



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Civil Suit 2 of 2003

MECHANISED CARGO SYSTEMS LIMITED.....PLAINTIFF

VERSUS

EAST AFRICAN BUILDING SOCIETY.....DEFENDANT

R U L I N G

The plaintiff filed this suit on 7th January 2003. The plaintiff filed an injunction application and after some appearances before different judges, the Hon Justice Ibrahim on 31st July 2003 ordered by consent, in part, that: -

“By consent, the application dated 4th June, 2003 is hereby stood over generally. The suit to proceed for full trial on merits.”

Thereafter the defendant on 13th December 2003 filed its statement of issues and also on 13th November 2003 filed list of documents.

The next activity was from the plaintiff counsel, who on 27th February 2004, fixed hearing the application dated 6th January 2003 for hearing on 7th May 2004. It ought to be noted that this was the application that was stood over generally by Hon Justice Ibrahim although his order, wrongly stated that it was dated 4th June 2003.

On 7th May 2004, plaintiff counsel adjourned the application on the basis that the Hon Justice Ibrahim had ordered that the suit proceed to hearing on merit.

Thereafter the plaintiff took no action on this matter.

The defendant by its application dated 16th August 2005 seeks the dismissal of the plaintiff’s suit for want of prosecution. The application is brought under Order XVI Rule 5 (a) and (b)

The defendants applications is based on the grounds that the plaintiff neglected or refused to take any steps to set down this matter for hearing since 31st July 2003, when Hon Justice Ibrahim directed that the suit be fixed for hearing, and that it is now two years since the judge so ordered. That the period of two years was likely to prejudice the defendant.

The plaintiff in opposition argued that there had been no communication from its former counsel until that counsel served it with an advocate/client bill of costs. That, that taxation was acrimonious and was the subject of a reference before a judge who delivered his ruling on 17th October 2005.

Plaintiff's present counsel said that he has had difficulty to get the plaintiff's file and documents from its former advocate and that he was forced to get copies from the court file.

Plaintiff's counsel said as a reason why the suit should not be dismissed that he has invited the defendants to take a date for hearing and that if the plaintiff's suit is dismissed the plaintiff stands to lose more because it involved a property valued at about kshs 200, 000, 000/-.

I have considered the arguments presented before me and the affidavit in support and in opposition to the application. The plaintiff undoubtedly has been indolent in this matter and as argued by the defendant, the plaintiff itself did not show that it had an interest in the suit by exhibiting letters of inquiry to its then advocate.

I do however find that the order under which dismissal is sought affords the court discretion. I am minded to exercise that discretion in favour of the plaintiff on the basis that this litigation involves land and land is known, particularly in Kenya, to have sentimental ties; and also because there indeed does seem to have been some kind of falling out between the plaintiff and its former advocate, which might have affected the speed with which this suit was prosecuted; I have also considered that the present plaintiff's counsel has arranged for a hearing date to be fixed.

Even though I will exercise my discretion as stated herein before, I am of the view that the plaintiff ought to pay costs of the defendant's application and ought to demonstrate some seriousness in prosecution of the suit. The defendant can, if the plaintiff fails to prosecute the suit hereafter, again seek dismissal for want of prosecution.

The orders of the court are:

(1) That the defendant's application dated 16th August 2003 is disallowed and costs assessed at kshs 20, 000 are awarded to the defendant as against the plaintiff, which costs shall be paid within seven (7) days from today's date, if the plaintiff does not pay within the said period the defendant is granted leave to execute for the same.

(2) That the defendant is granted leave to file another application, for dismissal for want of prosecution, if the plaintiff does not prosecute this suit with due diligence.

Dated and delivered this 24th November 2005.

MARY KASANGO

JUDGE