



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 20 OF 2007

**BANDARI CO-OPERATIVE SAVINGS &
CREDIT SOCIETY LIMITED PLAINTIFF**

V E R S U S

1. SEVEN SEAS TECHNOLOGIES (K) LTD1ST DEFENDANT
2. FINTECH (K) LTD2ND DEFENDANT

RULING

1. The Notice of Motion dated 15th October 2013 filed by 1st Defendant seeks the dismissal of this suit for want of prosecution. Plaintiff by a notice dated 14th April 2009 withdrew the suit against 2nd Defendant.
2. Plaintiff filed this suit on 5th June 2007. On that same day Plaintiff filed an injunction application. On that date the Court granted interim orders. By this Court's Ruling of 31st August 2007 Plaintiff's injunction application was dismissed. 1st Defendant learned Counsel stated from the bar that Plaintiff has not todate served on 1st Defendant the summons in this matter.
3. Plaintiff filed an appeal to Court of Appeal against that dismissal. It is not clear what was the outcome of that appeal since Plaintiff did not file an affidavit in reply to 1st Defendant's application. Defendant in its grounds of opposition stated that the appeal was settled on 26th January 2012 but in view of the fact there is no evidence before Court of that settlement the Court cannot accept that statement in the grounds of opposition.
4. Plaintiff opposed the Notice of Motion dated 15th October 2013 on the following grounds-
 - a. **That Plaintiff has not failed to prosecute this suit and 1st Defendant had also an obligation to fix the case for hearing.**
 - b. **That Plaintiff could not fix the case for hearing because the pretrial procedure had not been complied and because there were pending interlocutory application; and**
 - c. **That in the interest of justice Plaintiff should be allowed to proceed with the case.**
5. Following the dismissal of Plaintiff's interlocutory application on 31st August 2007 the Plaintiff

did nothing to ensure this suit is heard. Plaintiff relied on various authorities whose tenor is that Defendant has also an obligation to ensure suit is heard such case is NANDAL JIVRAJ SHAH & 2 OTHERS –VS- NYALI PLAZA LIMITED & ANOHTER (2013)eKLR and MBSA HCCC NO. 458 OF 1992 THE REGISTERED TRUSTEES OF MOMBASA PARSİ ANJUMAN – VS- SUSHIN ABDULKARİM ALİ.

6. Order 17 Rule 2(1) provides-

“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.”

In my humble view the use of the words “by either party” does not shift the responsibility on the Defendant to ensure the suit is heard. Absolutely not. What I believe Rule 2(1) is addressing is the fact that a suit is ripe for dismissal if no action has been taken by any party within one year. If within one year any action is taken then the suit cannot be dismissed for want of prosecution. In other words the Rule does not lay an obligation on all parties to fix the case for hearing but rather the Rule forbids a suit being dismissed if any action has been taken by any party. A suit therefore can be dismissed if no action or step is taken by any party within one year.

7. After the dismissal of injunction application on 31st August 2007 Plaintiff literally went to sleep on this case and was only awoken by 2nd Defendant’s application dated 20th March 2009 seeking the dismissal of suit for want of prosecution. That application might very much have been what triggered Plaintiff to file a Notice to withdraw the suit against 2nd Defendant. That Notice was dated 14th April 2009. Second Defendant sought and obtained costs of the suit from Deputy Registrar on 12th August 2009. Second Defendant costs were taxed on 12th February 2010. From that date until 1st Defendant filed its present application for dismissal of the suit for want of prosecution on 25th October 2013 Plaintiff took no action in this matter and for that matter no other action was taken by any party. That inactivity paved way for dismissal as provided under Order 17 Rule 2(1). Plaintiff in my view has failed to prosecute its suit. It is not a defence to the present application to argue that the suit was not ripe for fixing for hearing, since no pretrial directions had been given. There is no such precondition in Rule 2(1).

8. Interestingly the application that had been made by 2nd Defendant was premised on the ground, amongst others, that the Plaintiff had failed to serve the summons to 2nd Defendant. The first Defendant Counsel in submitting to the present application did state that no summons had been served on 1st Defendant either. Plaintiff did not respond to that submission and accordingly I will accept that as admission of the allegation. Plaintiff’s suit was filed in 2007 when the previous Civil Procedure Rules were operative. Order V of those Rules required summons to be served on Defendant. Those summons were initially valid for 12 months but could be extended on application. However where no application was made after 12 months Order V Rule 1(7) provide-

“The Court may without notice dismiss the suit at expiry of twenty-four months from the issue of the original summons.”

I have perused the Court file and I have found the two original summons, presumably for both Defendants, are still in the Court file. They are dated 5th June 2007. They have not according to the Court record, been extended. They undoubtedly are caught by the provisions of Order V Rule 1(7). Failure to extend the validity of those summons within 24 months gives this Court power to dismiss this suit. It is indeed very telling that both Defendants to date have not filed their memorandum of appearance nor defence. It means that Defendants were not served with summons.

9. There is only one course to take, that is to dismiss Plaintiff’s suit as against 1st Defendant.

Accordingly the orders of Court are-

- a. **This suit is dismissed for want of prosecution and as per Order V Rule 1(7) as against 1st Defendant and**
- b. **The 1st Defendant is awarded costs of suit and costs of Notice of Motion dated 15th October 2013.**

Ruling by:

MARY KASANGO

JUDGE

DATED and DELIVERED at MOMBASA this 27TH day of FEBRUARY, 2014.

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JUDGE