

THE NEW BIG TREE BEACH RESORT LIMITED.....PLAINTIFF

VERSUS

INTEGER LIMITED.....DEFENDANT

RULING

The Defendant presented Notice of Motion dated 28th October 2009 seeking that this suit be dismissed for want of prosecution or in the alternative the application dated 24th May 2007 be dismissed for want of prosecution or the order issued on 24th May 2007 be varied and set aside. The application invokes the provisions of Order XVI rule 5, Order XXXIX rule 4 of the Civil Procedure Rules and section 3A and 63(e) of the Civil Procedure Act. The application was supported by the affidavit of Collins N.K. Owuor who deposes that as from 6th December 2007 the Plaintiff has not taken steps to fix the chamber summons application dated 24th May 2007. That a date was supposed to be fixed for hearing at the Registry on priority basis. No date was taken. That the Plaintiff has been enjoying interim orders ever since.

The Plaintiff filed a Replying Affidavit contending that the Notice of Motion application is misconceived and has no merit at all. It deposes that it has been a long standing tenant of the Defendant and that after institution of the suit the Plaintiff and the Defendant entered into an agreement dated 26th February 2009. The Defendant was to give the Plaintiff a new lease. That it was mutually agreed orally that at the completion of the said negotiations this suit was would be compromised. that the Defendant levied an illegal distress and caused damage to Plaintiff's goods on trade on fake allegations that the Plaintiff owed Kshs. 10,000,000/= in rent arrears. That the suit was meritorious and should not be dismissed.

On 22nd September 2010 parties agreed to file written submissions. On 11th November 2010 I ordered that ruling will be on notice. I regret delay in delivering this ruling. The delay was occasioned by factors beyond my control.

I have considered the respective submissions. What is clear is that the Plaintiff did not comply with the Court order of 6th December 2007. It was ordered that a fresh hearing date be fixed at the registry on priority basis. Interim orders were extended to that hearing date. By failing to take a hearing date the Plaintiff ensured that the interim order had an indefinite life span which was not the intention of the Court. The Court record reflects that a hearing date for the application was fixed on 15th January 2008. The Chamber Summons was fixed for hearing on 20th March 2008. The Defendant fixed a Chamber Summons dated 29th October 2007 for hearing on 4th March 2008. The Plaintiff requested the Registry to change the date of the chamber summons dated 24th May 2007 from 20th March 2008 to 4th March 2008. On 4th March 2008 the Chamber Summons dated 29th October 2007 was prosecuted. Ruling was reserved for 4th April 2008 and Interim Orders were extended until then. On 4th April 2009 the Ruling was not ready and it was deferred to 10th April 2008. Ruling was delivered on 24th April 2008. On 2nd July 2008 parties requested for time to negotiate an out of court settlement. Matter was fixed for mention on 18th July 2008.

The matter was not listed on 18th July 2008. On 5th November 2009 a Notice of Motion dated 28th October 2009 was fixed for hearing on 24th November 2009. This is the application which seeks the striking out of the suit. Interim orders in this matter lapsed on 10th April 2008. There is no extension of interim orders on record from this date. The Court order also reflects that there was an issue of representation of Defendant and it was raised on 10th June 2010 while application to strike out suit for want of prosecution was pending.

It is not disputed that the parties entered into an agreement dated 26th February 2009. The Defendant however contends that it later repudiated the agreement. Looking at the court proceedings as whole I do not find that the there has been want of prosecution of the Chamber Summons dated 24th May 2007 for an inordinate period. The Defendant had fixed its application for hearing. The suit has been active as the proceedings reflect. Interim orders lapsed on 10th April 2008 and there is nothing to vary or set aside. For these reasons I dismiss the Notice of Motion application dated 28th October 2009 with costs to the Plaintiff. It is so ordered.

Dated AND Signed At Nairobi ON This 6TH DaY OF AUGUST 2012.

M. K. IBRAHIM

JUDGE

DATED AND Delivered At Mombasa on This 30TH DaY OF AUGUST 2012.

J.W MWERA

JUDGE

Delivered in the presence of: