



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.115 OF 2008

ATTORNEY GENERAL.....APPELLANT

-VERSUS-

THE STANDARD LIMITED.....1ST RESPONDENT

WESLEY CHEBURIT CHELAL.....2ND DEFENDANT

RULING

1. This is a ruling on application dated 18th June 2018. It seeks dismissal of this suit for want of prosecution plus costs of the suit.
2. Grounds on the face of the application are that since 28th July 2016 when the court ordered for proceedings to be typed, the plaintiff has not moved the court to prosecute this matter and that the defendants continue to suffer prejudice due to delay of this matter.
3. The application is supported by affidavit sworn by **John Maina Ngechu** who is the defendant's Advocate. He averred that the delay in prosecuting this matter has taken over 8 years.
4. In response the plaintiff filed replying affidavit sworn by **Vincent Wohoro Macharia** the plaintiff's Advocate.
5. He averred that the plaintiff instituted this matter on behalf of Kenya Bureau of Statistics who are the owners of the subject motor vehicle, which was involved in the accident with the defendants' leading to damage.
6. He averred that the pleadings in this matter closed on 14th October 2008 and the suit set down for hearing by the plaintiff but it is the defendants who occasioned the matter to be taken out of the hearing list on two occasions being 3rd November 2010 and 16th May 2011.
7. That when the new civil procedure came in in 2010 the plaintiff duly complied with the said rules depicting desire to have the matter heard and determined.
8. Counsel for plaintiff further averred that the plaintiff set the matter down for hearing on 10th June 2013 and the suit was adjourned by consent to 11th November 2013 as the plaintiff was required to call makers of documents.
9. Counsel further averred that amidst attempts to proceed with the hearing, the parties were attempting an out of court settlement and the plaintiffs have always been keen to settle this matter out of court.
10. That on 27th July 2014 the matter proceeded before **Justice Roselyne Wendo** when 2 witnesses testified and the matter was adjourned to 11th November 2014 for further hearing. The transfer of trial judge necessitated the typing of proceedings, which is evidenced by requests for mention on five occasions the last being 28th July 2016 when the court directed the plaintiff to be proactive in ensuring that the proceedings are typed.
11. Counsel further averred that the letter to the Deputy Registrar asking for proceedings has not elicited any response neither has numerous visits to the registry.
12. He averred that, when the current Advocates on record for the defendants came on record, they filed this application for dismissal of suit without appreciating efforts made by the plaintiff has put to have the matter heard and determined. He added that the plaintiff has always been desirous to have this matter heard and determined.

13. Plaintiffs advocate averred that, it would be fair and just to have proceedings typed and plaintiff be allowed to fix the matter for hearing.

ANALYSIS AND DETERMINATION

14. I have considered averments by parties herein. I have also perused submissions by parties herein and the court record. Record show that this matter proceeded with two witnesses on 22nd July 2014. The matter was adjourned by consent for plaintiff to produce inspection report.

15. On 8th April 2016 when the matter was mentioned, proceedings had not been typed to enable incoming judge to proceed. Further, directions on typing proceedings were made on 3rd May 2016, 28th July 2016. On 2nd November 2018, the court noted that, the proceedings had been typed. This application was filed on 18th June 2018.

16. I have seen the proceedings in the file. It is not however indicated when the typing was completed. I only see assessment note in the file dated 14th July 2017 which indicate fees for uncertified proceedings as kshs.510. Most likely, typing of proceedings was done by 2017 though the exact date cannot be ascertained from the record.

17. Counsel for plaintiff averred that the court directed the plaintiff to be proactive in ensuring that proceedings are typed. I have not seen any communication to Deputy Registrar by plaintiff in the year 2017 and 2018 before this application was filed. There is unexplained period of inaction.

18. However, upon looking at the record and efforts made by plaintiff before 2017, and considering the fact that parties may have taken some time attempting reconciliation as stated by counsel for the plaintiff, I cannot conclude that the plaintiff lost interest in this matter. Issues that occasioned delay cannot be wholly attributed to the plaintiff.

19. From the foregoing I find it appropriate to accord plaintiff an opportunity to prosecute this matter to enable this court conclusively determine issues between parties herein.

20. FINAL ORDERS

1. Application dated 18th June 2018 is hereby dismissed
2. Costs in the cause
3. This suit herein to be set down for hearing on priority basis.

Judgment dated, signed and delivered at Nakuru this 11th day of July 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Ondieki for A.G Counsel for Appellant

N/A Counsel for Respondent