



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.67 OF 2011

DHL GLOBAL FORWARDING (K).....PLAINTIFF/APPLICANT

VERSUS

SPRING GROWN KENYA LTD.....1ST DEFENDANT

SPRING GROWN PRODUCE.....2ND DEFENDANT

SEMWATI FRESH PRODUCE (K) LTD.....3RD DEFENDANT

PETERSON MUKULA MUNYOKI.....4TH DEFENDANT

GRACE VYONNE OTIENDE WANDOLO

T/A MILELE EXPORTERS.....5TH DEFENDANT

RULING

This is a ruling on the Defendant's application dated 22nd August 2017. It seeks to dismiss this suit for want of prosecution and costs be awarded to the 1st, 2nd, 4th and 5th Defendants.

Grounds on the face of the application are that since 19th May 2011, the Plaintiff has not made any attempts to set the suit down for hearing; that delay of 6 years is not only inordinate but also inexcusable; that the 1st, 2nd, 3rd and 5th Defendants have greatly been prejudiced by the delay and that it is in the interest of justice that litigation come to an end.

The application is supported by Affidavit of Eric Mutua. He averred that the suit was instituted on 2nd March 2011.

That on 29th April 2011, the Defendants filed statement of defence together with witness statement by the 4th Defendant and reply to defence was filed on 19th May 2011.

That after close of pleadings, the Plaintiff has not taken steps to prosecute this case.

In response, the Plaintiff filed Replying Affidavit dated 5th June 2018 sworn by Justin Nyaberi. He averred that interlocutory judgment was entered against the 3rd Defendant and that the Plaintiff thought that was full judgment thus failure to fix the matter for hearing. He further averred that the Plaintiff took off time investigating attachable assets of the Defendant causing failure to list the matter for hearing.

That the Plaintiff stands to lose Kshs. 31,289,206.98 if this matter is dismissed.

Plaintiff prayed for an opportunity to comply with case management proceedings as it had filed all statements.

I have perused the Court file and note that judgment was entered against the 3rd Defendant on 22nd September 2011.

In the Plaintiff, the Plaintiff sought judgment to be entered jointly and severally against all the Defendants.

The Plaintiff filed request for entry of judgment against the 3rd Defendant following failure to enter appearance and file defence within the stipulated period.

I note that the Plaintiff obtained decree after entry of judgment against the 3rd Defendant. There is no reason not prosecute the suit against the other Defendants even as he pursued execution as against the 3rd Defendant.

On perusal of pleadings I however find that it would be appropriate to give the Plaintiff an opportunity to prove its claim against the 1st, 2nd, 4th and 5th Defendant as failing to do so will result in the 3rd Defendant shouldering all the claim. I therefore disallow the application.

I however condemn the Plaintiff to pay the Applicants thrown away costs of Kshs 20,000. The same to be paid within 30 days from today's date.

Matter to be set down for hearing immediately. Parties to comply with pre-trial requirements 30 days before the hearing.

Ruling Dated and Delivered at Nairobi this 11th day of October, 2018

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

CATHERINE: COURT ASSISTANT

NYABERI: COUNSEL FOR PLAINTIFF/ RESPONDENT

MUSILI: COUNSEL FOR DEFENDANTS/ APPLICANTS