



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 929 of 200

PANATECH LIMITED1ST PLAINTIFF

JARIBU CREDIT TRADERS LIMITED 2ND DEFENDANT

VERSUS

MRADULA KANTARIA.....1ST DEFENDANT

RASHIL KANTARIA.....2ND DEFENDANT

JANTILAL KANTARIA..... 3RD DEFENDANT

THE HON. ATTORNEY-GENERAL..... 4TH DEFENDANT

RULING

By notice of motion dated 16.08.05 stated to be brought under Order VI rule 5 and Order L rule 1 of the Civil Procedure Rules, the 1st defendant applied for the following orders:-

1. That the suit against the 1st defendant herein be dismissed for want of prosecution.
2. That costs of this application and of the suit be awarded to the 1st defendant.

The grounds upon which the application is based are:-

- a) That the plaintiffs herein instituted the suit against the defendants on 07.01.03.
- b) That the 1st defendant filed her defence on 02.05.03.
- c) That since the close of pleadings 2 years ago the plaintiffs have taken no steps to set down the suit for hearing.
- d) That the nature of this case and other reasons to be adduced at the hearing.

At the hearing of the application on 19.02.08 the 1st defendant/applicant was represented by learned counsel, Miss A.O. Okuta while the plaintiff/respondent was represented by learned counsel, Mr J.T. Makori.

The 1st defendant's/applicant's counsel pointed out that two years had elapsed since the plaintiffs filed their case but had done nothing to fix it for hearing. The 1st defendant's/applicant's counsel referred to a replying affidavit of Sophia Mburu sworn on 28.01.08 and faulted it on two scores:-

- a) That it was filed without leave.
- b) That in any case it discloses only what the plaintiffs had done since December, 2005 but gave no explanation for the initial 2 – year delay.

The 1st defendant's/applicant's counsel also drew attention to an earlier replying affidavit by the same Sophia Mburu sworn on 07.11.05 and pointed out that even that affidavit gives no explanation for the initial 2 – year delay in fixing the case for hearing.

In the 1st defendant's/applicant's view, the plaintiffs were not desirous of prosecuting their case; and that they only took steps after the application under consideration was filed.

On the other hand, plaintiffs'/respondents' counsel opposed the application for dismissal of the case. He drew attention to Sophia Mburu's replying affidavit sworn on 07.11.05 and in particular to paragraph 6 where Sophia Mburu deponed that she is the secretary of the plaintiff companies and that the plaintiffs are interested in proceeding with the suit. Plaintiffs'/respondents' counsel also drew attention to paragraph 5 of the same Sophia Mburu's affidavit deponing that the plaintiffs had already taken dates for the hearing of the case on 1st and 2nd March, 2006. The same counsel also informed the court that his firm, Enonda, Makoloo, Makori & Co. Advocates was the third firm to act for the plaintiffs; that the case was filed by Hamilton Harrison & Mathews Advocates; taken over by Gatheru Gathemia & Co. Advocates; and finally by Euonda, Makoloo, Makori & Co. Advocates. Plaintiffs'/respondents' counsel also said that during 2005 the High Court was not confirming for hearing cases filed after 2000. These statements were not challenged.

Plaintiffs'/respondents' counsel did not address the issue of Sophia Mburu's replying affidavit sworn on 28.01.08 having been filed without leave but he all the same purported to refer to the explanations given therein of certain actions taken by the plaintiffs/respondents toward getting their case fixed for hearing. I surmise from plaintiffs'/respondents' counsel's silence on the issue of Sophia Mburu's replying affidavit sworn on 28.01.08 being filed without leave that there was no answer to the accusation that the affidavit was filed without leave. In the premise, I ignore the affidavit and direct that the said affidavit be expunged from the court record.

Major activities relating to progress of this case include the following:-

- Ø Filing of plaint by Hamilton Harrison & Mathews on 07.03.03.
- Ø Filing of memorandum of appearance for 2nd and 3rd defendants on 09.04.03.
- Ø Filing of memorandum of appearance for 1st defendant on 17.04.03.
- Ø Filing of chamber summons application by plaintiffs for default judgment to be entered against the 4th defendant on 27.08.03.
- Ø Filing of issues by plaintiffs on 17.09.03
- Ø Filing of issues by 2nd and 3rd defendants on 24.09.03.

Ø Filing of notice of change of advocates from Hamilton Harrison & Mathews to Gatheru Gathemia & Co. Advocates on 10.08.05.

A different firm of advocates is now acting for the plaintiffs/respondents.

The 1st defendant's/applicant's grounds for applying for dismissal of the plaintiffs' suit are essentially that the plaintiffs filed their case on 07.01.03, that the 1st defendant filed her defence on 02.05.03, that two years after closure of pleadings, the plaintiffs had taken no steps to set down the case for hearing and that, therefore, the case should be dismissed for want of prosecution.

On the other hand, plaintiffs'/respondents' counsel maintained that the plaintiffs/respondents have been active to ensure that the matter proceeds. He relied on the following cases in support of his position:-

a) Victory Construction Co. -vs- A.N. Duggal [1962] E.A. 697 where the court (Edmonds, J) held that where parties to an action are called upon to show cause why an action should not be dismissed for want of prosecution, the court should be slow to make an order if satisfied that the suit can be heard without further delay, that the defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the plaintiff.

b) Alice Githae (t/a Alice Nursing Home) -vs- National Hospital Insurance Fund (through Board of Trustees), H.C.C.C. No.1465 of 2002 to make the point that even where there has been inordinate delay on the part of the plaintiff but such delay has not been flagrant and culpable, that the suit can be heard without further delay and that the defendant can be compensated for the delay by an award of costs, such delay may be excusable.

Order VI rule 11 of the Civil Procedure Rules provides:

'11. The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with'

I cannot find in the court file any defence filed by any of the defendants. That makes it difficult to determine when pleadings closed but I shall not dwell on that now.

The major activities sampled hereinabove indicate that various steps were taken by the parties including the plaintiffs between the filing of the suit on 07.03.03 and 10.08.05 in connection with the taking forward of this case. The plaintiffs/respondents seem to have accelerated their steps towards having the suit heard after the notice of motion dated 16.08.05 was filed. While the plaintiffs'/respondents' activities may have been less intense before the notice of motion was filed, the fact remains that the plaintiffs/respondents were not idling over the matter. Dismissal of an action without hearing on merit is a drastic remedy, to be resorted to only in the clearest of cases. I find the present suit not to be such case. Accordingly, the notice of motion application dated 16.08.05 is dismissed and the parties are directed to proceed to take steps on priority basis towards disposal of the suit on merit. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 10th day of March, 2008.

B.P. KUBO

JUDGE