



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 2 OF 2014

SIMONA RIZZATO.....PLAINTIFF

VERSUS

KENYA WAY LIMITED.....1ST RESPONDENT

FRANCESCA GOBESSO.....2ND RESPONDENT

(AS CONSOLIDATED WITH MALINDI CMCC NO. 7 OF 2014)

KENYA WAY LIMITED PLAINTIFF

VERSUS

SIMONA RIZZATO 1ST DEFENDANT

FRANCO TATTONI 2ND DEFENDANT

FRANCESCA GOBESSO 3RD DEFENDANT

RULING

(Notice of Motion Application dated 12th April, 2017)

1. Francesca Gobesso, the 2nd Defendant/Applicant is through the notice of motion application dated 12th April, 2017, filed in court on the same date, seeking a dismissal of the Plaintiff's suit with costs. The application is brought under Article 159 (2) (d) of the Constitution; sections 1A and 3A of the Civil Procedure Act; and Order 17 Rule 2(3) and Order 51 Rule 1 of the Civil Procedure Rules.
2. Simon Rizatto, the Plaintiff/1st Respondent and Kenya Way Ltd, the 1st Defendant/2nd Respondent are opposed to the application.
3. The foundation of the application, which is supported by the grounds on its face and the supporting affidavit of the Applicant, is that it is over one year since the Plaintiff took any positive action towards the finalization of the matter. According to the Applicant, the 1st Respondent's last action in the matter was on 13th April, 2016 when the notice of motion application dated 18th March, 2016 was allowed. It is the Applicant's averment that the 1st Respondent's inaction is prejudicial to her as she is not only subjected to

untold anxiety but has to deal with a high legal fee retainer.

4. The 1st Respondent opposed the application through a replying affidavit sworn on 25th April, 2017 whereas the 2nd Respondent opposed the application through Grounds of Opposition filed on 27th April, 2017.

5. The 1st Respondent's replying affidavit, whose contents were never rebutted by way of a supplementary affidavit, narrates the history of the matter. The averment of the 1st Respondent is that the application dated 30th March, 2016 for consolidation of this matter (Malindi HCCC. No. 2 of 2014) with Malindi CMCC No. 7 of 2014 was allowed by this court on 13th April, 2016. The Applicant was, however, aggrieved by the said decision and moved to the Court of Appeal to challenge the same. It is the 1st Respondent's view that proceeding with this matter in light of the existence of an appeal challenging the decision to consolidate the matters would amount to an abuse of the court process.

6. The 1st Respondent states that a certificate of delay of proceedings was issued on 24th June, 2016.

7. The 1st Respondent's take on the application is that the same is a tactic by the Applicant to deny justice to the 1st Respondent as in any case there is no inordinate delay.

8. The 2nd Respondent's position is that due to the Applicant's pending appeal in the Court of Appeal, the application herein is premature, misconceived, mischievous, frivolous, and vexatious and is brought in bad faith.

9. The advocates for the parties, in their submissions, reiterated the contents of the pleadings in respect to the matter. Additionally, Mr. Nyasimi for the 1st Respondent submitted that by the time the application was filed one year had not lapsed since action was last taken by his client.

10. Article 259 provides how the Constitution is to be construed. In regard to what the term year means, Article 259 (5) (c) states: -

“In calculating time between two events for any purpose under the Constitution, if the time is expressed –

(a)

(b)

(c) as years, the period of time ends at the beginning of the date of the relevant year that corresponds to the date on which the period began.”

11. In reference to this matter, this means that the period of one year started running from 13th April, 2016, when the decision to consolidate this matter and CMCC No. 7 of 2014 was made, and ended on 13th April, 2017. The instant application was filed on 12th April, 2017 which, according to the Constitution, came a day too early. The 1st Respondent is therefore correct that this application is bad for failing to comply with Order 17 Rule 2 (3) of the Civil Procedure Rules. The application is one unknown to the law as the provision under which it is brought talks of action not being taken within one year. The application should be dismissed for that reason alone.

12. Even assuming that the instant application is valid, does it have merit? Order 17 Rule 2 (1) states 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.”

13. Sub-rule 3 opens the door for any party to a case to move the court for dismissal of a suit pursuant to sub-rule 1.

14. In order for a suit not to be dismissed under the provision in question, the respondent must show cause to the satisfaction of the court why the suit should not be dismissed. The question therefore is whether the respondents herein have given satisfactory reasons as to why the Applicant's application should not succeed.

15. The respondents have stated that this matter is currently before another forum within the Judiciary. The Applicant does not dispute this fact. Although no action has been taken in this matter since 13th April, 2016, the truth of the matter is that the parties are litigating over a ruling of this court in the Court of Appeal. The respondents have told the court that it is unnecessary to take action since the success of the Applicant in the Court of Appeal would result in the disengagement of the matters already consolidated by this court.

16. I agree with the respondents that in view of the nature of the appeal filed by the Applicant, it was indeed unnecessary to take any steps in this matter. The Applicant having filed the appeal was aware of its existence. In my view, this application was not necessary as it is one of those applications that end up eating into judicial time that could have been taken up by more deserving matters.

17. The outcome is that this application has no merit and the same is dismissed. Each respondent (the Plaintiff and the 1st Defendant) will get costs of the application from the Applicant/2nd Defendant.

Dated, signed and delivered at Malindi this 29th day of June, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT