



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO. 14 OF 2013

KIAMOKAMA TEA FACTORY.....PLAINTIFF

-VERSUS-

ABEL MOGAKA .

STANLEY MACHOKA

STEPHEN MOTIRI DEFENDANTS

EVANS MABURI

RICHARD MOIBI

RULING

1. Vide the Notice of Motion dated 26th May 2015, the applicants/defendants seek orders for the dismissal of the respondent/plaintiff suit against them for want of prosecution and for the costs of the application and the suit to be borne by the respondent.

The application is based on the grounds in the body of the notice of motion as fortified by the averments in a supporting affidavit deposed by the applicants' counsel, **Gogi Dorah**, dated 26th May 2015.

The respondent being opposed to the application filed a replying affidavit deposed by **Florence Mitey**, dated 12th October 2015.

2. At the hearing of the application, learned counsel, **Mr. O.M Otieno**, appeared for the applicants while learned counsel, **M/s Shilwatso**, holding brief for **Mr. Nyachiro**, appeared for the respondent.

Arguments for and against the application were received by way of written submissions which were relied upon by the parties in support of their respective cases.

Due considerations has been given to the rival submissions by this court in the light of the grounds in support and in opposition to the application.

The issue arising for determination is whether the applicant has shown satisfactory cause for the grant of the orders sought.

3. Order 17 Rule 2(1) of the Civil Procedure Rules on which the application is founded provides 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”.

Sub-section (3) of the Rule, allows any party to a suit to apply for its dismissal as provided in sub-section (1).

This present application is one such application made under sub-section (3).

4. In essence, Rule 2 of Order 17 CPR is aimed at part heard cases such that if a case is adjourned generally after being heard in part and the parties do not apply to the court within one year (12 months) of the last adjournment for the hearing to resume, the court may call upon them to show cause why the suit should not be dismissed (see, ***Ivita Vs. Kyumbu (1984) KLR 441***).

In the instant case, it is the defendants who have invoked Rule 2(3) of Order 17 to apply for the dismissal of the Plaintiff’s suit for reasons that the suit was commenced on 30th July 2013 and on the 25th November 2013, interim order of injunction were obtained by the plaintiff against them. Thereafter the matter came up for hearing of the plaintiff’s application. This was on the 2nd December 2013, and on the 4th December 2013, the interim orders of injunction were confirmed. Since then, the plaintiff has taken no step at all to have the suit set down for hearing or to be finally determined.

5. It is the applicant’s contention that the respondent continues to enjoy the interim orders of injunction yet the continued subsistence of this suit is causing them great anxiety. That, the plaintiff has failed to exercise due diligence and therefore this suit should be dismissed by the court as the plaintiff shall not suffer any prejudice.

6. In ***Ivita Vs. Kyumbu (supra)***, it was held that ***“the test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.”***

7. Herein, the record shows that the suit was filed in court on 2nd August 2013, vide a plaint dated 30th July 2013, in which the plaintiff prayed for judgment against the defendants from holding themselves as executive committee directors and/or officers of the plaintiff and from transacting any business on behalf of the plaintiff in whatsoever manner and secondly, barring the defendants from proceeding to hold an extra ordinary general meeting as requisitioned or at all.

Declaration orders were also sought by the plaintiff to the effect that the extra ordinary meeting set to be held on 22nd August 2013, be declared illegal, null and void.

8. A Notice of motion dated 30th July 2013, was contemporaneously filed with the plaint for interim orders of injunction against the defendants pending the hearing and determination of the suit. The matter was fixed for inter-parties hearing on 19th August 2013, after the court granted ex-parte interim orders of injunction and on the 29th August 2013, the court decided the application in favour of the plaintiff.

However, after about three (3) months on the 25th November 2013, the plaintiff filed a second application for interim orders. In response, the defendants filed a preliminary objection on the 29th November 2013.

9. On 4th December 2013, the court ruled in favour of the plaintiff by granting interim orders against the defendants and dismissing their preliminary objection. Since then, no steps have been taken by the parties to fix a date for the hearing of the suit. Consequently, the defendants filed the present application on 18th June 2015. The application is dated 26th May 2015 and as stated hereinabove, was argued by way

of written submissions. There is no dispute that the plaintiff was required to fix the suit for hearing after obtaining the interim orders on 4th December 2013. However, no action was taken despite the fact that the plaintiff was enjoying interim orders of injunction to the prejudice of the defendants who were also at liberty to have the case fixed for hearing. A period of about eighteen (18) months had lapsed between 4th December 2013 to the 18th June 2015 when this application was lodged.

10. The prolonged delay in having the suit fixed for hearing and final determination was clearly attributable to the plaintiff/respondent who alleges in the replying affidavit dated 12th October 2015, that after the court ruled against the holding of an extra ordinary general meeting until it was properly requisitioned, the plaintiff in the interim sought to resolve the impasse by calling a meeting with the auditors. Indeed the meeting was held on 24th May 2013 and on 1st November 2013, a meeting of shareholders was held and it resolved that the matter be referred to ICPAK for arbitration.

The plaintiff contends that all the shareholders resolved to await the arbitration which would substantially compromise the suit and that the defendants/applicants are fully aware of the fact yet they preferred this application.

11. What the respondent is saying is that the prolonged delay in having this suit fixed for hearing was occasioned by the fact that the dispute was referred for arbitration without any dispute from the applicants who are therefore acting in bad faith in bringing this application.

The applicants contended that they did not agree and did not participate in the resolution to refer the matter for arbitration. They therefore imply that this application is not made in bad faith.

12. It is normal and quite regular for an existing dispute to be referred for arbitration either as sanctioned by the court or by the parties themselves. Arbitration is an alternative form of dispute resolution provided for under Article 159(2) (c) of the Constitution and it's aimed at doing justice to all without unnecessary delays associated with the normal civil court process. Therefore, if the delay in having this matter fixed for final hearing and determination was occasioned by its reference to ICPAK for arbitration as contended by the respondent, then the delay cannot be said to be intentional or unreasonable or inexcusable. It was in any event, intended to facilitate a faster alternative form of dispute resolution which would be in the interest of both parties and most importantly, serve the wider interest of justice.

13. As alleged by the applicants, it is highly unlikely that they did not consent to arbitration and were unaware of it. If this were so, they would not have waited for a period of eighteen (18) months since the last order of the court to file the present application. They also had the liberty to fix the suit for hearing and serve the necessary hearing notice upon the respondents but they did not. Such conduct is clearly a demonstration of their lack of good faith in bringing this application. No prejudice shall be occasioned to them if this matter is expeditiously resolved by arbitration.

14. In sum, the present application is without merit and is accordingly dismissed. However, the respondent ought not be allowed to continue enjoying interim orders issued by this court on account of the ongoing arbitration process. In that regard, the respondent is given a period of ninety (90) days from the date hereof to ensure finalization of the arbitration process failure to which the interim orders shall forthwith be vacated and the suit be fixed for hearing and final determination by this court within a period of fourteen (14) days from the date of vacation of the interim orders.

Each party shall bear own costs of this application.

Ordered accordingly.

[Delivered and signed this 30th day of November 2016].

J.R. KARANJA

JUDGE

In the presence of

O.M. Otieno for defendant/applicant

Defendant/applicant

Njoroge CC