



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL CASE NO 23 OF 2018

MBOE SAMBU RESOURCES LTD.....PLAINTIFF/RESPONDENT

VERSUS

STEPHEN SAMWEL PAINO.....1ST DEFENDANT

FRANCIS EDWARD STRANGE.....2ND DEFENDANT

RULING

The case for the first defendant/applicant

1. Pursuant to the provisions of Order 51 Rule 1, Order 17 Rules 3 and 4, sections 1A, B, 3A & 63 (e) of the 2010 Civil Procedure Rules and articles 48, 50, (1) & 159 (2) (b) of the 2010 Constitution of Kenya, the 2nd defendant/applicant has applied for the following major orders.

- 1) an order to dismiss the plaintiff's/respondent's suit herein for want of prosecution.
- 2) an order directing that costs of this application be borne by the plaintiff/respondent.

2. The application is based on the following grounds. First, the suit was filed on 8/11/2018. Second, the second defendant entered appearance and filed his defence. Third, the plaintiff/respondent has failed and/or neglected to list the matter for case conference. Fourth, the subject matter has remained pending to date for over one year and two months (1 year and 2 months). Fifth, the plaintiff has not found it fit to set it down for hearing and that the continued subsistence of the suit causes and continues to cause anxiety to the second defendant. Sixth, this is a fit case for dismissal under Order 17 Rules 3 and 4 of the 2010 Civil Procedure Rules. Seventh, the plaintiff's conduct amounts to and constitutes an abuse of the court process.

3. In addition to the foregoing, the 2nd defendant has deposed to a 22 paragraphs supporting affidavit. In that affidavit the 2nd defendant has reproduced the same matters that are set out on the face of the notice of motion, except for the following major averments. First, the duration of delay in fixing the suit for hearing has been inordinate and unreasonably long and there is likely to be lapse in memory; which will compromise the accuracy of the evidence tendered. The conduct of the plaintiff is contrary to and is in contravention of the overriding objectives of this court.

The case for the plaintiff/respondent

4. The plaintiff through its managing director (Stephen Kimanyi) has deposed to a 23 paragraphs replying affidavit in opposition to the application.

5. He has deposed to the following major averments. First, the plaintiff was not able to effect service upon the 1st defendant, which necessitated him to effect service upon him through substituted service. Second, the plaintiff was awaiting the outcome of a criminal case against the applicant being Kilgoris PM Criminal Case No. 48 of 2015, in which the applicant was convicted; to enable him amend the suit. In the suit the plaintiff is claiming special damages in the sum of Shs. 50,000,000/-

6. Third, the plaintiff changed his advocate to the current one, because he was not prosecuting the case timeously to its conclusion. The advocate was not able to timeously serve the defendant owing to the slowing down of the Kenya economy due to the global corona pandemic. Fourth, following advice from his advocate, which he believes, the plaintiff avers that it should not be punished for the mistakes of its advocate. Fifth, the dismissal of the suit for want of prosecution will greatly prejudice the respondent. Sixth, following advice from his advocate, the respondent believes that dismissal of the suit should only be done when the delay is prolonged and inexcusable, such that it would cause grave injustice in the case.

Issues for determination

7. I have considered the affidavit of both parties in the light of the applicable law. As a result, I find that the following to be the issues for determination.

- 1) Whether the delay is excusable.
- 2) Whether the delay is likely to cause injustice to the defendant/applicant.
- 3) Who bears the costs of the application?

Issue 1

8. I find that there is delay of slightly over one year in this suit. I find as credible the evidence of the respondent that he was unable to serve the 1st defendant. As a result, the respondent was forced to apply for substituted service, which succeeded. Furthermore, I take judicial notice that the global corona pandemic adversely affected the economic life in Kenya.

9. I find that it was not necessary for the respondent to await for the outcome of a criminal case against the defendant to enable it amend its pleadings. However, I find that a litigant should not be punished for the mistakes of his advocate. Furthermore, I find as credible its affidavit that it was forced to replace its advocate as the suit was not timeously being prosecuted.

10. I therefore find that the delay is excusable.

Issue 2

11. I find that a prolonged delay that is not excusable might prejudice the case of the applicants due to lapse of memory and loss of potential evidence. In the instant application the delay is slightly over one year. After considering all the circumstances of the application, I find no grave injustice will be caused to the applicants.

Issue 3

12. Costs of this application will be costs in cause.

13. In the premises, the application fails and is hereby dismissed with costs ordered to be costs in cause.

Ruling signed, dated and delivered at Narok this 15th day of October, 2020 in the presence of Mr. Njuguna holding brief for Mr. Kago for the Plaintiff and Mr. Tanyasis holding brief for Mr. Anyona for the 2nd Defendant.

J. M. BWONWONG'A.

J U D G E

15/10/2020