



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE NO. 218 OF 2012

HORIZON BUSINESS VENTURES LTD.....PLAINTIFF/RESP.

VERSUS

ECO FUELS LTD.....DEFENDANT/APPLICANT

RULING

The defendant/applicant filed a motion dated 30th January, 2015 in which it sought for the order that the plaintiff's suit be dismissed for want of prosecution. The application is based on **Order 17 Rule 2(1) and (3), Order 51 Rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**.

The motion is also supported by the affidavit of Allan Murray Paul who is a director in the applicant company.

It is the applicant's case that until the 4th February, 2015, when this motion was filed, the plaintiff had not taken any action on its suit since the 6th May, 2013 when it was last in court. The applicant has urged that it is in the interest of justice that the suit be dismissed since public policy demands that justice should be administered without undue delay. It has also been deposed on behalf of the applicant that the delay in the prosecution of the case will prejudice the defendant as the circumstances are likely to change.

In response to the application, Mr Kiminda for the respondent swore and filed a replying affidavit, in which he has deposed that on the 6th May, 2013, the applicant was allowed to amend its defence following a formal application for that particular order. As at the time of filing this current application, so Mr Kiminda deposed, the applicant had not complied with the order it had been granted by this court on 6th May, 2013.

Order 17 Rule 2(1) and (3) of the Civil Procedure Rules under which the motion was made states 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)...

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

The record shows that the suit was last in court on 6th May, 2013. On that date the court granted the defendant/applicant an order to amend its defence. Although the order was made on the application of the applicant, it never amended its defence as it had sought to; going by the depositions in the affidavit in support of the instant application, failure to follow up on the order and amend its defence was a deliberate option it chose take, for reasons that are of little concern in determination of this application.

In circumstances where the time limit within which an amendment has to effected is not specified, as was the case here, **Order 8 rule 6 of the Civil Procedure Rules** came into play. That rule says:-

6. Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.

In view of this rule counsel for the plaintiff cannot be heard to say that the plaintiff could not take any action on its case ostensibly because the defendant did not amend its defence as directed by the court; the order for amendment expired by effluxion of time and after such expiry nothing stopped the plaintiff from taking any step to move its case forward.

For purposes of determination of this application I am not satisfied that sufficient cause has been proffered by counsel for the plaintiff why this suit should not be dismissed. No reason has been demonstrated to the satisfaction of this court why the plaintiff has not taken any action on its suit for more than a year. In the absence of any such reason there is no material before me upon which I can exercise the discretion with which this court is clothed in favour of the plaintiff and allow the continued existence of this suit. Instead, I am satisfied that there is sufficient reason to dismiss it for want of prosecution and to that extent I am persuaded that the applicant's application dated 30th January, 2015 is merited. I hereby allow it with costs to the defendant.

Signed, dated and delivered in open court this 14th day of December, 2015

Ngaah Jairus

JUDGE