



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.439 OF 2015

FIRST COMMUNITY BANK LIMITED.....PLAINTIFF

VERSUS

MAHSON'S COMPANY LIMITED.....1ST DEFENDANT

FEISAL MAHSEN AL-SAGGAF.....2ND DEFENDANT

SALHA MOHAMED MONIF AL NAHDI.....3RD DEFENDANT

KHALID MAHSEN AL-SGAFAF.....4TH DEFENDANT

QUALITY GAS LIMITED.....5TH DEFENDANT

RULING

1. The plaintiff through a plaint dated 7th September 2015 and filed on 15/9/2015 sued the defendants praying for judgment against the defendants for repayment of sum of Kshs.28, 150,555/60 with interest and costs of the suit. The plaintiff amended the plaint on 15th March 2016. The defendant entered appearance on 1st August 2016 and filed defence on 16th August 2016.

2. Before me is an application dated 18th October 2018 filed on 1st November 2018 seeking the following orders:-

- a) The plaintiff's suit against the defendants be dismissed for want of prosecution.
- b) The costs of the application and of the suit be awarded to the defendants.

3. The application is premised on the grounds on the face of the application being as follows:-

- a) The plaintiff has not taken any step to prosecute the suit since it was filed on 15th September 2015.
- b) The plaintiff has apparently lost interest in the case. It is consequently unfair to keep this case pending and therefore clog the justice system.
- c) It is therefore fair and just that the suit against the defendants be dismissed for want of prosecution hence this application.

4. The application is further supported by an affidavit sworn on 18th October 2018 by Feisal Mahsen Al-saggaf, the 2nd Defendant herein who has sworn the affidavit in support on his behalf and that of other defendants.

5. The application is opposed. The plaintiff has through a Replying affidavit sworn on 18th January 2019 by Claris Ogombo opposed the application.

6. I have perused the application, the affidavit in support and Replying affidavit in opposition of the application. The issue arising thereto for consideration is as follows:-

- a) **Whether the defendant met the threshold to warrant dismissal of this suit for want of prosecution?**

7. The application is brought before this court pursuant to **order 17 rule 2 (3) of Civil Procedure Rules** which provides:-

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1."

8. The Defendant/Applicant has in view of order 17 Rule 2(3) of Civil Procedure Rules demonstrated that the Civil Procedure allows any party to a suit to file an application for a dismissal of a suit in which no application has been made or step taken by either party for one year for its dismissal.

9. In the instant suit, since the filing of the suit on 15th September 2015 and subsequent amendment of the plaint on 15th March 2016, followed by the filing of the defence on 16th August 2016 to the date of filing this application on 1/11/2018 is more than one year without any step being taken by the plaintiff or the defendant to set the suit down for hearing. The last time this matter was before court before filing of the application dated 18th October 2018 was on 11/5/2016 when the plaintiff was granted leave to serve the defendants by way of substituted service. From 11th May 2016 to the time of filing of the present application is a period of 2 years, 5 months without any action on part of the plaintiff.

10. The plaintiff urges the application do not meet the threshold for dismissal of the suit for want of prosecution under order 17 Rule 2 of the Civil Procedure Rules 2010. It is further urged the plaintiff has not exhibited inordinate, prolonged and unjustified delay in prosecuting the matter and urges owing to congestion in courts diary, the plaintiff has been unable to set the matter down for hearing. It is urged by the plaintiff that it has not lost interest in this matter and that it has been keen, eager and ready to prosecute the case and has done everything possible to have the matter proceed to hearing.

11. I have considered the reasons advanced by the plaintiff for its failure to set the matter down for hearing. I have also perused the court record and its clear once the advocate was granted leave to serve the defendants by way of substituted service and upon such service, the plaintiff never bothered to move the court to set the matter down for hearing. In actual fact, there no single document that has been exhibited to demonstrate the plaintiff has shown interest to prosecute this matter since it was filed. The delay in taking any steps to have the matter heard are inordinate, prolonged and unexplained to the satisfaction of the court. I find that the plaintiff has not demonstrated that it is keen, eager and ready to prosecute this case as it has done nothing after filing and serving the summons to enter appearance.

12. It is contended, that the failure to set the suit down for hearing has been due to congestion in court's diary. It may be true, the court has many cases but in the instant case, no effort has been made to seek a hearing date and was denied. In the commercial division it is possible in some courts to get a hearing date within a period of 2 months to 6 months. I find had the plaintiff sought a hearing date since 2016 to date a hearing date would have been given. It is the plaintiff who has chosen for whatever reasons to sit on the matter and cannot be heard to blame the congestion of the court diary as an excuse. Courts are keen these days to have matters heard as fast as possible and no court would be a party to unjustified delay in prosecution of matters before it.

13. I am satisfied the plaintiff has not shown good cause for failure to set down the matter down for hearing and is wrong in hiding behind its failure to prepare the suit for trial. This is a suit in which the plaintiff has a lot at stake if the same is dismissed for want of prosecution. The fault squarely falls at the feet of the Advocate who has not made the right and fast steps to set the matter down for hearing. I am alive to the fact that if the suit is dismissed for want of prosecution, it is the Advocates' client who would suffer damage though once a party hands over his matter to an advocate he should not go to slumber but should be checking the Advocate the progress of its suit from time to time. He is to blame himself for putting all his trust on an Advocate, fail to visit him from time to time to find out how far he has dealt with his matter. I am also aware that every case should be considered on its own facts for no case is like any other. The amount claimed herein is substantial. Secondly case should where possible be determined on merit and not on technicalities. I am aware that a claim of Kshs.28, 150,555/60 is too big to be dismissed due to want of prosecution and due to laxity of an Advocate. The plaintiff prayed that it be given last opportunity to set the suit down for hearing as it is intended in prosecuting the suit.

14. Having considered the application and having come to the conclusion that I have, I find though the plaintiff has failed to set the matter down for hearing, that by dismissing the suit for want of prosecution, in view of the amount claimed, the court shall not be doing substantive justice in this matter, hence I find that it would be better to award the Applicant cost of the application and give the plaintiff limited time to take necessary steps to set the suit down for hearing.

15. I therefore proceed to make the following orders:-

a) The plaintiff is granted 30 days from today to comply with order 11 of Civil Procedure Rules and set the matter down before Deputy Registrar to confirm compliance with order 11 Civil Procedure Rules and set the matter down for mention before court for setting a hearing date.

b) That if the plaintiff do not comply with order (a) above the suit shall be deemed dismissed for want of prosecution.

c) Costs of the application herein dated 18th October 2018 is assessed at Kshs.30, 000/- and be paid to the defendant within 30 days from the date of this ruling in default execution to issue.

Dated, signed and delivered at Nairobi this 14th day of February, 2019.

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J .A. MAKAU

JUDGE