



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 157 of 2011

FRED MUZUNGYO.....PLAINTIFF/RESPONDENT

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT/APPLICANT

RULING

The Applicant herein Kenya Railways Corporation has brought this application dated 24/8/2012 *under Order 17 Rule 2(1) 3 of the Civil Procedure Rules and Section 1A, 1B, 3A of the Civil Procedure Act* and any enabling provisions of the Law for orders that: -

1. The plaintiff suit be dismissed for want of prosecution.
2. That costs be borne by the plaintiff.

The application was based on the grounds stated on the face of the application and also on the supporting affidavit of Pauline Kamunya – McAsila.

Among the grounds set out on support of the application are: -

1. That the suit herein was filed by the plaintiff against the defendant on 7/4/2011 along with a Notice of Motion application even dated filed under certificate of urgency.
2. The said application was determined by a consent order entered into by the parties on 13/4/2011.
3. That the plaintiff failed to abide by the consent order and defendant proceeded and attached the plaintiff's goods as agreed.
4. That the plaintiff subsequently filed a notice of motion on 28/4/2011 seeking an extension of time to deposit the rent arrears which application was fixed for hearing on 10/5/2012 but was not listed on the stated date.
5. That the plaintiff has not set down the matter for hearing and he is no longer interested in prosecuting this suit.
6. That the Defendant is being prejudiced by the suit which lies in court unprosecuted and it is for the interest of justice that this suit be dismissed for want of prosecution.

The application was not opposed. The plaintiff was served through by advocate Kounah & Co. Advocates

as per the affidavit of service filed in court on 26/11/2012. the plaintiff and or his advocate were not present in court on 12/11/2012 when the application was first came on hearing and on 26/11/2012. The application was therefore not opposed and defendant through its counsel Mr. Ngetho prayed for dismissal of the suit for want of prosecution. Though the application is not opposed. Is it oriented?

I have carefully considered the instant application in totality and the court record. I have also considered the relevant law.

It is evident that this suit was filed on 7/4/2011. On 13/4/2011, parties recorded a consent whereof the plaintiff was to deposit kshs.502,000/= as security for arrears in court within the days from date of consent.

As per the court record, the case was to be mentioned on 10/5/2011 but on 29/4/2011, the plaintiff brought an application under certificate of urgency seeking stay of the sale of the plaintiff's goods. The ... and orders were not granted but same was to be set down for hearing on 5/5/2011 upon service of the application to the Defendant.

The court record shows no other action was taken by the plaintiff after 29/4/2011. On 7/9/2012, the defendant filed the consent application for dismissal of the suit for want of prosecution. The plaintiffs have not filed reply to the present application.

It is therefore evident that this suit which was brought by the plaintiff has not been prosecuted for more than one year.

Section 17 (2) (I) provides that "In any suit in which no application has been made and no step taken by either party for one year, the court may give notice on counting to the parties to show cause why the suit should not be dismissed and if cause is not shown to the court's satisfaction. (court) may dismiss the suit".

In the instant case, the matter was last in court on 29/11/2011 for an application brought by the plaintiff. The plaintiff did not take any action until 7/9/2012 when defendant filed an application for dismissal of the suit for want of prosecution. The Defendant have therefore rightly moved the court. Plaintiff though served with the application is not in court. He could therefore not show cause to the satisfaction of the court ... to why the suit may not be dismissed. The plaintiff may have lost interest in the case and that delay is therefore prejudicial to the Defendant.

As was held by Warsame Judge in the case of *Mobile Kitale Services Station Vs. Mobil Oil Kenya Ltd CC. No. 205/1990*. ***"It is the duty of the plaintiff and his advocate to bring the suit for that, usually the burden is on their shoulders and failure to discharge that onces could be detrimental to their cause"***.

The plaintiff herein has not set down the case for hearing or taken any action for more than one year. That action offends the objections of *Section 1A & 1B of the civil Procedure Act*.

Having carefully considered the content application dated 24/8/2012 brought by 1st Defendant/Applicant, I find that it has merit and I allow it entirely.

The plaintiff's suit is dismissed for want of prosecution.

Cost to be borne by the plaintiff.

Dated, signed and delivered this 16th day of January, 2013.

L.N. GACHERU

JUDGE

In the Presence of:

.....for the Applicant

.....for the Defendant

.....Court Clerk