



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 160 OF 2014

KENAFRIC DIARIES MANUFACTURERS LIMITED.....PLAINTIFF

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....DEFENDANT

RULING

[1] This Ruling is in respect of the Defendant's Notice of Motion dated **14 December 2016** which was filed herein on **16 December 2016**. That application was brought pursuant to **Sections 3A and 63(e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 17 Rule 2 as well as Order 51 Rule 1 of the Civil Procedure Rules, 2010** for orders that the Court be pleased to dismiss the suit against the Defendant for want of prosecution; and that the Plaintiff be ordered to bear the costs of the suit as well as the application. It was further prayed that the Court be pleased to issue any other or further orders as it may deem apt in the circumstances.

[2] The application was premised on the ground that more than one year has lapsed since the last step was taken in the matter; and that the Plaintiff had made no efforts to have it set down for hearing; an indication that the Plaintiff is disinterested in pursuing this suit. The Defendant accordingly averred that it is in the interests of justice that the orders sought be granted to bring this matter to closure. These grounds were explicated in the affidavit filed in support of the application, sworn on **14 December 2016** by **Wilfred Akhonya Mutubwa, Advocate**.

[3] In response to the application, the Plaintiff relied on the affidavit of **Amit Patel**, sworn on **7 February 2017**. The Plaintiff averred that the application has been brought in bad faith; and that the Defendant failed to make a full and honest disclosure to the effect that the Defendant had since paid a sum of **Kshs. 52,000,000** in partial settlement of the Plaintiff's claim; and that what is outstanding is a balance of **Kshs. 7,643,000.05** together with interest and costs. It was further deposed by the Plaintiff that its Advocates had, vide a letter dated **21 October 2015** (marked **Exhibit "AP-1"** to the Replying Affidavit) invited the Advocates for the Defendant to jointly complete the pre-trial documents in readiness for Case Management Conference; but that the Defence Counsel ignored the invitation and has not acted thereon to date. The Applicant, consequently urged for the dismissal of the application; and for the balance of the Plaintiff's claim to be proceeded with to conclusion.

[4] Counsel for the parties urged their respective positions before me, in which the Defence Counsel, **Mr.**

Lubulellah made reference to their letter to the Plaintiff's Advocates dated **13 October 2015** by which it gave notice that if there was no response from them, the Defendant would proceed to file the instant application for the dismissal of the suit for want of prosecution. Counsel further urged the Court to note and find that no evidence had been given of the alleged part payment by the Defendant of the sum claimed by the Plaintiff. **Mr. Lubulellah** further submitted that the Replying Affidavit should be disregarded for the reason that it was undated.

[5] The brief background to the application is that, by a Plaintiff **dated 22 April 2014**, the Plaintiff prayed for judgment against the Defendant for:

[a] Kshs. 59,643,600.05;

[b] Kshs. 14,368,342.00 in interest from April 2013 to April 2014;

[c] Interest on [a] and [b] at Court Rates

[d] Any other relief that the Court deems expedient.

The claim was in respect of goods sold and delivered by the Plaintiff to the Defendant in the years **2012** and **2013**; and when the Defendant filed a Memorandum of Appearance on **13 May 2014**, thereby evincing its intention to defend the suit, the Plaintiff filed an application, by way of Notice of Motion seeking summary judgment. That application was determined on **19 January 2015** after consideration on the merits; whereupon the same was dismissed and the parties directed to "**...take such necessary steps as soon as is practically possible with a view of having this matter heard and determined at full trial without any further delay...**" That order marked the last step that was taken herein prior to the filing of the instant application. Accordingly, the issue for my determination is whether this is a suit that ought to be dismissed for want of prosecution as has been sought by the Defendant.

[6] **Order 17 Rules 2 of the Civil Procedure Rules**, pursuant to which this application was filed, provides that:

(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.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

[7] It is therefore manifest that a period of more than one year had elapsed between **19 January 2015** when the Court's Ruling was delivered and **16 December 2016** when the instant application was filed. Accordingly, for purposes of **Order 17 Rule 2 of the Civil Procedure Rules**, the Applicant has demonstrated one of the two ingredients set out therein, namely that there has been **inordinate delay** in prosecuting the suit. That being the case, the next question to pose is whether **the delay is excusable**. The test, in such circumstances was well explained in the case of **Ivita vs. Kyumbu [1975] eKLR** thus:

"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 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 however 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

[8] What can be gleaned from the Replying Affidavit is that the dispute has largely been settled; and that the Plaintiff was waiting for a response to its letter dated **21 October 2015** before taking steps to comply with the **Case Management Practice Directions, as per Gazette Notice No. 6807 of 2014**. The allegations made by the Plaintiff in the Replying Affidavit have not been refuted; and although Counsel for the Defendant argued that there was no proof of partial settlement of the sum claimed herein, it was not refuted that a substantial portion thereof has been paid by the Defendant. Accordingly, I am persuaded that, in the circumstances, it cannot be said that the inaction between **January 2015** and **December 2016** is inexcusable; or even that either party stand to suffer some prejudice for which an award of costs may not be sufficient recompense. Moreover, there appears to be no dispute that the Defendant received the Plaintiff's letter dated **21 October, 2015**, for it bears the stamp of the Advocates on record for the Defendant to that effect.

[9] In sum, therefore, I am satisfied that, although a period of over one year has elapsed since the last step was taken by the parties herein, the delay is not inexcusable. Accordingly, I would dismiss the Defendant's application dated **14 December 2016** with an order that the costs thereof be borne by the Plaintiff.

[9] Last but not least, it bears stressing that it is the duty of the Plaintiff to bring his suit to early hearing, notwithstanding any tardiness on the part of the Defence. This point was made in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** thus:

"It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty by saying that the defendant consented to the position..."(per Newbold,P)

Accordingly, it is hereby directed that the Plaintiff proceeds to finalize the pre-trial procedures, and to thereafter fix the case for Case Management Conference for appropriate directions in respect of the disputed aspects of the Plaintiff's claim.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF AUGUST 2017

OLGA SEWE

JUDGE