



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE NO. 214 OF 2012

MUNICIPAL COUNCIL OF MAVOKOPLAINTIFF

VERSUS

ATHI STORES LIMITED 1ST DEFENDANT

UNIKEN ENTERPRISES2ND DEFENDANT

RULING

The Application

The application before this Court for determination is a Notice of Motion dated 2nd March 2015, brought by the Defendants pursuant to Order 17 Rule 2(3) of the Civil Procedure Rules. The Defendant is seeking an order that this suit be dismissed for want of prosecution, and that the costs of the application be provided for. The grounds for the application are that the Plaintiff has failed to prosecute this matter since the filing of the plaint, and that it has been more than two (2) years since any step was taken to determine this matter.

The Defendants in a supporting affidavit sworn on 2nd March 2015 by Stephen Nyaga, a Director of the 1st Defendant, further explained that the Plaintiff filed this suit on 19th June 2012, Further, that the 1st Defendant thereupon filed its Defence on 30th April 2013 , and that the suit has never been set down for hearing.

The Plaintiffs filed Grounds of Opposition dated 28th April 2015, wherein they opposed the Defendants application on the grounds that the said application is fatally defective and cannot stand in law; is mischievous and made in bad faith; and that the applicants have not disclosed any prejudice to them. Other than the said Grounds of Opposition, the Plaintiff did not file any other pleadings and did not attend the hearing of the application despite service of notice upon them.

The Issues and Determination

The Defendants were directed by the court to file written submissions on their application. The Defendant's advocates, R.M Mutiso & Co. Advocates filed submissions dated 12th May 2015, wherein reliance was placed on Order 17(2) of the Civil Procedure Rules for the position that the Plaintiff has not

filed any replying affidavit to explain the failure to move this suit forward, and that it is the Plaintiff's primary role to take steps to advance their case.

Further, that it is unfair to subject the Defendants to the anxiety of defending a suit that is not being prosecuted since its inception, and that it is evident that the Plaintiff has lost interest in the suit. Lastly, that the Plaintiff's inertia is contrary to the overriding objectives stated in sections 1A and 1B of the Civil Procedure Act.

This Court is guided by Order 17 Rule 2 of the Civil Procedure Rules which provides for dismissal of a suit for want of prosecution as follows:

“2. (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 not 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.”

The decision in the case of **Ivita vs. Kyumbu [1984] KLR 441** set out the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution. This is firstly, whether the delay is prolonged and inexcusable, and, secondly if the delay is excusable, whether justice can still be done to the parties despite the delay.

A perusal of the court record in this suit shows that no step has been taken herein since the filing of the suit herein on 19th June 2012, and that in fact the first step to be taken was the filing of the Defendants' application on 2nd March 2015 and subsequent hearing of the same. Therefore, at the time of the filing of the Defendant's Notice of Motion on 2nd March 2015, the threshold of a delay of more than one year in prosecuting the suit had been met, to render this suit amenable to dismissal under Order 17 Rule 2 of the Civil Procedure Rules.

No reasons for the delay in prosecuting this suit have been given by the Plaintiff, neither did it indicate any interest in continuing with this matter upon filing of the Defendants' application. The Defendants are clearly being prejudiced by the anxiety caused by the existence of a suit that the Plaintiff does not appear to want to prosecute. This Court will therefore allow the Defendant's Notice of Motion dated 2nd March 2015 for the foregoing reasons, and accordingly dismisses the suit filed herein for want of prosecution. The Plaintiff shall bear the costs of this application and of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 18th day of November 2015.

P. NYAMWEYA

JUDGE