



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO 512 OF 2009

EVA RATIA LIKIMANI..... PLAINTIFF

VERSUS

1.MOHAMED AHMED MOHAMED

2.GEORGE N NJUGUNA (t/a G N NJUGUNA & ASSOCIATES).....DEFENDANTS

RULING

1. This is the 1st Defendant's application by **notice of motion dated 19th January 2012** for dismissal of the Plaintiff's suit for want of prosecution. It is brought under **Order 17, rule 2(1) & (3)** of the **Civil Procedure Rules** (the **Rules**). **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Cap 21** (the **Act**) have also been cited.

2. The grounds for the application stated on the face thereof include –

(i) That since the filing of the suit the Plaintiff has not taken any step towards prosecution of the suit.

(ii) That public policy and the overriding objective of the Act and Rules demand that cases should be heard expeditiously: the Plaintiff filed this suit without any intention of prosecution it.

The application is supported by an affidavit sworn by the 1st Defendant's advocate, **Allen Waiyaki Gichuhi**. It gives a history of the litigation.

3. The Plaintiff has opposed the application by **replying affidavit filed on 13th March 2012**. It is sworn by her advocate, **Oriaro Geoffrey**. Grounds of opposition emerging therefrom include -

(i) That pleadings closed about 7th December 2009 and on 22nd February 2010 the Plaintiff filed an application seeking to strike out the Defendants' statements of defence, which application is pending.

- (ii) That on 26th November 2010 the Plaintiff filed her list of documents and list of issues: the same were served upon the Defendants on 26th and 29th November 2000 respectively.
- (iii) That before the suit could be set done for hearing the new Civil Procedure Rules, 2010 came into operation, and the Plaintiff needed time to comply with them before setting down the suit for hearing.
- (iv) That it is thus not true that the Plaintiff has not taken any step towards prosecution of the suit.
- (v) That the delay has **not** been inordinate.
- (vi) That the Defendant will not suffer any prejudice that cannot be compensated by way of damages.

4. The application was canvassed by way of written submissions. The 1st Defendant's submissions were filed on 19th September 2012 while those of the Plaintiff were filed on 16th October 2012. I have considered the submissions, including the cases cited by the 1st Defendant. I have also perused the court record.

6. Indeed the Plaintiff filed chamber summons dated 19th February 2010 seeking orders to strike out the statements of defence of both Defendants. The Defendants opposed the application by replying affidavits filed respectively on 29th April and 4th May 2010. On 15th July 2010 the Court (Dulu, J) directed that the parties do file and serve written submissions in respect to the application. As it happened, no party filed submissions as directed. On 26th November 2012 the Plaintiff withdrew the application with costs to the Defendants.

7. The court record further shows that in the meantime the Plaintiff filed her list of documents and list of issues on 26th November 2010. On 16th October 2011 she also filed her own witness statement.

8. The present application was filed on 19th January 2012. As already seen, there was in place an application by chamber summons dated 19th February 2010 to strike out the defences. It was filed on 22nd February 2010. The parties appeared before the court on 15th July 2010 for hearing of that application when the court directed the parties to file written submissions in respect thereto within 30 days. None of them did so. The 1st Defendant cannot now shout too loudly that the Plaintiff never filed her submissions when he himself did not! The application remained in place until 26th November 2012 when it was withdrawn. In the meantime the present application had been filed.

9. With an application to strike the Defendants' defences in place, and particularly when there were already orders in place in respect to hearing of the same, how did the 1st Defendant expect the Plaintiff to otherwise prosecute the suit itself?

10. Whereas there was some delay in disposing of the application to strike out the defences, particularly after the order of 15th July 2010, it cannot be said that there was delay in prosecuting the suit itself.

11. I find that the present application was filed prematurely. It is entirely without merit and is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26th DAY OF NOVEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2013