within the next six months in default of which it shall stand dismissed with costs to the defendant.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 23rd day of November, 2018.

C. W. GITHUA

JUDGE

In the presence of:

No appearance for the plaintiff

No appearance for the defendant

Mr. Fidel: Court Assistant