REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 15 OF 2007

NAKURU WATER & SANITATION SERVICES CO. LTD…….....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION…….....DEFENDANT

RULING

1. By the Notice of Motion dated 25th September 2014, the Defendant seeks an order that the Plaintiff's suit be dismissed for want of prosecution with costs.
2. The application is supported by the affidavit of Joseph Nyoike Mutonyi and is premised on the grounds that the suit was last in court for hearing on 23rd June 2010 when it was stood over generally. Since then, the Plaintiff has not fixed the matter for hearing. This inaction is a clear demonstration that the Plaintiff has lost interest in the suit while in the meantime, the Defendant continues to be prejudiced. It is therefore in the interest of justice that the suit is dismissed.
3. The Plaintiff has opposed this application and has filed a Replying Affidavit sworn by its Counsel on 3rd February 2015.
4. The Plaintiff's claim is for Kshs. 11,933,379.75/= being the sum due to it for the water, sanitation and sewerage services supplied to the Defendant's various properties within Nakuru between September 2004 and December 2006. The Defendant entered appearance and filed its defence on 8th February 2007.
5. On 2nd October 2007, the parties recorded a Consent wherein the Defendant admitted that it owed the Plaintiff Kshs. 6,164,739.75/= which it settled in full. The parties indicated to court that they were negotiating on the rest of the Plaintiff's claim of Kshs. 5,768,640/= and the matter was mentioned several times thereafter for purposes of recording the consent.
6. As the parties were unable to agree, the Plaintiff unsuccessfully applied for an order to strike out the defence. It then proceeded to list the matter for hearing on 23rd June 2010 when it was taken out as the parties had not filed their list of documents.
7. From that date the Plaintiff did not set the matter for hearing and the only step taken towards its prosecution was filing the List of Documents on 7th March 2012. The Defendant alleges that the Plaintiff has lost interest in the case, and accordingly it should be dismissed.
8. The Plaintiff explained that it failed to prosecute this matter following a Consent entered on 2nd October 2007 wherein the Defendant acknowledged owing part of the sum claimed and proposed a manner of settlement. The Plaintiff believed that the Defendant would continue to pay until the entire debt was settled and therefore did not find reason to pursue the case. In addition, the Defendant has contributed to the delay in conclusion of this case, by failing to comply with **Order 11** of the **Civil Procedure Rules.**

ANALYSIS:

9. **Order 17 Rule 2(1)** of the **Civil Procedure Rules** provides that a party to a suit in which no application has been made or other step taken for one year, may apply to the court to dismiss the suit.
10. The power of court under **Order 17 Rule 2(1)** is discretionary. It must be exercised sparingly and only on deserving case as the courts must be hesitant to strike out a suit that has not been determined. Every case must be considered on its own facts and ultimately the court must determine whether the delay was inordinate and inexcusable and whether despite the lapse of time, it is possible for a fair trial to be conducted. (See Lee Waigwa Waruingi Vs. Housing Finance Co. of Kenya Limited [2005] eKLR).
11. This is an old matter that was filed on 30th January 2007. Prior to 23rd June 2010, the record shows that the Plaintiff was very keen on having the matter determined. During this period, there was evidence that the parties were negotiating with an intention of settling the matter out of court and had the matter mentioned for purposes of recording a consent in court. When their negotiations broke down, the Plaintiff prosecuted its application for an order to strike out the defence and thereafter took a date for hearing of the main case.
12. However, after 23rd June 2010, the Plaintiff did not make any further step. The Plaintiff alleges that it was hopeful that since the parties had already agreed on part of the sum claimed, they would also agree on the remaining claim.
13. This contention however, is not borne out from the evidence. At the time when the Plaintiff listed the matter for hearing, it was clear that the negotiations had broken down as the Defendant disputed the rest of the claim on the ground that the same had not been properly computed by the Plaintiff. In addition, there was no evidence of any correspondence between the parties on the negotiations that had been undertaken during this period when the Plaintiff remained indolent. Therefore, there was no basis for the Plaintiff's belief that the matter would be settled amicably.
14. The Plaintiff has also blamed the Defendant for the delay. It was its argument that the Defendant failed to comply with the pretrial directions under Order 11 of the Civil Procedure Rules to enable the Plaintiff set the matter down for hearing. The inaction of the Defendant does not justify the Plaintiff's indolence. The duty remains with the Plaintiff to ensure the expeditious conclusion of his case. The Defendant does not gain by the inaction. Instead, the continued pendency is prejudicial to it. It was therefore upon the Plaintiff to comply with the court's directions and thereafter move the court for appropriate orders if the Defendant failed to act. I am guided by the holding in Century Oil Trading Company Ltd Vs. Mwaniki Mbogo & Another (Milimani Commercial Courts H.C.C.C NO. 367 OF 2001), cited with approval in Dipak Premchand Shah & Others Vs. Akiba Bank Limited Nairobi H.C.C.C No. 34 of 2003, where Mutungi, J held that:

> "I do not prescribe to the motion that Order XVI, rule 5 (d) (now Order 17 Rule (3) shifts the burden of expeditious prosecution of a suit from the Plaintiff to the Defendant."

15. A period of four years, without taking any step, is an inordinately long period of time. The explanation given by the Plaintiff for this delay is not satisfactory as, it was its obligation to pursue the conclusion of its case and the Defendant showed no intention of acknowledging the rest of the claim.
16. However, the Plaintiff has filed its list of documents and intimated that it is ready to prosecute the matter. Therefore, notwithstanding the delay, I find that in light of the fact that the Defendant has not shown that the ends of justice have been compromised by the delay, the Plaintiff should be given a chance to ventilate its case. I rely on the holding of Chesoni, J in Ivita Vs. Kyumbu [1984] KLR 441, that:

> "The test to be applied in an application for dismissal 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, 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."

DETERMINATION

17. For the above reasons, I make the following orders:

a. the application dated 25th September 2014 is hereby dismissed;
b. the parties shall comply with the pretrial directions under Order 11 of the Civil Procedure Rules within 30 days from the date of this ruling.
c. the Plaintiff shall thereafter set the matter down for hearing within 90 days notwithstanding that the Defendant has not complied with Order (b);
d. If the Plaintiff does not comply with order (c) above, the suit shall stand dismissed with costs to the Defendant; and

e. The costs of this application shall be in the cause.

Orders accordingly

Dated, Signed and Delivered at Nakuru this 26th day of June, 2015.

A. MSHILA

JUDGE