



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 293 OF 2011

DAVID MUSAU MUTETI1ST PLAINTIFF

WINNIE NYAMBUGA KIMANI2ND PLAINTIFF

NDURUBU THUO3RD PLAINTIFF

T/A

GITHURAI URBAN SELF HELP GROUP.....4TH PLAINTIFF

VERSUS

REDSKY LIMITED1ST DEFENDANT

SAFARICOM LIMITED.....2ND DEFENDANT

RULING

By an application dated 20th July, 2018 the 1st defendant sought orders for the dismissal of the plaintiff's suit for want of prosecution. It was brought under Order 17 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 3A and 1B of the Civil Procedure Act. The reasons for seeking that order are set out on the face of the application alongside an affidavit sworn by Grace Wairimu Kinyanjui, the advocate for the 1st defendant. The record shows that the application was served upon the plaintiff's advocate but I have not seen any reply to the said application. That notwithstanding, there was an earlier application dated 15th July, 2014 by the 2nd defendant seeking the same order, a ruling of which was delivered on 7th July, 2015. I will return to that ruling shortly hereunder.

In the present application, the plaintiffs' advocate submitted that the plaintiffs have not lost interest in this case and were ready to prosecute the same. On the other hand, the advocate for the 1st defendant referred to the ruling of this court made on 7th July, 2015 and submitted that the suit stands dismissed as that order overrides the present application.

It is important at this point to refer to the ruling cited above. In addressing the application, the court observed that the power to dismiss the suit for want of prosecution was drastic and should be exercised only as a last resort, and where the suit can be heard without further delay, an application of that nature ought to be refused. The court also observed that there had been a fairly long delay of some three years from the date the plaintiffs' application for injunction was dismissed on 19th July, 2011 to the filing of the application on 15th July, 2014. The plaintiffs had not by then taken any action at all within those three years. The court agreed, that the delay was inordinate and inexcusable in the circumstances of the case and contrary to article 50 (2) (e) of the Constitution. Observing that no serious prejudice was likely to be visited upon the defendant, the application was then refused but the plaintiffs were condemned to pay costs for the delay to the defendants within 14 days from the date of that ruling.

The last paragraph of that ruling is instructive and it reads as follows,

“The plaintiffs should also within 30 days of delivery of this ruling, take demonstrable steps towards the prosecution of the suit. In default the suit shall stand dismissed for want of prosecution without necessity of any further application.”

The court proceeded to extend the validity of the summons to enter appearance for a period of 12 months from the date of the ruling. From 7th July, 2015 nothing took place until 3rd November, 2017 when there is an entry by Njuguna J, of some proceedings. It will be noted that, that was way beyond the 30 days reserved in the ruling aforesaid. There are then proceedings recorded on 25th September, 2018 when the application dated 20th July, 2018 came up for hearing. Counsel for the plaintiffs applied for an adjournment to file a reply or await for directions, whether or not the Deputy Registrar should be seized of the matter. The application for adjournment was opposed by the 1st and

2nd defendants. It was pointed out that the plaintiffs have lost interest in the matter.

The court allowed the final indulgence to the plaintiffs to file a reply to the application within 14 days. They were also condemned to pay costs to both defendants amounting Kshs. 10,000/= before the next hearing date, which was set for 5th November, 2018. When the matter came up for hearing on 5th November, 2018 it was observed that the plaintiffs having failed to comply with the required steps set out in the ruling of 7th July, 2015 and having failed to pay the costs as ordered earlier, the suit should stand dismissed.

I have considered the respective positions of the parties herein. It is clear that the plaintiffs have defied express orders of the court in terms of timelines and payment of costs.

Justice must look at both sides and therefore litigation must come to an end. There has been laxity of the part of the plaintiffs which has resulted in prolonged delay in the determination of this matter. The submission that the plaintiffs have lost interest in this case is irresistible. The order that commends itself in the circumstances of this case is that the plaintiffs' suit should be and is hereby dismissed with costs to the defendants.

Orders accordingly.

Dated, signed and delivered at Nairobi this 4th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE