



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCC. CASE NO. 346 OF 2002

KENYA COMMERCIAL BANK LTDPLAINTIFF

VS.

LEXINDA TRAVELS LTD.....DEFENDANT

RULING

1. By a Motion dated 18.9.2015 the Defendant/Applicant prays for the Orders of 7.2.2012 to be set aside plus costs. The application is anchored on Article 50 (1), 159 (2) (d) Constitution of Kenya, Section 1A, 1B 3 and Orders 12 Rule 7 and 51 Rules 1 & 4 CPR 2010 inter alia.
2. The application is based on the grounds on the face of the motion and is supported by the affidavit of ELLISTONE KIWINDA sworn on 15.9.2015. The application is opposed by the Plaintiff/Respondent and it has filed grounds of opposition dated 7.12.2015.

THE APPLICANT CASE

3. The parties delayed in taking steps in the matter since the filing of defence and counter claim dated 30.9.2002 and reply to Defence and Counter claim on 16.10.2002.
4. The Applicant avers that it had expressed intention to change advocates but the suit was dismissed in the transition period. The Defendant delayed in taking action on making a move due to financial problems it was experiencing.
5. The Applicant submits that it will suffer injustice if the Counter claim is not reinstated.

RESPONDENT CASE

6. The Respondent avers in the grounds of opposition that the application is a non starter and does not lie. It is also devoid of merit, frivolous and vexation.
7. The Applicant is accused of delay in lodging it since the order of dismissal was made after a span of 3 years 7 months. There are no reasons advanced to explain the delay aforesaid nor has the defendant demonstrated grounds for setting aside the impugned order.
8. In the Respondent Counsel submissions, the Respondent indicated that it has no intention of having the Plaintiff case revived and/or reinstated. The Respondent submits that there is inordinate delay and unjustified thus a need to let the dismissal Orders to remain undisturbed.

ANALYSIS

9. After perusing the application, affidavits, grounds of opposition and the parties oral submissions, I find the issues arising are;

1. **Whether there is inordinate delay in filing the application?**
2. **If the answer in affirmative whether there is justified grounds for the delay?**

10. On 19.3.2002 the Plaintiff/Respondent lodged claim for Ksh.1,256,495, against Defendant and upon service with summons the Defendant filed Defence and Counter Claim on 30.9.2002 claiming for Kshs.561,990/=
11. The matter came for hearing on 2.4.2003 but the Defendant counsel was unwell and thus the matter was adjourned.
12. On 10.5.2004 the matter came again for hearing but the Defendant advocate was not ready to proceed and intimated that due to want of instructions, he intended to cease acting for the Defendant and thus the matter was once more adjourned.
13. On 22.9.2005 the matter came for hearing again, but Mr. Mburu advocate for Defendant was not ready to proceed with the hearing. Once more on the 20.11.2009 the matter came for hearing of the suit, and the Defendant MD appeared in court but instead of proceeding with the hearing, he sought an adjournment to enable him engage another advocate.
14. Further on the 9.2.2010 the matter came for hearing and the Defendant sought an adjournment once more to engage another advocate. Finally on the 7.2.2012 the matter came for hearing and no party was present and thus the Judge dismissed the suit.
15. From the aforesaid record, it is clear that the Defendant/Applicant was never interested to have the matter heard. This is a matter which has taken almost 13 years since filing without any action being taken. The Applicant took over 3 years 7 months since order of dismissal was made to lodge the instant application for setting aside the impugned Orders.
16. The Plaintiff has rightly said it has no interest in pursuing the matter. The grounds advanced by the Applicant that it had financial problems and that it intended to change advocates are not convincing at all.
17. The filing fee for the motion is less than Kshs.1000 and the court cannot be convinced that a party claiming over Kshs.1/2 million could not raise a Ksh.1000 to lodge the motion.
18. The court thus finds that the application has no merit and makes the following orders;

1. The Notice of Motion dated 18.9.2015 is dismissed.
2. Parties bear their costs.

Dated, signed and delivered in court at Nairobi this 5th day of February, 2016.

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C. KARIUKI

JUDGE