



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 53 of 2009

MUNZA INVESTMENT CO. LTD.....RESPONDENT

VERSUS

GATEWAY INSURANCE CO. LTD.....APPLICANT

RULING

The application before me is dated 5th October, 2011 filed pursuant to the provisions of Orders 17 rule 2(3) and 51 rule 1 of the Civil Procedure rules, section 3A of the Civil Procedure Act and all other enabling provisions of law. The application is brought by the defendant and seeks in the main that this suit be dismissed with costs for want of prosecution. The other prayer but which is secondary is for costs.

The grounds in support of the application are that the plaintiff had not taken any steps to prosecute the suit for more than 2 years, he had filed an application to amend the plaint on 16th July, 2009, but the same had not been prosecuted and lastly, that the continued existence and uncertainty of the suit was prejudicial to the defendant.

Lilian Munyiri, the legal officer of the defendant swore an affidavit in support of the application. She gave a narrative of the events leading to the application. The suit had been filed on 10th March, 2009. The suit papers were served on them and they entered appearance and filed a defence on 9th April, 2009. On 14th July, 2009, the plaintiff filed an application to amend the plaint. Though the application had been scheduled for hearing on 22nd July, 2011, it never took off. Since then the plaintiff had not endeavoured to have it prosecuted. The plaintiff had therefore neglected and or refused or otherwise not taken any material steps to prosecute its claim or set the suit down for hearing for a period of more than 2 years. That amounts to an abuse of the process of the court as the continued existence and uncertainty of the suit was prejudicial to the defendant. In the premises it was only just, fair and expedient that the suit be dismissed for want of prosecution.

In its reply to the application, the plaintiff through its managing Director, **Stephen Muchini Nzaku** deposed where pertinent that, the application in was bad in law and incompetent was full of falsehoods, brought in bad faith and with sole intent of denying the plaintiff justice. In the interest of justice, the application ought therefore to be dismissed. The delay had been occasioned by ongoing taxations in the suit and that the file was last in court on 5th November, 2010.

When the application came before me for *interpartes* hearing on 19th September, 2012, parties agreed to canvass the same by way of written submissions. The written submissions were subsequently filed and exchanged. I have carefully read and considered them.

Order 17 rule 2(3) under which the application is brought provides inter alia

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”.

It is clear that that sub rule is subject to sub rule (i) above which provides ;-

“(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

So that for the defendant to succeed in this application, it must demonstrate that in this suit for a year or so, none of the parties had made an application or taken steps in the suit towards its finalization. By the defendant’s own admission, the plaintiff had on 14th July, 2009 taken out an application to amend the plaint. That application was scheduled for hearing on 22nd July, 2011. However, it never took off. As long as the application aforesaid was pending, I cannot see how the plaintiff was expected to set down the suit for hearing.

This application was filed on 10th October, 2011. This was just under 3 months after the application for amendment of the plaint had unsuccessfully come up for hearing. The suit having been in court on 22nd July, 2011 time started to run then for purpose of this application. The application is therefore incompetent as it was filed before one year was up after the matter was last in court. This ground is sufficient to dispose of the application. It is dismissed with costs to the plaintiff

DATED at MACHAKOS this 22ND day of NOVEMBER, 2012.

**ASIKE-MAKHANDIA
JUDGE**

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of NOVEMBER, 2012.

**GEORGE DULU
JUDGE**