



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 261 OF 2012

INTEX CONSTRUCTION COMPANY.....PLAINTIFF

VERSUS

EXPRESS (K) LIMITED.....DEFENDANT

AND

AFRICAN LINE TERMINAL & LOGISTICS LIMITED.....3RD PARTY

RULING

1. On 18th April 2017 the defendant filed an application to dismiss the suit for want of prosecution.
2. Thereafter, the Third Party, **AFRICAN LINE TERMINAL & LOGISTICS LIMITED**, also filed an application for the dismissal of the suit for want of prosecution.
3. This Ruling is in respect of the two applications.
4. It is common ground that the suit was filed in court on 3rd May 2012. The plaintiff's claim was in respect of spares valued at US \$ 21,595. The said spares were a part of the consignment which the defendant cleared through customs, on behalf of the plaintiff.
5. However, whilst the defendant had cleared six packages, the plaintiff received only four packages.
6. After being served with the plaint, the defendant entered appearance on 28th May 2012, and thereafter filed its Defence on 13th June 2012.
7. The defendant denied the existence of any privity of contract between it and the plaintiff.
8. The defendant added, that if two wooden boxes were not delivered to the plaintiff, the blame should rest on **AFRICAN LINE TERMINAL & LOGISTICS LIMITED**.
9. In its Reply to Defence, the plaintiff stated that the African Line Terminal & Logistics Limited was a stranger to the plaintiff. As far as the plaintiff was concerned, the responsibility of delivering the goods lay with the defendant at all times.
10. On 24th October 2013 the defendant sought leave of the court, to issue a Third Party Notice. When

the defendant's application came up for hearing on 3rd December 2013, the plaintiff did not oppose it, and the court granted the requisite leave.

11. After being served with the Third Party Notice, the Third Party entered appearance on 30th January 2014. Thereafter, the Third Party filed its Defence on 10th February 2014.

12. According to the Court records, the plaintiff attended at the Court Registry on 28th February 2014, where it was assigned the date of 16th May 2014, for the purposes of the pre-trial conference.

13. However, as the plaintiff had not served appropriate notices on the other parties, the pre-trial conference was adjourned to 26th June 2014.

14. On 26th June 2014, the plaintiff informed the court that it had already complied with all pre-trial procedures. However, as the defendant had not yet complied, it asked the court for 30 more days.

15. The court granted the defendant's request for more time and the court also allowed the Third Party 30 days to comply with the pre-trial procedures.

16. On 24th July 2014, when the matter was next in court, it transpired that the parties had not yet agreed on the Issues which they would be asking the trial court to determine.

17. Taking into account the Court Recess which traditionally runs from 1st August of every calendar year, the court then fixed the 10th of October 2014, as the date for the pre-trial conference.

18. Regrettably, the court did not sit on 10th October 2014, as the Judges were away on other official duties.

19. Since the 10th of October 2014, the plaintiff does not appear to have taken any steps to prosecute the suit. And it was for that reason that the defendant and the Third party have asked the court to dismiss the suit for want of prosecution.

20. The defendant pointed out that the alleged cause of action arose more than five years ago.

21. The defendant also said that its employees tend to leave and also that the memories of witnesses tend to fade. In the circumstances, the defendant reasoned that the pendency of the suit was prejudicial to it, and was causing it unnecessary anxiety.

22. Meanwhile, the Third party described the plaintiff's conduct as being injudicious and a clear manifestation that the plaintiff was not interested in prosecuting the case.

23. The Third party added that it cannot trace its intended witnesses.

24. Therefore, both applicants asked the court to dismiss the suit for want of prosecution.

25. When canvassing the application, Miss Kemunto, the learned advocate for the defendant, submitted that even assuming that the plaintiff's witnesses had left its employment, that was not a sufficient reason for the plaintiff's failure to take steps to prosecute the suit over the last 4 years.

26. She added that the defendant's employees had left employment and that documents may not be available.

27. On his part, Mr. Wangila, the learned advocate for the Third Party, first, associated himself with the submissions of the defendant.

28. Secondly, he described the delay as inexcusable.
29. And, lastly, he said that his client was being prejudiced because it continues to pay legal costs.
30. In answer to the application, Mr. Munoko, the learned advocate for the plaintiff, submitted that it was inaccurate to assert that it had not taken steps for over 4 years.
31. Between October 2014 and April 2017 is a period of two-and-a-half years. Therefore, in a literal sense, the delay is not one of 4 years. However, that alone should not bring consolation to the plaintiff, as there is definitely some delay.
32. Both applications were supported by affidavits which were sworn by advocates. Neither of the deponents has provided facts concerning their respective client's positions.
33. When an advocate says that employees tend to leave the companies where they were working, that is a generalized statement. It does not tell the court that in the particular case some employees had left employment.
34. More importantly, even if some employees had actually left the employment of the company, the said company could only be prejudiced if such employees were the actual persons who were scheduled to be the company's witnesses.
35. As relates to the Third Party, it has also failed to give particulars of the witnesses who cannot be traced.
36. Therefore, the applicants have not provided the court with sufficient material and information which could enable the court make an informed assessment on the question as to whether or not the delay in the prosecution of the case was prejudicial to the applicants.
37. The situation of the plaintiff could be contrasted to that of the applicants. I say so because, from the outset, the plaintiff had identified its two witnesses, **RAPHAEL KILUU** and **GEORGE OMOSA**. Those names were on the List of Witnesses dated 3rd May 2012.
38. The plaintiff has provided copies of correspondence exchanged between it and their lawyer, indicating that the 2 witnesses had since left the plaintiff's employment.
39. The fact that inquiries were being made between the plaintiff and its advocates before the applicants had sought the dismissal of the suit, is an indication that the plaintiff's interest in the prosecution of the suit was very much alive. In fact, in one email the plaintiff expressly instructed its advocates to fix a Hearing Date for the case. That email is dated 10th April 2017, which was just over 2 weeks before the plaintiff was served with the defendant's application.
40. Whilst it cannot be denied that the plaintiff could have acted more efficiently in prosecuting the case, I find that the defendant and the Third party cannot be unduly prejudiced if the case were to proceed to trial. My said finding is influenced by the fact that the plaintiff had taken all the requisite pre-trial steps, and that, from the plaintiff's perspective, the suit was ready for trial.
41. If anything, it is the defendant and the Third party who appear to be lagging behind on compliance with pre-trial procedures.
42. In the result, I reject the 2 applications by the defendant and the Third party, respectively.
43. I order that each of the parties will bear their own costs of those applications.
44. I further direct that all the pre-trial procedures be finalized within the next 45 days. If any party will not have filed and served its Witness Statements together with its Bundle of Documents, the said party

will be deemed to have consciously made a decision that they or either of them would not be calling witnesses or would not be adducing documentary evidence.

45. For the avoidance of any doubt the pre-trial procedures that must be finalized include the drawing up of the Issues which are to be placed before the trial court, for determination.

DATED, SIGNED and DELIVERED at NAIROBI this 15th day of November 2017.

FRED A. OCHIENG

JUDGE

Ruling rea

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

d in open court in the presence of

No appearance for the Plaintiff

Ms. Janmohamed for the Defendant

No appearance for the 3rd Party

Collins Odhiambo – Court clerk.