

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 183 OF 2010

NORTH ATLANTIC AIRWAYS (K) LTD.....PLAINTIFF/RESPONDENT

VERSUS

AVILINE SERVICES LIMITEDDEFENDANT/APPLICANT

RULING

The application for determination before this court is the Notice of Motion dated 25th April 2013 brought under Order 5 Rule 1 (6) and 2(7), Order 17 Rule 2 (3), Order 51 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking for the orders that this court declares that the suit herein has abated as against the Plaintiff and in the alternative this court dismisses this suit for want of prosecution with costs to the defendants.

This application is based on the grounds and the Supporting Affidavit of Kennedy O. Ochieng stating that he is an advocate of the High Court of Kenya on record for the Defendant. That this suit was filed by the Plaintiff against the Defendant on 21st April 2010 together with an interlocutory application which was dismissed by the court. That the Plaintiff seemed to lose interest after the dismissal of the interlocutory application and it is now over three years since there was action on this suit. He further stated that there cannot be sufficient cause for the status of affairs in this suit and since litigation must come to an end he is praying that this application be allowed. He further stated that on 23rd December 2011 when this court issued notice to both parties to show cause why this suit should not be dismissed, the Plaintiff sought for more time to prepare for the hearing and the court granted the Plaintiff 60 days but it did not take any steps to prosecute the matter. He believes that it is unfair and unjust for the Defendant to have this suit hanging over his head as a liability indefinitely and therefore it should be declared to have abated or dismissed with costs.

This application is not opposed. When this application was set down for hearing Mr Gachoka Holding brief for Mr Waweru for the Plaintiff told this court that he had no instructions from the Plaintiff on the way forward and leaves it to the court to make a determination.

OPINION

I have considered the submissions of the Defendant/Applicant's counsel appearing before me on 16th July 2013. The test in applications for dismissal for want of prosecution is laid out in the case of ***Ivita Vs Kyumbu [1984] KLR 441 where Chesoni, J. (as he then was) held as follows, "The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the***

Plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

This is a case that is has been pending prosecution for three years and no action has taken place since the dismissal of an application for an injunction on 26th July 2010. The court even tried to ask the Plaintiff to show cause why this suit should not be dismissed through a notice issued on 23rd December 2011 and further gave the plaintiff an opportunity to prosecute its case by ordering that the suit be set down for hearing within 60 days but the Plaintiff did heed any regard to the orders of the court and went on to slumber. I will rely upon the words of Lord Denning in **Reggentine –vs- Beecholme Bakeries Ltd [1967] III Sol, Jo. 216** where he held that, ***"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 that can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution."***

Arising from the foregoing, I hereby allow the application and award costs to the Defendant.

SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2013

MARY M. GITUMBI

JUDGE