



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO. 209 OF 2010

KENYA RAILWAYS CORPORATION.....PLAINTIFF/APPLICANT

VERSUS

DEVELOPMENT BANK OF KENYA LTD.....DEFENDANT/RESP.

R U L I N G

This is a ruling on the Defendant's application dated 12th July 2018. It seeks to dismiss this suit for want of prosecution.

Grounds on the face of the application are that this suit was filed on April 2010 but struck out on 15th March 2012.

The Plaintiff being aggrieved by with the ruling lodged appeal which was allowed on 7th June 2017 and since then the Plaintiff has not set down this suit for hearing.

The Plaintiff's contention is that it is primarily the duty of the Plaintiff to take steps to prosecute this and failure to do so for over one year now demonstrate lack of interest in this suit.

In response Plaintiff filed Replying Affidavit sworn on 26th July 2018 by Peter Mwaniki Gachoka Advocate for the Plaintiff. He confirmed that the Plaintiff filed appeal against ruling by Mutava J striking out this suit.

Counsel further averred that Plaintiffs Advocates attended Court for judgment on 3rd February 2017 but the judgment was not ready and parties were directed that judgment would be delivered on notice. Counsel attached a letter dated 25th July addressed to Deputy Registrar asking for an indication as to when judgment would be delivered. He also attached a reminder dated 30th November.

Counsel averred that no response was received from the Deputy Registrar in respect of the two letters.

Counsel added that he sent another letter dated 18th January 2018 which was served on the Defendants Advocates on 19th January 2018.

That in June 2018 he visited the Deputy Registrar to enquire when judgment would be delivered only to learn that it was delivered on 9th June 2017. Counsel averred that the Deputy Registrar informed him that Advocates were not served with judgment notice.

Plaintiff's Counsel aver that upon learning of the delivery of judgment they sent a draft order of Court of Appeal to Counsel for Defendant as required by Rule 34(2) (a) and (b); and on 23rd July 2018 the Registrar Court of Appeal invited both parties for settlement of the terms of the order as required by 34(2) (c) (d). He attached notice of settling terms of order dated 17th July 2017. That both parties attended Court on 23rd July 2018 and J. Koome approved draft order after hearing both parties.

Plaintiff contends that this case could have been revived without Court of Appeal orders being extracted; that the application is defective ab initial, an abuse of the Court process aimed at denying the Plaintiff an opportunity of prosecuting this case.

I have considered rival arguments by parties herein. I have also perused documents attached to Affidavits filed.

From the judgment attached, there is no indication that it was delivered in the presence of the parties herein. The correspondences between Counsels for Plaintiff and the Deputy Registrar confirm that judgment was not delivered on the date it was scheduled. Thereafter Counsel for the Plaintiff wrote letters asking the new dates. There is no indication that the Deputy Registrar neither responded to the enquiries for new dates nor notified parties of the delivery of judgment.

Record clearly shows that the Plaintiff has been keen in prosecuting this suit.

Upon issuance of order to strike out this suit, an order from the Court of Appeal reinstating it had to be obtained before the Plaintiff could move this Court.

Looking at the history of this case, my view is that this application is intended to further delay prosecution of this suit. Plaintiff should be allowed to prosecute this suit to allow the Court to conclusively determine the issues between the parties herein.

From the foregoing, I do not see merit in this application.

FINAL ORDERS

1. Application dated 12th July 2018 is hereby dismissed it with costs to the Plaintiff.
2. This matter be set down for hearing on priority.

Ruling, Delivered, Dated and Signed at Nairobi this 1st day of November, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

Jasmine: **COURT ASSISTANT**

Mr. Kingara: **COUNSEL FOR APPLICANT**

Mr. Kamau: **COUNSEL FOR RESPONDENT**