



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 345 OF 2004

CHINA JIANGSU INTERNATIONAL ECONOMIC

TECHNICAL CO-OPERATION CORPORATION.....PLAINTIFF

VERSUS

FINTEL LIMITED.....1ST DEFENDANT

HILLARY MAINA THEGEYA.....2ND DEFENDANT

RULING

1. On 22nd January 2019, this court on its own motion issued a notice to the parties in the suit to attend the court on 8th February 2019 to show cause why the suit should not be dismissed for want of prosecution.
2. On the hearing date, learned counsel *Mr. Karuga* represented the plaintiff. He informed the court that he had sworn an affidavit in response to the notice to show cause detailing reasons why the suit should not be dismissed for want of prosecution as proposed by the court.
3. In his oral submissions and in the depositions made in his replying affidavit sworn on 7th February 2019, learned counsel explained the delay in the prosecution of the suit by contending that on all hearing dates, the plaintiff has always been ready to prosecute his case but has been prevented from doing so by the defendants' inability to proceed with the hearing on most of the dates when the suit was fixed for hearing and at other times the court had adjourned hearing of the suit on its own motion.
4. Learned counsel averred that even on 28th January 2016 when the case was last scheduled for hearing, he was ready to proceed with the hearing but the court directed that a preliminary objection which was filed by the defendants and served on the plaintiff on 26th January 2016 be heard first; that subsequent efforts to have the preliminary objection fixed for hearing bore no fruits as the court file went missing from the court registry; that the file resurfaced on 28th June 2018 when the plaintiff filed documents in response to the preliminary objection but the court file could not subsequently be traced in the court registry to enable the plaintiff fix a hearing date for the preliminary objection. Counsel urged the court to dismiss the notice to show cause and instead fix a mention date for directions on the hearing of the preliminary objection.
5. It is not clear from the court record whether or not the defendants were served with the notice to show cause as they were not represented at the hearing on 8th February 2019.
6. I have carefully considered the application, the oral submissions made by *Mr. Karuga* on behalf of the plaintiff and the depositions made in the replying affidavit. I have also perused the court record. Having done so, I note that though the plaintiff is responsible for three adjournments, it has been ready to prosecute its case on most of the dates previously fixed for hearing. I agree with *Mr. Karuga's* submissions that most of the delay in the prosecution of this case has been caused by the defendants who for one reason or the other have not been ready to proceed with hearing of the suit on majority of the dates when the suit was scheduled for hearing. The court record also reveals that there is a time when parties were negotiating for an out of court settlement in the matter and a considerable amount of time was also spent before the defendants prosecuted their application for leave to amend their statement of defence to introduce a counter claim.
7. Though it was contended on behalf of the plaintiff that unavailability of the court file in the registry has also contributed to the delay in the hearing of the suit, I am not persuaded by this argument because the only letter annexed to *Mr. Karuga's* affidavit complaining about the alleged unavailability of the court file is dated 14th November 2018 while the preliminary objection was filed about two years ago on 26th January 2016.

8. Be that as it may, I am satisfied that the plaintiff cannot be entirely blamed for the delay in the hearing of this suit to justify dismissal of the same for want of prosecution. Taking everything into account, I find that sufficient cause has been shown to demonstrate why the suit should not be dismissed as proposed by the court.

9. In the premises, the suit is sustained but in order to facilitate its expeditious disposal, since the court had directed that the defendants preliminary objection be heard first and the defendants appear to have gone to sleep soon after the court gave this direction, I now direct the defendants to take a hearing date for the preliminary objection in the registry on a priority basis and have the same prosecuted within ninety (90) days from today's date failing which the plaintiff will be at liberty to fix the main suit for hearing. Given the age of the suit, I also direct that the same should be prosecuted within six months of the date of the expiry of the three months period granted to the defendants to prosecute their preliminary objection failing which the suit will stand dismissed with costs for want of prosecution.

Lastly, the plaintiff is directed to extract this order and to serve it on the defendants forthwith.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 13th day of February, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mrs. Njoroge holding brief for Mr. Karuga for the plaintiff

Mr. Kimani for the defendants

Mr. Salach: Court Assistant