



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 207 OF 2014

GATTS (K) LIMITED.....PLAINTIFF

-VERSUS-

JAMES PETER AWANDO GODIAL.....1ST DEFENDANT

ROSELINDA AMOLO A.....2ND DEFENDANT

TOM JOHN AWANDO.....3RD DEFENDANT

GEORGE GITONGA MUCHIRI t/a

FANTASY AUCTIONEERS.....4TH DEFENDANT

RULING

1) Pursuant to the provisions of Order 17 rule 2(1) and (3) of the Civil Procedure Rules, the 1st, 2nd and 3rd defendants took out the motion dated 4th April 2019 whereof they sought for this suit to be dismissed for want of prosecution. The motion is supported by the affidavit of Tom John Awando. When served, the plaintiff filed the replying affidavit sworn by Nadeem Khan Shakoor to oppose the motion.

2) When the motion came up for interpartes hearing, learned counsels appearing in the matter made oral submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application together with the rival oral submissions.

3) It is submission of Mr. Bwire, learned advocate for the defendants that this suit has been pending in court for more than five years and that during this period the plaintiff has failed to comply with trial conference orders.

4) The learned advocate averred that on 6th September 2017, the Deputy Registrar gave the plaintiff 21 days to comply with the trial conference directions but the plaintiff has not done so. It was pointed out that more than a year has lapsed since the trial directions were made and yet the plaintiff has continued being unmoved thus holding the defendants hostage yet they have fully complied with trial directions. For the above reasons this court was beseeched to dismiss the suit for want of prosecution.

5) Mr. Ondieki, learned advocate for the plaintiff beseeched this court not to dismiss this suit as urged by the defendants. The learned advocate stated that the plaintiff is ready and willing to prosecute the suit if given a chance to do so. The plaintiff blamed its erstwhile advocate for failing to alert it of the significant steps to be taken to make the suit ready for hearing.

6) This court was implored not to punish the plaintiff for the mistakes of its advocate. The plaintiff stated that it was not informed of the pre-trial conference directions given on 6/9/2017. It was also pointed out by the plaintiff's director that he was out of the country when the directions were given hence he was not in a position to comply with the pre trial conference directions. This court was urged to find that the delay was not intentional nor deliberate. In his oral submissions, Mr. Ondieki stated that the plaintiff is ready to pay nominal thrown away costs to the defendants.

7) Having considered the material placed before this court together with the rival oral submissions, it is apparent that the plaintiff admits that there was a considerable delay in complying with the trial conference directions and in prosecuting this suit. The plaintiff has however blamed the firm of Peter Gachuhi & Co. Advocates, its erstwhile advocates for the delay. The plaintiff's director who is the deponent of the replying affidavit also stated that he was out of the country when the trial conference directions were given hence he had no knowledge of those directions.

8) The defendants did not controvert the plaintiff's averments. I am convinced that the plaintiff has given a plausible explanation for its

failure to comply with the pre-trial conference directions and for its failure to prosecute the suit. The plaintiff was let down by its erstwhile advocate hence it should not be penalized for the mistakes of its advocate. However, the plaintiff must compensate the defendants by way of costs. I think a fair order in the circumstances is to decline to dismiss the suit for want of prosecution.

9) In the end the motion dated 4th April 2019 is dismissed. However the following orders and directions are given as a consequence:

- i. The 1st, 2nd and 3rd defendants to be paid costs of the motion assessed at ksh.10,000 within 30 days.**
- ii. The plaintiff to comply with the trial-conference directions given on 6.9.2017 within a period of 15 days from the date hereof.**
- iii. The suit to be prosecuted within a period of 120 days from the date hereof.**
- iv. In default of the orders given in (i), (ii) and (iii) hereinabove, the suit shall automatically stand dismissed without further reference to this court.**

Dated, signed and delivered at Nairobi this 12th day of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... **for the Plaintiff/Respondent**

..... **for the Defendant/Applicant**