



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1662 of 2000

SUNRAYS GARDENS LIMITED1ST PLAINTIFF

KANN GREENS LIMITED2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

The application is a Notice of Motion dated 21st December 2006, brought under Order XVI Rule 5(d) and Order L Rule 15(2) of Civil Procedure Rules and Section 3A of Civil Procedure Act. It seeks to have this suit dismissed for want of prosecution and for costs.

There are six grounds cited on the face of the application in support thereof which are:

- (i) This suit was filed on 15th September 2000 contemporaneous with an application dated 13th September 2000 seeking injunctive orders.**
- (ii) The aforesaid application dated 13th September 2000 and other subsequent applications seeking temporary injunctive orders were dismissed with costs by the Honourable Court.**
- (iii) More than two (2) years has lapsed without the plaintiffs setting this suit down for hearing.**
- (iv) The plaintiff have depicted by his indolence, a lack of willingness to prosecute the suit herein.**
- (v) Litigation must come to an end.**
- (vi) No prejudice whatsoever or at all shall be occasioned on the plaintiff/respondent upon dismissal of this suit.**

There is also an affidavit sworn by Ms Mogaka, the Recoveries Manager of the Defendant Bank. In it the deponent summarizes the history of the case since it was filed. She also avers that all applications filed

by the Respondent seeking to injunct the Defendant Bank from selling the suit property were dismissed. Ms Mogaka depones further that it is two years since the matter was last in court i.e. on 28th February 2003 when the Plaintiffs' Chamber Summons dated 22nd May 2002 was dismissed.

The Respondent's Advocate on record were served with this application and the hearing notice. No papers were however filed and therefore the application is unopposed.

Mr. Mungu argued this application on behalf of the Defendant/Applicant. Counsel submitted that ever since the Plaintiffs' application was dismissed on 14th August 2002 the Respondent has gone into slumber. Mr. Mungu also relied on paragraph 9 of the supporting affidavit where it is deponed that the Plaintiff has since filed Milimani HCCC No.170/03 on the same subject matter which is pending. On that ground counsel urged court to dismiss the suit.

I have considered the application. The last time this suit came up in court was on 28th February 2003 when **Ombija J** dismissed the Plaintiffs/Respondents' application dated 22nd May 2002. Since then no action has been taken to have the suit set down for hearing.

The court's discretion to dismiss a suit for want of prosecution is unfettered. However the discretion should be exercised only where it is shown that the delay is prolonged and inexcusable. See **IVITA UKYUMBU [1984] KLR 441**.

In the instant suit, not only has the delay been prolonged being over 2 years, the Plaintiff despite service, filed no papers to try and explain the delay. In addition the Defendant's official has deponed that the Plaintiff has since filed a fresh suit on the same subject matter. Despite being served with the Applicants' affidavit, the Plaintiff has filed no reply and therefore the averment that it has filed a similar suit on the same subject matter is uncontroverted.

I find that the Plaintiffs have lost interest in this mater; that the delay in setting down the suit is prolonged and inexcusable. I will allow the application by dismissing this suit with costs of the application and of the main suit to the application.

Dated at Nairobi this 16th day of November 2007

LESIIT J

JUDGE

Read, signed and delivered in the presence of:

Kaungu for Mr. Burugu for Applicant

N/A for Respondent

LESIIT J

JUDGE