

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND DIVISION

ELC CIVIL NO. 154 OF 2011

FOUNTAIN SCHOOL LIMURU LTD.....PLAINTIFF

-VERSUS-

CHRISTOPHER WANJARIA KIMITI..... DEFENDANT

RULING

In response to a Notice to Show cause why the suit herein should not be dismissed for want of prosecution under the Provision of Order 17 Rule 2 of the Civil Procedure Rules, counsel for the Plaintiff has filed an affidavit detailing why for a period of over 2 years the suit herein has not been actively prosecuted. The Affidavit it is to be noted has been filed by the law firm of Messrs. Kinoti & Kibe Advocates whilst the suit herein was commenced by or through the firm of Macharia Kahonge & Co. Advocates. Nonetheless, the affidavit is to the effect that following the filing of this suit the parties proceeded on to arbitration and an Award was rendered by the Sole Arbitrator in December, 2014. The Award is the subject of contest and challenge in High Court Misc. Civil Application No. 600 of 2014 at Nairobi. It is easy to understand why the challenge was not filed in the suit. This suit never existed when the arbitral proceedings were commenced in the year 2010. This can be gleaned from the Award which is attached to Mr. Kibe Mungai's affidavit. Paragraph 4 thereof is clear that the Sole Arbitrator was appointed on 8th March, 2010.

While I have carefully considered the affidavit of Kibe Mungai I am not convinced that sufficient cause has been shown why this suit should not be dismissed for want of prosecution. The arbitral proceedings alluded to though concerning the same subject matter did not involve the parties to these proceedings. The Award is the subject of challenge in High Court Misc. Civil Appl. No. 600 of 2014. The challenge has not been filed in this suit. Neither has the Plaintiff even sought orders to have the Arbitral Award set aside and cause the dispute to be heard and determined in this suit. I am satisfied that it would be proportionate to dismiss this suit. I note too that the reliefs sought before the Arbitrator by another party were the same reliefs the Plaintiff had sought in this suit. I also note that since the filing of this suit in the year 2011 there is no evidence that the summons to enter appearance have ever been served upon the defendant.

The Plaintiff also filed this suit whilst knowing that the Arbitral proceedings were already on going. The Arbitration and Award cannot therefore be used as a reason for the stalled prosecution of this suit. I deem it that it would be appropriate to dismiss this suit for want of prosecution as in any event the Arbitral Tribunal did determine the dispute. This suit is dismissed for want of prosecution. There will however be no orders as to costs. I have made the foregoing conscious of the fact that the Plaintiff may very well seek to join in the proceedings in ELC No. 153 of 2011 (NBI) in the event the application to set aside the Arbitral Award succeeds.

Dated, signed and delivered at Nairobi this 23rd day of April, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff

..... for the Defendants