



1. KENUSA INTERLINK SERVICES

2. MOHAMED ALI TAIB.....PLAINTIFFS

VERSES

1. MITSUI OSK LINES LTD

2. KENYA PORTS AUTHORITY.....DEFENDANTS

RULING

1. This is the 1st Defendant 's application dated 28th February, 2012, and is brought under Order 2 Rule 15(1) (b) (c) and (d) of the Civil procedure Rules and Sections 1A, 1B and 3A Civil Procedure Act. It seeks that the suit be struck out/dismissed with costs on, *inter alia*, the following grounds:

That the Plaintiffs have neglected or failed to prosecute their claim in this suit which has been pending for 16 years.

That on 22nd February, 2012 the Plaintiffs neglected, failed and refused to proceed with the hearing, without credible reason, despite it having been fixed by consent three months earlier.

2. The application is supported by the Affidavit of Hudson Nyangala of Shipping Services Kenya, the agents of the 1st Defendant. To that affidavit is attached an exchange of correspondence and documentary evidence tending to disclose the indolence of the Plaintiff in prosecuting the suit since filing of the suit in 1996.

Order 2 Rule 15(2), however, disallows the introduction of evidence to support an application under that Order.

3. The 2nd Defendant supports the application pursuant to submissions filed on 5th April, 2012, but concedes that the application would have been brought under Order 17 Rule 2 (3). They then proceed to set out a number of authorities showing that where there has been inordinate delay in prosecuting a suit, it may be dismissed. Order 17 Rule 2 (3) and (4) provides that:

“... Any party to the suit may apply for its dismissal as provided for in sub rule 14. The court may dismiss the suit the suit for non compliance with any direction given under this Order.”

4. This court readily agrees with the 2nd Defendant's submissions. Indeed, this court after carefully perusing the record of proceedings and court file since the case was filed in 1996, notes that there has been notorious, and inordinate delay in prosecuting this suit. The most recent examples will suffice:

- On 26th September, 2011, the Plaintiffs were ordered to file and serve their list of documents and statements of witnesses within twenty one (21) days. The deadline was 17th November, 2011. They eventually filed their documents on 8th December, 2011, but this excluded witness statements.

- On 9th Dec 2012 the parties by consent fixed the hearing for 22nd February, 2012. The Plaintiffs counsel failed to turn up, and the 1st Defendant orally applied for the suit to be dismissed. 2nd Defendant's counsel said she was ready to proceed. A counsel present then stood up after this exchange and said he was holding brief for counsel for the plaintiff who was out of the country.

5. The court, giving the benefit of the doubt to the Plaintiffs directed the 1st Defendant's counsel to make a formal application for dismissal and file and serve the same by 8th March 2012, for inter parties hearing.

It is that order that precipitated this application. On 26th March, 2012 it was agreed that the parties file written submissions for highlighting on 14th May, 2012.

6. By 14th May, 2012 both defendants had filed their written submissions, and were ready to highlight. The Plaintiffs only had a list of authorities dated 11th May, 2012 without accompanying submissions, which were presented in the court room on 14th May, 2012.

7. Despite the Plaintiffs' arguments and explanations, there is no justification for their general malaise and indolence towards prosecuting their own suit. Except that the application herein has brought under the wrong provisions of law, this court was minded to dismiss the suit, given the plaintiffs' deleterious ineptitude in prosecuting the same, as shown by the file record.

8. I will order that the hearing be fixed in the Registry within 30 days from the date of this order and proceed on an expedited basis. A mention for directions shall be fixed within 14 days from the date hereof. Should the hearing not proceed as ordered herein on account of any act or omission of the Plaintiffs, the suit shall stand dismissed. No liberty is granted to extend time for any of the orders herein.

In the special circumstances of the case, and given their conduct, the Plaintiffs shall carry the costs of this application.

Orders accordingly.

Dated, signed and delivered this 31st day of August, 2012.

R.M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwango
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)