

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 184 of 2000

HIGHLANDS MINERAL WATER COMPANY LTD.....PLAINTIFF

Versus

KENYA COMMERCIAL BANK LTD.....DEFENDANT

RULING

The application before court is by way of Notice of Motion dated 19th March 2007. The same is brought under order XV1 Rule 5 (d) of the Civil Procedure Rules. The Defendant by that application seeks the dismissal of this suit for want of prosecution. The affidavit in support of that application is sworn by advocate for the Defendant. He deponed that the suit was filed on 19th August 2000. That the present advocate for the Defendant came on record on 24th November 2004. That on 14th December 2005 an application was argued before court for particulars and the ruling was resolved for 23rd February 2006. That since the delivery of that ruling the plaintiff had failed and neglected to fix the suit for hearing. For that reason the Defendant sought that the suit be dismissed for want of prosecution. The application was opposed. In opposition a replying affidavit was sworn by the chairman of the plaintiff company. He deponed that after the suit was filed the Defendant filed a request for particulars dated 18th October 2000. That the then advocate on record for the plaintiff supplied to the Defendant those particulars. On 22 November 2002 the plaintiff's advocate invited the Defendant to fix the case for hearing. The case was on that occasion adjourned by consent. In February 2004 the then advocate acting for the Defendant applied to cease to act. The present advocate for the Defendant came on record on 11th March 2004. On coming on record the said advocate for the Defendant made an application for particulars that application was heard and a ruling was delivered on 23rd February 2006. Pursuant to that ruling the plaintiff supplied to the defendant the particulars sought. Thereafter on 17th July 2006 the plaintiff advocate wrote to the Defendant advocate proposing an out of court settlement. That letter was annexed to the affidavit. It seems that the defendant did not respond to that letter and the plaintiff advocate wrote another letter on 14th August 2006. Again the Defendant advocate did not respond and another letter was written by plaintiff advocate dated 15th December 2006 whereby the plaintiff advocate proposed a settlement figure in order to settle this case. The afore stated letters were annexed to the affidavit. Another letter dated 15th March 2007 was written by the Plaintiffs Advocate to the defendant advocate whereby the plaintiff advocate included in their former proposal an aspect of legal fees to be paid to the plaintiff. The deponent therefore concluded that it is not true that the plaintiff is no longer interested in prosecuting this suit. He stated that the reason why the plaintiff has not yet fixed this case for hearing is because the plaintiff was seeking an out of court settlement with the Defendant. For the reasons stated the plaintiff deponed that it will be grossly unfair and unjust to dismiss the suit. In support of application the Defendant relied on two authorities namely:-

High Court Of Kenya

irobi, Commercial Division, Milimani Civil Suit 117 Of 2003. Fidelity Commercial Bank Limited v Muthogas Gaturu & Company Advocate.....Defendant

In this case the respondent had failed to fix the case for a period in excess of 2 years and the court found that the delay was inexcusable and therefore dismissed the suit for want of prosecution. Secondly the Defendant also relied on High Court *civil suit 625 of 2002 Skool Enterprises Limited Plaintiff V Housing*

Finance Company Of Kenya Limited.

In this case the suit was dismissed for want of prosecution for the plaintiffs failure to fix the suit for hearing for a period of 3 years. The plaintiff in opposition relied on the case of *Titus Ngatia V Danyla Pereira And Another Nairobi High Court Civil Case No. 536 Of 1970 Per J(1970) KHCD 19 January To February.*

The plaintiff relied on the following portion of that case:-

(a) It is discretionary on the part of the Court to grant an application for dismissal of a suit for want of prosecution but it should not in any event be exercised without giving the Plaintiff an opportunity of remedying his default unless the Court is satisfied either that the default has been intentional or contumelious or that the inexcusable delay which the Plaintiff or his lawyer have been responsible has been such as to give rise to substantial risk that a fair trial of the issues in litigation will not be possible at the earliest date and as a result of the delay the action would not come to trial if it were allowed to continue.

I have considered the application before court indeed it is correct that the Rules require that a party would fix a case for hearing within 3 months of it being adjourned. In this case it is correct to state that the plaintiff did not fix the case within 3 months. The Plaintiff however has shown that it engaged the Defendant with out of court proposal which the defendant did not respond to. What I find is that the defendant failure to respond the proposal may well have led the plaintiff to believe that the defendant was considering responding to the proposal. That may well have delayed the plaintiff from fixing this case for hearing. I therefore find that the delay in fixing this matter occasioned by the plaintiff is excusable. I therefore find that this is not a case whereby the court will act in strictly following the provisions of order XV1 Rule 16. The delay in fixing this case is one year. For that reason the Notice of Motion dated 19th March 2007 is hereby dismissed but the costs shall be in cause.

Dated and delivered at Nyeri 11th of May 2007.

MARY KASANGO

JUDGE