



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 1187 of 2007

RAMUKA AGENCIES LTD.....PLAINTIFF

- VERSUS -

ESTHER WANJIRA MAINA1ST DEFENDANT

THE ATTORNEY GENERAL2ND DEFENDANT

RULING

1. This is the 1st defendant's notice of motion dated 20th January 2012. The 1st defendant prays that the plaintiff's suit against her be dismissed for want of prosecution. The application is expressed to be brought under order 17 rule 2 (3) of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act.

2. The gist of the motion is that the plaintiff has lost interest in prosecuting the suit. It is averred that the last hearing in the matter was on 30th July 2008. As the plaintiff had not complied with certain pre-trial procedures, the matter was taken out of the hearing list. A mention date was then taken for the 22nd November 2011. The plaintiff or its counsel did not attend court. As a result, the 1st defendant avers that she is prejudiced by this old action and it is only just and fair that it be dismissed.

3. The 2nd defendant supported the motion for dismissal. The plaintiff however opposes the application. It was submitted on behalf of the plaintiff that the motion is incompetent as the proper procedure is to first file a notice to show cause for dismissal. It was further submitted that the 1st defendant is to blame for the delays by her non-compliance with discovery and inspection. The plaintiff filed its list of documents and has tried to fix the suit for hearing through a series of mentions in court. Lastly, the plaintiff submitted that since the suit would still be alive as against the 2nd defendant, the current application for dismissal was a futile act. The plaintiff relied further on the replying affidavit sworn on 9th October 2012.

4. I have heard the rival arguments. I have also paid due regard to the records before me, the pleadings, depositions and the cases cited by counsel. I am of the following considered opinion.

5. Under Order 17 rule 2 (1), (2) and (3), if no step is taken in any suit by either party for one (1) year, any party may apply to the court for dismissal of the suit. In the instant case, the suit was first filed over 9 years ago on 7th October 2003. It was later transferred to this court and renumbered. It was last in court for hearing on 30th July 2008. It did not proceed. There were subsequent mentions but the matter did not proceed to trial. So the application is properly before the court.

6. The test in a matter of this nature was laid out in Ivita Vs Kyumbu [1984] KLR 441. It is whether the delay is prolonged and inexcusable, and if it is, whether justice can still be done. In that event instead of dismissal, the court may exercise its discretion to set the suit down for hearing. That is the position Lady Justice Kasango took in The County Council of Meru Vs Rutere [1984] KLR 441.

7. I have studied the record of the court. On 20th February 2004, The pleadings closed with the filing of a statement of defence by the 1st defendant. The matter was last listed for full hearing on 30th July 2008. On that date the court was informed by learned counsels that there was no compliance with discovery and inspection. The matter was taken out of the day's cause list. The plaintiff on 11th October 2011, nearly 3 years later, fixed the matter for mention for 1st November 2011. The plaintiff's counsel had not served a mention notice. A further mention was granted for 22nd November 2011. On the latter date, the plaintiff or its counsel of record did not attend court. The present motion for dismissal was then fixed for hearing by the 1st defendant.

8. Granted that state of affairs, I draw the following inescapable conclusions. The plaintiff's suit was presented to court on 7th October 2003. Pleadings between the plaintiff and the 1st defendant closed way back in the year 2004. The plaintiff last fixed the suit for hearing on 30th July 2008. The plaintiff's counsel did not attend the court for mention on 22nd November 2011 to fix the suit for hearing. That last mention cannot thus constitute a step to fix the suit for hearing as known by order 17 of the Civil Procedure Rules 2010. The present motion for dismissal is properly before the court. The plaintiff's counsel's view that it should be preceded by a notice to show cause is mistaken. Order 17 grants either the court, by way of notice to show cause, or an aggrieved party, by way of a notice of motion, to move for dismissal of the suit.

9. In Fitzpatrick Vs Batger & Co. Ltd [1967] 2 ALL ER 657 Lord Denning citing his decision in Reggentine Vs Beecholme Bakeries Ltd [1967] 111 sol. Jo. 216 said;

“It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition the delay is far beyond anything we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution”.

10. With the overriding objective to do justice to the parties, it is also in the interests of a fair trial. The defendants here are prejudiced by the existence of a stagnant suit. In Mugo Njogu Vs Mary Githinji [2010] e KLR the court was of the view, and I agree, that the plaintiff's counsel must take full responsibility for such delay. The court went further to say that “counsel have a role and duty to assist the court in realizing the overriding objective and incompetency or lapses of counsel derogate from the objective”.

11. Lastly in a recent decision in Nilam Doshi Vs Credit Agricole Indosuez Limited and 3 others Nairobi HCCC No 802 of 2002 (as consolidated with HCCC Nos 803 & 804 of 2002) (unreported) I observed that the dictates of justice and the inherent power of the court require, in circumstances such as these ones, to free the defendants from the hold of the plaintiff's inert grip.

12. For all the above reasons, this is a perfect case of a disinterested plaintiff who has completely slept on its rights. I commiserate with the plaintiff for the predicament it now faces. But it is not without other remedies if well advised. But granted the circumstances, the suit cannot be sustained any longer against the defendants. Justice is a two way street. The defendants as I have stated are prejudiced by the lethargy of the plaintiff to prosecute its case. In the result, I order that the plaintiff's suit be and is hereby dismissed with costs to the 1st defendant.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 12th day of November 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

Ms Ndiho for the 1st Defendant.

No appearance for the 2nd Defendant.