



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 42 OF 2011

KENYA KNITTING AND WEAVING MILLS LTD.....PLAINTIFF

VERSUS

YUSUF ABDALLA IBRAHIM DEFENDANT

RULING

The defendant's application dated 15th February, 2012 seeks dismissal of the plaintiff's suit for want of prosecution. The application was made on the ground that the plaintiff had not taken any step towards prosecution of the suit for a period exceeding one year and the delay is inordinate and inexcusable.

The application was supported by an affidavit sworn by the defendant who stated that the suit was filed on 14th February, 2011. A statement of defence was filed on 22nd February, 2011. Since then the plaintiff had not made any attempt to set down the suit for hearing.

The plaintiff opposed the application and a replying affidavit was filed by **Kevin Dzumo**, an advocate in the firm of **Rombo & Company** who were on record for the plaintiff. He stated that he had informed the plaintiffs' Managing Director that in order to prosecute the case diligently he required additional supporting documents, in particular, certified copies of cheques issued to the defendant which are referred to in the plaint. The plaintiff was unable to avail the additional supporting documents owing to the fact that its Managing Director had been travelling extensively to various parts of the world. The plaintiff's counsel therefore sought more time to enable him procure the additional supporting documents from his client to be able to prosecute the suit.

When the defendant's application came up for hearing on 23rd March, 2012 the plaintiff's advocate did not attend court, though he had been served with a hearing notice on 19th March, 2012. The plaintiffs' advocate had acknowledged service of the hearing notice by stamping the same and an affidavit of service to that effect was filed by the defendant's advocate.

In the plaint, the plaintiff alleged that at the defendant's request and instance the plaintiff advanced to the defendant a sum of **Kshs.6,846,000/=** as a loan. The plaintiff had allegedly issued to the defendant 19 cheques totalling to the aforesaid sum. The plaintiff however prayed for judgment against the defendant for:

- “(a) Damages**
- (b) Interest**

(c) **Costs of this suit.**

(d) **Any other or better relief that this honourable court may deem fit to grant.”**

The plaintiff's claim was denied by the defendant. He averred that the claim was fraudulent and the same was the subject of criminal investigations by the police. The defendant put the plaintiff to strict proof of his claim and urged the court to dismiss the suit with costs.

There is no dispute that the plaintiff has not taken any step to prosecute its case for more than a year since filing of the same. The plaintiff's advocate categorically stated that he requested the plaintiff's Managing Director to avail to him copies of the cheques which were allegedly issued to the defendant but the plaintiff's Managing Director has been unable to do so because of his busy travelling engagements. In my view, that cannot be sufficient explanation for the inordinate delay on the part of the plaintiff. The plaintiff ought to have been in possession of all the necessary evidence before the filing of this case. In his witness statement filed together with the plaint on 14th February, 2011 the plaintiff's Managing Director, **Kamal Joshi**, stated that the defendant had requested for a temporary loan of Kshs.6,846,000/= from the plaintiff and the loan was granted by way of 19 cheques which were paid to him from 1st September, 2005 to January, 2009. The plaintiff's Managing Director went on to state that the plaintiff has in its records copies of the cheques issued to the defendant. However, the plaintiff's advocate stated in paragraph 4 of his replying affidavit that:

“4. That the plaintiff's director aforesaid, owing to various business concerns in India and United Kingdom travels extensively and is only in Kenya for a few weeks at a time, a fact which has hampered his efforts to obtain the said copies of cheques from Diamond Trust Bank, Capital Centre Branch.”

That averment by the plaintiff's advocate is in sharp contrast with the averment made by the plaintiff's Managing Director that:

“We have requested the bank to avail all documents that show these payments, and have presently in our records copies of cheques that show these payments.”

In the circumstances, I would agree with the defendant that the plaintiff has not advanced any reasonable explanation for the inordinate delay in prosecuting this suit.

Section 1 (A) of the Civil Procedure Act states that:

”The overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

Under subsection (3) thereof:

“A party to civil proceedings or his advocate is under a duty to assist the court to further the aforesaid overriding objective.”

The court cannot operate at the convenience of a party, and there being no reasonable explanation as to why the plaintiff has failed to avail the necessary supporting evidence to its advocate, it appears to me that the plaintiff is not desirous of expeditious disposal of this suit. The judiciary has over the years been accused of delay in finalizing matters pending before it but cases such as this one reveal otherwise. It is the plaintiff in this case who has refused, failed and/or neglected to prosecute its case even after the filing of the present application.

Consequently, the defendant's application dated 15th February, 2012 is granted with the result that the plaintiff's suit is hereby dismissed for want of prosecution. The plaintiff shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL, 2012.

D. MUSINGA

JUDGE

In the presence of:

Muriithi – Court Clerk

Mr. Marete for Mr. Rongo for Plaintiff

Miss Owando for Mr. Jalemy for defendant