



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 6 OF 2013

ACQUALINE DISTRIBUTORS LIMITEDPLAINTIFF

VERSUS

COASTAL BOTTLERS LIMITED DEFENDANT

RULING

1. The Notice of Motion dated 29th March, 2016 has been brought under order 17 rule 2(3) and order 51 rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. It seeks the following orders:-

i. That this Honourable Court be pleased to dismiss the Notice of Motion dated 18th January, 2013 for want of prosecution; and

ii. That the costs of this application be awarded to the defendant (sic).

2. The application is based on the ground that the plaintiff has for a period exceeding three (3) years failed to take any steps to prosecute the application or take further steps to set down the application dated 18th January, 2013 for hearing. The application is supported by the affidavit of Noel L. Adagi dated 29th March, 2016. The plaintiff/respondent filed grounds of opposition on 29th June, 2016.

APPLICANT'S SUBMISSIONS

3. Ms. Adagi, Learned Counsel for the applicant submitted that the plaintiff/respondent (respondent) filed a Notice of Motion dated 18th January, 2013 for leave to commence contempt proceedings. The respondent was at that time ordered to serve the application. The applicant's deponent Evans Ogutu filed a replying affidavit on 12th February, 2013 which was served on the respondent's Advocates on 13th February, 2013. Since then, the respondent has not taken any action to have the application listed for hearing. Counsel referred to the annexure marked as NIA 1 to her supporting affidavit, which is a letter addressed to the respondent's counsel requesting them to have the said application listed for hearing.

4. It was submitted that the grounds of opposition filed by the respondent's counsel do not reflect the correct position as the respondent was ordered to serve the application for leave to commence contempt proceedings. Counsel for the applicant added that the Notice of withdrawal of the application dated 12th February, 2013 was never served on them. She prayed that the respondent's application dated 12th February, 2013 be dismissed for want of prosecution with costs to the defendant/applicant.

RESPONDENT'S SUBMISSIONS

5. The respondent's counsel on record filed grounds of opposition on 29th June, 2016 raising the following issues:-

- i. The applicant's application dated 29th March, 2016 is incompetent, bad in law and an abuse of the process of the court and the same ought to be struck out with costs;
- ii. The Notice of Motion (application) dated 18th January, 2013 seeking leave to bring contempt proceedings was brought under order 52 rule 2 of the Supreme Court Practice Rules of England, which requires the same to be an ex parte application (sic) and therefore the defendant/applicant herein had no audience before the court in the aforementioned application;
- iii. The plaintiff/respondent did file a Notice of Motion (application) dated 18th day of January, 2013 seeking leave to institute contempt proceedings against the Directors of the Defendant/Applicant herein;
- iv. The plaintiff/respondent later abandoned that course and subsequently on the 14th day of June, 2014 filed a notice of intention to withdraw application (sic) dated 31st day of March, 2014 and therefore the Honourable Court became *functus officio* upon withdrawal of the application on the 14th day of June, 2014 as stated above; and
- v. The application dated the 29th day of March, 2016 as brought by the defendant/applicant herein is therefore void and a nullity for all purposes and ought to be dismissed/expunged from the records with costs to the respondent.

6. Ms. Oyier, Learned Counsel, held brief for Ms. Lujanje for the respondent. She submitted that she was relying on their grounds of opposition dated 28th June, 2016 and stated that the application for dismissal and Notice of intention to withdraw the application dated 18th January, 2013, will serve the same purpose. She added that on 24th June, 2014, the respondent filed a notice to withdraw the respondent's application dated 18th January, 2013. She requested the court not to award costs to the applicant.

APPLICANT'S RESPONSE

7. Ms. Adagi submitted that costs follow events and as they had moved this court to have the application in issue dismissed, costs should be awarded to the applicant.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- i. If the application dated 18th January, 2013 should be dismissed for want of prosecution; and
- ii. If the respondent's notice to withdraw the application dated 13th January, 2013 serves the same purpose as the present application seeking dismissal of the said application for want of prosecution.

8. A perusal of the file reveals that Counsel for the respondent on 18th January, 2013 filed an application for leave to institute contempt proceedings against the Directors of the applicant company. The said application was filed under certificate of urgency. The Deputy Registrar then ordered that the said application be heard on 11th March, 2013 and for a notice to issue to the applicant herein. It is apparent that the applicant was served with the application as the law firm of Inamdar & Inamdar Advocates filed a notice of appointment of Advocates on 4th February, 2013, a replying affidavit on 12th February, 2013. They also filed grounds of opposition and a list of authorities on 6th February, 2013. On 24th June, 2014,

the respondent's Advocates filed a Notice of intention to withdraw the application dated 18th January, 2013. The applicant contends that it was not served with the notice of withdrawal of the said application.

9. Order 25, rule 1 of the civil procedure rules provides that:-

“At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”

10. The respondent did not controvert the assertion made by the applicant that it was not served with a Notice of withdrawal of the application dated 18th January, 2013. A plain reading of the provisions of order 25 rule 1 shows that it is a mandatory requirement for a notice of withdrawal of a suit to be served on all parties. The respondent herein failed to do so. This court therefore holds that the Notice of withdrawal on record serves no useful purpose and is of no effect as the applicant is oblivious to its existence. I therefore hold that in this instance, the Notice of withdrawal does not serve the same purpose as the application dated 29th March, 2016 seeking for dismissal of the application dated 18th January, 2013.

11. Order 17, rule 2 of the civil procedure rules 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 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.

3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.

4. The court may dismiss the suit for non-compliance with any direction given under this order”.

In the interpretation section of the Civil Procedure Act, the word **“suit”** means all Civil proceedings commenced in any manner prescribed.

12. It is clear that the respondent filed its application dated 18th January, 2013 and went into deep slumber. The applicant has therefore rightly brought the application seeking orders for dismissal of the said application. This court notes that as long as the application is subsisting it remains a thorn in the flesh of the applicant and will continue to remain so unless this court takes action as required.

13. In the case of **Safina Ltd. vs Jamnadas (K) Ltd**, [2006] eKLR Kasango Judge observed thus:-

“It is obvious that when parties file court actions it is expected that they would follow the prosecution of such action with diligence. It was the plaintiff's responsibility to ensure that the case was prosecuted without delay ... any delay in such proceedings can sometimes lead to prejudice to the defendant. The plaintiff has itself to blame for having gone to sleep in this matter.”

14. It is my finding that due to slumber on the part of the plaintiff/respondent, the defendant/applicant is entitled to the orders sought. I hereby make the following orders:-

- i. The application dated 29th March, 2016 is hereby allowed; and
- ii. Costs to the defendant/applicant

DELIVERED, DATED and SIGNED at MOMBASA on this 19th day of September, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Adagi for the defendant/applicant

Ms Luganje for the plaintiff/respondent

Ms Rose Echor Court Assistant