



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL SUIT 731 OF 2000

PAN AFRICAN GLASS INDUSTRIES LIMITED 1ST PLAINTIFF
IJAZ HUSSEIN GANIJEE 2ND PLAINTIFF
SHIRAZ NAJMUDIN GANIJEE..... 3RD PLAINTIFF
VERSUS
FIDELITY COMEMRCIAL BANK DEFENDANT

RULING

On 27th December, 2011, the Court issued a Notice to the parties to show cause why the suit should not be dismissed for want of prosecution. That notice came up for hearing on 20th January, 2012. On the said 20th January, 2012 I granted the Plaintiff more time to file an Affidavit showing cause and adjourned the matter to 9th February, 2012 for hearing.

On 9th February, 2012, the Plaintiff filed an Affidavit showing cause which satisfied the Court that the suit should not be dismissed. In discharging the Notice, the Court gave directions to the effect that the parties do take steps to comply with the provisions of Order 11 of the Civil Procedure Rules within 45 days and the suit be listed for trial within 120 days. The matter was fixed for mention on 26/3/12 to confirm compliance.

When the matter came up on 26th March, 2012 to confirm compliance, the Court found that there was completely no compliance with any part of the directions made on 9th February, 2012. It is only the Defendant who had filed a witness statement by one Phillip Muoka. On the part of the Plaintiffs, as usual, they had gone back to the slumber they had been in before the Notice of December, 2011 was issued. I asked Mr. Sagana to explain why the Plaintiffs had failed to comply with the directions of 9th February, 2012 and the only answer he gave me was that the parties had engaged in negotiations.

Order 17 Rule 2(4) of the Civil Procedure Rules provides that:-

“The Court may dismiss the suit for non-compliance with any direction given under this order.”

It is quite clear that the Plaintiffs have failed to comply with the directions made on 9th February, 2012. Before the Notice for dismissal was issued in December, 2011, the suit had remained unprosecuted for over 6 years. The last time the matter had been dealt with was 5th May, 2005. The Plaintiffs had

alleged in their Affidavit showing cause that the court file had gone missing which explanation was accepted by the court.

However, with the Court file available, for forty five (45) days within which the Plaintiffs were to take steps to prosecute the suit they failed to act. They are not only contemptuous of the court but, in my view, they have completely lost interest in this suit. The allegations that there were negotiations to settle the matter does to endear itself to me. It is a red-herring being raised on the face of the court to cloud the court's vision of the disinterest of the Plaintiffs with this suit. When asked to produce any evidence such as communication between the parties as proof of the alleged negotiations, Mr. Sagana produced none.

Rule 2(4) of Order 17 allows this court to dismiss a suit in which the Plaintiff has failed to comply with any directions given under that order. In my view, this is a proper suit for dismissal in the circumstances I have set out above. It is suits like these that portray the Judiciary in a bad light. They add into a backlog that never is. In my view, this is one of those suits that are filed by the parties only for fanciful purposes, to annoy Defendants. How else can it be explained that a suit that has existed since 2000, remained unprosecuted for six (6) years and when the party is given a chance to prosecute the same, it stays put in the same corner of convenience and waits for any of the interested parties, i.e. the Defendant or the court to take action.

For the record, the court will not hesitate to take the deserved action and help the Plaintiffs remove the burden of this suit from their shoulders. This court would have done so were it not that the defendant did not press for dismissal. Be that as it may, this court is still prepared to help the Plaintiffs achieve that goal by directing that the Plaintiffs do file and serve their bundle of documents, list of and witness statements and their set of agreed issues within three (3) days of the date hereof failing of which the suit shall stand dismissed with costs.

Further, on complying with the foregoing order, the plaintiffs do comply with the order of 9th February, 2012 and list the suit for trial within 120 days from 9th February, 2012, in default the suit shall stand dismissed with costs without any order whatsoever.

Orders accordingly.

Dated and delivered at Nairobi this 28th day of March, 2012.

A. MABEYA
JUDGE