



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 30 of 2009

QUALITY GROUP LIMITED.....PLAINTIFF

VERSUS

GENERAL MOTORS EAST AFRICA LIMITED..... DEFENDANT

RULING

1. By a Notice of Motion dated 13th July, 2010, the Defendant applied to this Court under Order X Rule 11A and Order XVI Rule 5 of the former Civil Procedure Rules, and Sections 1A and 1B of the Civil Procedure Act, to have the Plaintiff's suit dismissed for want of prosecution. The Application was argued before this court and a Ruling delivered on 16th March, 2012, whereby the said application was dismissed. However, in dismissing the application, the Court made certain directions as follows:-

“Accordingly, the Defendant’s Notice of Motion dated 13th July, 2010 is dismissed and I make no orders as to costs. I direct that the Plaintiff does take steps to comply with pre-trials under Order 11 of the Civil Procedure Rules and consequently list the suit for trial within 90 days in default the same shall stand dismissed.”

2. The Defendant has now applied by way of a Notice Motion dated 23rd July, 2012 for an order that the Plaintiff's suit against the Defendant stands dismissed on the grounds that that the Plaintiff failed to comply with the Court order dated 16th March, 2012 (“the Order”). The Motion is supported by the Affidavit of Anthony Musyoki, the legal officer of the Defendant.

3. It is contended by the Defendant that since the delivery of the said Ruling on 16th March 2012, Ninety (90) days have lapsed without the Plaintiff complying with the pre-trial directions under Order 11 of the Civil Procedure Rules and/or fixing the suit for pretrial directions or fixing the suit for trial as ordered by the Court. It is further contended that on 26th June, 2012, 102 days after the Order of 16th March, 2012, the Plaintiff filed and served Witness Statements, List of witnesses and purported to invite the Defendant to fix the suit for hearing. That the Registry declined to fix the suit for hearing on the ground that the suit stood dismissed by virtue of the Orders issued on the 16th March, 2012. That despite not complying with the Order issued by this Court, the Plaintiff still attempted to fix the suit for hearing.

4. The Application was opposed by the Plaintiff vide a Replying Affidavit sworn on 2nd August, 2012 by Stephen Ligunya, the Advocate for the Plaintiff. It was contended that the Plaintiff has taken tentative steps in complying with the said Order and has since filed a list of agreed issues and even tried to comply with the pre-trial procedures by filing the requisite documents and serving them upon the Defendant's Advocates who had duly acknowledged the same. It is the Plaintiff's contention that there has been

compliance with the Order issued on 16th March, 2012. The Plaintiff also contends that the Ninety (90) days granted had not lapsed, as the computation of the 90 days excludes Sundays, Christmas day, Good Friday and Public Holidays. As such, it is the contention of the Plaintiff that the Order was supposed to lapse on the first week of July 2012, that the Defendant's interpretation on the computation of time was erroneous and the move to dismiss the suit herein is in bad faith. The Plaintiff therefore asked the court to render an interpretation as to the computation of time with regard to the Order of 16th March, 2012. It was argued for the Plaintiff that the Registry was misguided in declining to give a date for the hearing of the matter on the pretext that the suit stood dismissed and that the Plaintiff will stand to suffer irreparable harm and damage if the suit is dismissed and not decided on its merits. For the foregoing reasons, the Plaintiff urged that the application be dismissed.

5. I have considered the Affidavits on record and the submissions of the learned counsel. The matter in contention before me is simple. Did the Plaintiff comply with the order made by this Court on 16th March, 2012? That is, did the Plaintiff take steps to comply with the pre-trial's under Order 11 of the Civil Procedure Rules and take steps to list the suit for trial within 90 days of the order?

6. What then constitutes 90 days? The Defendant has referred the court to two provisions of the law, namely, Order 50 (2) of the Civil Procedure Rules and Section 57 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya, which deal with the computation of time. Section 57 of the Interpretation and General Provisions Act provides:-

“ In computing time for the purposes of a written law, unless the contrary intention appears -

a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

b)if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

d)where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.” (emphasis mine)

Order 50 Rule 2 of the Civil Procedure Rules deals with the issue of Sunday, Christmas Day , Good Friday and Public Holidays. The Rule states:-

“Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time”

7. From the plain reading of the above provisions, it is clear that for one to argue that Sundays, Christmas Day, Good Friday and Public Holidays are excluded in the computation of time, the period for which an act ought to be done must be less than six (6) days. In the present case, the Order issued by this court on the 16th March 2012 had a time frame of 90 days, which is over six (6) days contemplated by Order 50 Rule 2. Section 57 of the Interpretation and General Provisions Act excludes Sundays and Public Holidays if the period given is less than six days and if the last day falls on any of those days. In the foregoing, I find that the Plaintiff's argument on the computation of time is not correct. The time period for complying with the court order was from 17th March, 2012 to 14th June, 2012, Sundays and public holidays inclusive. Any activity that the Plaintiff purported to undertake beyond the 14th June, 2012 fell beyond the time limit prescribed by the Court Order.

8. I have also examined the documents adduced by the Plaintiff in support of its claim that it took substantive steps to comply with the Orders of the Court. I do note that the Agreed Issues dated 23rd July, 2010 were filed in Court on 13th August 2010, therefore were not a subject of the Order given by this court on 16th March 2012. I have also seen the list of documents filed on 15th May, 2012. This was done within the time period. However, the list of witnesses plus the witness statements were filed on 25th June 2012, which was beyond the 14th June, 2012 deadline. Clearly, the Plaintiff had not observed the time limit of 90 days when engaging in these pre-trial activities.

9. In any event, the Order of 16th March, 2012 contained two limbs, first the compliance of Order 11 and secondly the fixing of the Suit for hearing within 90 days. The letter dated 25th June, 2012 inviting the Defendant to fix the suit for hearing was filed with the Court on 4th July 2012. The same was received under protest by the Defendant's advocates on 28th June, 2012. All these dates were beyond the time limit of 90 days mandated by the Court Order. In the Case of **Cheshire –v- Rosemond (1965) 1 All ER 145** it was held that in an application for dismissal for want of prosecution, the Court can make the Plaintiff give an undertaking, that if the case is not set down for hearing within a specific time, the same should stand dismissed. In the foregoing, I find that this court was sympathetic towards the Plaintiff as demonstrated in the Ruling issued on 16th March, 2012. The Court made it plain and clear that the Plaintiff had to adhere to certain conditions, chief among them, setting down the matter for hearing within 90 days. The Plaintiff subsequently went into a deep slumber and did not adhere to the Orders of this Court. Once the 90th day struck, the suit stood dismissed. No step could be taken. There was no application to extend the 90 day period. The suit remained dead on expiry of the time as directed by the order of 16th March, 2012.

10. Consequently, I find that the Defendant's application dated 23rd July, 2012 has merit and the same is allowed. The Plaintiff's suit stands dismissed with costs to the Defendant.

DATED and **DELIVERED** at Nairobi this 3rd day of **December**, 2012.

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A. MABEYA

JUDGE