



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 772 OF 2010

VOLEX CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

NATIONAL WATER CONSERVATION

& PIPELINE CORPORATION.....DEFENDANT

RULING

1. Pleadings in this matter closed on or about 6th January 2011. The defendant has filed a Notice of Motion dated 20th July 2018. The defendant seeks the dismissal of this suit for want of prosecution. It is opposed by the plaintiff.
2. The history of this matter shows that on 19th May 2014 the court issued notice to show cause, to the parties to show cause why this suit should not be dismissed. Justice E. K. O. Ogola by his Ruling of 31st July 2014, on that Notice to show cause, found that there was activity in the file and parties were desirous to proceed with the case. The learned judge ordered the parties to comply with pre-trial process.
3. By 15th October 2014 the court gave parties more time to comply with pre-trial process. The last time the matter was before court, before the defendant filed its present application, was on 15th October 2014 when parties were ordered to comply with pre-trial. They were given 11th November 2014 as a date to attend court to confirm compliance. The matter was not listed on that date.
4. The defendant has stated through its legal officer that the pendency of this case is causing the defendant anxiety.
5. The plaintiff in opposing the application refers to exchange of letters, between the parties, where the plaintiff offered to the defendant settlement of this dispute. The letters are of the period between 30th October 2014 and 13 November 2015. The learned advocate for the plaintiff, through his affidavit, stated that after that exchange of letters, and because the advocate handling the matter in his firm left employment, this file in that firm went dormant. The advocate then stated in his affidavit:

“I believe the plaintiff is keen to settle this matter and that is why he had proposed to have an out of court settlement.”

ANALYSIS

6. There is no doubt that there is inordinate delay in prosecuting this case. There has been inactivity from 15th October 2014, when this matter was last in court. The letter of the defendant’s advocate indicating that he had not obtained defendant’s instructions on the plaintiff’s offer is dated 15th November 2014. It does seem that from end of 2014 the plaintiff went to sleep on this matter.
7. The decision of this court is made in the light of the provision of the Civil Procedure Act which requires that matters in court be expeditiously dealt with in court – see S 1A of that Act. The defendant has proved that there has been inordinate delay in the prosecution of this case and in my view that delay is inexcusable and serious. In the case of Supreme Court of British Columbia in *Arellano v Wong* 2013 BCSC 2093 the court stated:

“A starting point for dismissal for want of prosecution is the decision of Mr. Justice Goldie in *Busse v. Robinson Morelli Chertkow*, 1999 BCCA 313 (CanLII), where he writes:

[18] In my view, it is open to this Court to adopt the principle that once a defendant has established the delay complained of has been inordinate and is inexcusable a rebuttable presumption of prejudice arises.”

8. There is no ground before me to show that this action should be sustained. The plaintiff does seem to have lost interest in this case. The suit shall be dismissed. The defendant is entitled to the costs.

CONCLUSION

9. This case is hereby dismissed for want of prosecution with costs to the defendant. The defendant is also awarded costs of the Notice of Motion dated 20th July 2018.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of October, 2019.

M. KASANGO

JUDGE

Ruling read in open court in the presence of

Sophie Court clerk.

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANT