



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 1415 OF 2001

ORIENTAL COMMERCIAL BANK LIMITED ::::::::::::::: PLAINTIFF

VERSUS

ALBERT R. SHITAKHA

LUDMILLA I. SHITAKHA

T/A INTERTRANS SERVICES ::::::::::::::: DEFENDANTS

RULING

1. The Notice of Motion before me is dated **4th September 2012** and filed in Court on **5th September 2012**. It is expressed to be brought under **Order 17 Rule 3** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. The Applicant, seeks for the following orders:-
 1. *That the Plaintiff's suit be dismissed for want of prosecution.*
 2. *That the 2nd Defendant be awarded costs of this application and of the suit.*
 3. *That the Honourable Court be pleased to make further or other orders deemed necessary for the ends of justice.*
2. The application is based on the grounds stated on the face of the application and is supported by the affidavit of **the 2nd Defendant, Ludmilla I. Shitakha**, sworn on **4th September 2012**.
3. It is averred by the deponent that this matter was last in Court on **5th November 2004** when the Court granted the Plaintiff leave to amend its Plaint. Since, **3rd December 2004** when the Plaintiff served its amended Plaint on the **2nd Defendant's** Advocates, the Plaintiff has not taken any steps to prosecute the case against the Defendant.
4. According to the deponent, the Plaintiff is guilty of inordinate delay and that such delay is calculated to dissipate evidence and to deny the Plaintiff a fair hearing.
5. The application is opposed vide the Replying affidavit of **Patrick Kibuchi**, an Advocate of the high Court of Kenya and sworn on **19th November 2012**.
6. It is contended by the Advocate that the Plaintiff was a stranger to the current application which was served upon them on **31st October 2012**. Apparently the said application came up for hearing *inter partes* on **10th October 2012** yet the Plaintiff had not been served.
7. As regards the suit, it is averred by the Advocate that the **2nd Defendant** has not been candid with

- the Court as it has been in negotiations with the Plaintiff to settle the matter by way of Consent for the last three years. According to the Advocate the delay in concluding the negotiations and the aspect of settlements in this matter has been occasioned by no communication from the 2nd Defendant's Advocates.
8. It is the Advocate's position that it would be inequitable and unjust for the 2nd Defendant to benefit from its delay in closing the negotiations. The advocate avers that it is the said negotiations which estopped the Plaintiff from taking any further steps towards the hearing of the suit.
 9. It is also averred by the Advocate that the Court file herein has been missing on certain occasions when fixing dates for hearing. Therefore, the plaintiff has tried to fix the matter for hearing without success as the file has not been available on these occasions.
 10. In reply, the 2nd Defendant filed a further Affidavit sworn on 21st November 2012. It is the Defendant's assertion that the Plaintiff made unreasonable and unacceptable proposals that she should assume debts of the 1st Defendant. It is further the deponent's assertion that the Plaintiff was informed that she was not interested in the said proposals.
 11. The Defendant avers that between September 2011 and May 2012 the Plaintiff proposed to withdraw the suit in terms that were not acceptable to her. It is her position that her Advocates did not in any way engage the Plaintiff's Advocates in negotiations to settle or withdraw this case.
 12. The Application was prosecuted by way of written submissions.

ANALYSIS

13. I have considered the application herein as well as the affidavits on record. Having done so, I take the following view of the matter.
14. Having perused the file, there seems to have been some action on this file by the Plaintiff's Advocate sometime in the year 2007. There is a letter dated 12th November 2007 from the Plaintiff addressed to the Deputy Registrar. Therefore, by the time the current application was being filed it had been more than one year since the Plaintiff took any steps on this matter.
15. I have considered the account given by the Advocate for the failure to prosecute the matter for over a year. The Advocate has stated that the parties have been involved in negotiations to settle the matter by way of Consent for the last three years. For this reason the Plaintiff did not take any further steps to prosecute the matter. According to the Advocate the delay in concluding the negotiations has been occasioned by no communication from the 2nd Defendant's Advocates.
16. I have perused the relevant correspondences on record with regard to the aforesaid negotiations. In the said correspondences, it is evident that the Plaintiff wrote to the 2nd Defendant's Advocates on several occasions indicating that they intended to withdraw the case against the client. To this effect, the Plaintiff's proposal was that the parties record a consent. It is apparent that despite the several letters, the 2nd Defendant's Advocates did not respond. Negotiations can never be unilateral. It can only be two-way. In this case there was no communication on the part of the 2nd Defendant with regard to the Plaintiff's proposal. To this end, it is Inconceivable that there were any negotiations in this matter.
17. Even if there were negotiations, which the 2nd Defendant has denied, it's not always that these negotiations will have a positive outcome. In some cases the negotiations will hit a snag and automatically terminate. It should never escape our minds that it is primarily the duty of the Plaintiff to move or prosecute its case.

In **Fitzpatrick Vs Batger & Co. Ltd [1967] 2 ALL ER 657** Lord Denning, citing his decision in **Regentine Vs Beechholme Bakeries Ltd [1967] 111 Sol. Jo. 216**, said as follows;

“It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition . . . the delay is far beyond anything we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution”.

18. In the current circumstances, the Plaintiff's claim that they did not set the matter down for hearing because of the negotiations is not satisfactory.
19. The other reason advanced for the Plaintiff is that the Court file herein had been missing on certain occasions when fixing dates for hearing. There is no evidence on the Court record to show that the file was lost or misplaced. It was upon the Plaintiff to write to the Deputy Registrar or the relevant Court official to enquire about the missing file. In the event that the file was indeed missing, there is no evidence of any attempts by the plaintiff to reconstruct the court file. Having made the foregoing observations, the only commendable conclusion is that the original court file was never lost or misplaced.
20. In light of the above, it is the Court's finding that the Plaintiff has not given sufficient reasons as to why it did not take steps to fix the suit for hearing for almost over ten years. To my mind, such delay is inordinate and in the current circumstances inexcusable. (*See Ivita Vs Kyumbu [1984] KLR 441*). In that case the Court is not inclined to exercise its discretion in favour of the Plaintiff. Therefore the Court has no option but to dismiss the suit against the Defendant in accordance with **Order 17 rule 2** of the **Civil Procedure Rules** and the inherent powers of court.
21. For the foregoing reasons the 2nd Defendant's Notice of motion dated **4th September 2012** and filed in Court on **5th September 2012** is hereby allowed. The costs of the application shall be for the 2nd Defendant.

DATED, READ AND DELIVERED AT NAIROBI

THIS 27TH DAY OF JUNE 2014

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for Plaintiff

No appearance for Defendant

F. N. Wamalwa for 2nd Defendant

Jason – Court Clerk