



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

ELC CASE NO.152 OF 2011

KYAVANZI COMPANY LIMITED 1ST PLAINTIFF

VERSUS

TROPICAL FARMERS MANAGEMENT LIMITED DEFENDANT

R U L I N G

1. By an application dated 17.2.2014 and filed on 19.3.2014, the Defendant/Applicant seeks order for dismissal of the suit for want of prosecution plus costs. The application is based on the ground that since the suit filing on 27.6.2011 the Plaintiff Respondent has made no effort to have matter placed before the court for hearing. The application is supported by the Affidavit of Jesse Kariuki sworn on the 17.2.2014. The motion is brought under Order 17 Rule 2 of Civil Procedure Rule, and Section 3A of Civil Procedure Act. The application is further supported by a further affidavit of Ambrose Muthoka Mwanza sworn on the 1.7.2014. The application is opposed via the Affidavit of James Muia Muema sworn on 9.5.2014.

2. The Applicant's case is that since 27.6.2011 when the instant suit was filed no date has ever been fixed for hearing of the suit. The Applicant submits that the omission aforesaid is a clear demonstration of lack of interest. The Respondent rejoinder is that there is a HCC No.Nai 255/2010 where the Defendant is the Plaintiff and the Plaintiff the Defendant.

3. That there has been partial settlement and parties are negotiating on Final settlement upon which the issues in this suit would have been canvassed. The Respondent contend that the earlier suit HCC 255/2010 has to be heard first and determined to avoid offending the provisions on subjudice and thus seeks the instant suit to be stayed to await HCC 255/2010 to be concluded.

4. In a further affidavit, the Applicant argue that the suits are not similar as in the instant suit, the subject is milling and subsequent sale of coffee belonging to the plaintiff and thereafter the sharing of sale proceeds. The instant suit is in respect of debenture dated 22.5.09 in favour of the defendant over coffee husks grown on various parcels of land owned by the Plaintiff, thus the two cases deal with 2 different and distinct matters. The Nairobi 255/2010 will not settle Machakos case instant herein; thus subjudice rule cannot apply in the circumstances.

5. The parties consented to canvass the motion by way of written submissions. The applicant filed written submissions on 3.7.2014. The Applicant argues that the two cases of action are distinct and are not related at all as demonstrated by the further affidavit of Ambrose Muthoka Mwanza sworn on 1.7.2014. The Applicant cannot thus use HCC 255/2010 as an excuse of delay in prosecuting its case.

6. The Applicant seeks an authority of **SALKAS CONTRACTORS LTD VS- KPL (2004) eKLR** which held that.

“..... court has to consider whether inordinate delay inexcusable and if so satisfied, then the court has to consider whether justice can still be done to the parties notwithstanding the inordinate delay. If court is satisfied that justice can still be done, then it will in exercise of its discretion before the application for dismissal for want of prosecution. If it follows that court is not satisfied that the inordinate delay is excusable, then it will again in its discretion, allows the application and dismiss the suit for want of prosecution.”

7. The Respondent reply is that if the parties manage to solve HCC 255/2010 and settle all debts, then the instant suit will be solved and the current suit will be rendered res judicata. The aforesaid belief made Plaintiff halt prosecution of the instant suit. The Respondent cites the provisions of Section 6 Cap 21 to justify that the suits are similar in that the parties are the same and so is the subject matter.

8. On delay the Respondent cites MOGAKA VS. NBK (KLD)2009 eKLR, where court stated that;

“Order of dismissal is discretionary and should only be issued where the delay is inordinate, inexcusable and where it causes or is likely to cause prejudice to the parties.”

The courts find the following issues arising:

1. Whether the two suits are similar in parties and subject matter?
2. Whether the delay is inordinate, inexcusable and likely to cause prejudice to the Applicant?
3. What order as to costs?

9. The instant suit subject is the debenture dated 22.5.09 on debt amounting to KShs.27 million while in HCC 255/2010 the Defendant seeks injunction to stop marketing and sale of coffee it milled. Essentially and in terms of the provisions of Section 6 Civil Procedure Act, the parties are the same but the subject matter are different, the excuse by the Respondent that the suits are similar and thus delay to await the determination of HCC No.255/2010 does not hold water.

10. In any event since the instant suit was filed later than 255/2010, why didn't Respondent mount its claim in HCC 255/2010 or seeks to consolidate both or stay the instant suit? On the issue of delay, the court finds that since the suit was filed, the only steps taken are filing lists of witnesses and copies of documents together with the Plaintiff. Also there is request for judgment dated 5.9.2011. The Applicant lodged documents (list of witnesses and copies of exhibits) on 6.9.2011 along with the statement of defence.

11. The Applicant also waited until 19.3.2014 to lodge the instant motion to dismiss suit.

“Order 17(2) in a suit where no application or step taken by either party for one year,....

Sub-rule 3, any party may apply for its dismissal”

12. Either of the parties is obliged to apply and also to take steps. Other than the stated steps above no party applied or took steps since September, 2011 to date of filing the motion herein. The delay of over 3 years is rather long and amounts to inordinate delay.

13. The next question is whether the same is excusable? The Respondent cites the fact that the suit HCC No.255/2010 is similar to instant suit and its determination could settle the instant suit. The court found that the same reasoning and/fact cannot obtain in the circumstances. The court finds the excuse for delay untenable.

14. Finally the court examines the prejudice to the parties and/or the Applicant. The parties have filed the requisite documents can still fix the matter be heard. The court finds that no party will be prejudiced by

hearing the matter. The court however will penalize the Plaintiff/Respondent for going into a slumber after lodging the instant suit.

15. The court makes the following orders:

1. The motion is rejected.
2. The Respondent to pay the Defendant/Applicant KShs.20,000/- before the hearing dates and in default the suit stands dismissed.
3. The parties to fix hearing date in the next 30 days.

Signed and delivered at Machakos, this 16th day of January, 2015.

CHARLES KARIUKI

JUDGE.