



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 1205 OF 2000

PROTEIN & FRUITS LIMITEDPLAINTIFF

V E R S U S

1. CREDIT BANK LIMITED

2. PAUL MUTUNGI

3. JOSEPH GIKONYO (T/a Garam Investments).....DEFENDANTS

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

This is an application (by notice of motion dated 7th March 2006) by the Defendants for dismissal of the Plaintiff's suit for want of prosecution. It is alleged that the suit was last in court for hearing on 17th February, 2003; it was not heard, and since then the Plaintiff had not set it down for hearing. There is a supporting affidavit sworn by the Defendants' advocate, Mr. ASHITIVA B. MANDALE.

The Plaintiff has opposed the application as set out in the grounds of opposition dated 26th April, 2006. Those grounds are, that the application is incompetent, frivolous, vexatious and in bad faith; that it offends the Civil Procedure Act and Rules; that it does not disclose a cause of action; and that the Defendants have not come to court with clean hands. These grounds do not say much in the circumstances of this case, except that the Plaintiff really has no answer to the application. There is no replying affidavit.

I have considered the submissions of the learned counsel for the Defendants and those of Mr. Mwaura, a director of the Plaintiff. I have also perused the court record. The matter was last in court on 5th November, 2002 for hearing of an application dated 5th July, 2000; it was not on 17th February, 2003 as stated by the Defendants. On that latter date the matter appeared before the duty judge under a certificate of urgency in respect of an application for injunction; the judge ordered that the application be heard the following day, 18th February, 2003. Apparently the matter was not heard on that day.

The present application was filed on 7th March, 2006. Between the 17th February 2003 and 8th March,

2006 is a period of over three years. During that time the Plaintiff did not set down its case for hearing. This is inordinate delay that has not been explained at all. It is inexcusable.

I would have had no hesitation at all in dismissing the suit for want of prosecution had the application been made under rule 6 of Order 16 of the Civil Procedure Rules (the Rules). That rule provides:-

“6. In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed, and in such case the plaintiff may, subject to the law of limitation, bring a fresh suit.”

But the present application is brought under rule 5(d) of Order 16. Under that rule, if, within three months of the adjournment of the suit generally, the plaintiff or the court of its own motion on notice to the parties does not set down the suit for hearing, the defendant may do so or apply for its dismissal. I cannot find in the record an order adjourning the suit generally on either 17th or 18th February, 2003 or thereabouts. I am not persuaded by the submission of the learned counsel for the Defendants that as the matter was not listed for the hearing of the application on 18th February, 2003 as ordered the previous day it must be presumed that it was stood over generally. To give rule 5(d) aforesaid its proper effect, there must be a specific order standing the matter over generally.

For this reason alone, I will refuse the application by notice of motion dated 7th March 2006. It is hereby dismissed. Regarding costs, to award the Plaintiff costs would be to reward its indolence. I order that parties bear their own costs of the application. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 14TH DAY OF SEPTEMBER, 2007