REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 227 OF 1997

HEMA INVESTMENT LIMITED .....PLAINTIFF

VERSUS

SPENCON (K) LTD.....DEFENDANT

RULING

1. The plaintiff herein brought an application dated the 20th July 2015 under the provisions of **Orders 25, 51, of the Civil Procedure Rules** seeking the following orders:

1. Spent

2. *That the plaintiff be granted leave to file a fresh application.*

On the 3rd 2015, the applicant had filed an application through the firm of Ogega Achola and Company Advocates seeking an order to set aside or vary court orders issued on the 18th May 2012 dismissing this suit for want of prosecution among other prayers. When the application came up for hearing, it transpired that Advocate Ogega Ochola did not hold a valid practicing certificate.

That translated to automatically the application being incompetent. It was thus withdrawn. In the current application, the plaintiff seeks leave to file a fresh application presumably to set aside the dismissal of the suit orders, and for an order of transfer of the suit, being a land case, to the Environment and Land Court for hearing and determination.

2. The grounds stated by the applicant are that the said application should not have been heard by a High Court Judge as it was a land case and that the Notice to Show cause was not served upon all the parties to the suit. It is deponed in the affidavit in support sworn by one Samuel Kiprono Sang the plaintiff.

3. I have noted that the plaintiff in this suit is **Hema Company Limited**. The deponent of the supporting affidavit Samwel Kiprono has not disclosed his status or capacity in the Limited Liability Company (Plaintiff) and whether he had obtained authority to swear the said affidavit on behalf of the company. This is contrary to clear provisions under the **Companies Act, Chapter 486 Laws of Kenya and the Oaths and Statutory Declarations Act, Chapter 15, Laws of Kenya.**

I find the supporting affidavit incompetent and it is struck out. That leaves the Notice of motion without a supporting affidavit.

4. The defendant opposes the application by its grounds of opposition dated 28th July 2015.

On the order seeking filing a fresh application, it is stated that the applicant has slept on his rights as it had been granted leave to prosecute the case on the 16th April 2010 and thereafter, but he took no steps. It was submitted by the defendant and the third party that the suit remained unprosecuted for twenty years, having been filed in 1997. Several applications for dismissal were filed in 2008 and 2009 but the plaintiff showed no interest leading to the court to issue the alluded notice to show cause why the suit should not be dismissed. Despite service, the plaintiff and or its Advocates failed to heed to the notice when it come up for hearing on the 18th May 2015. The suit was dismissed.

Thereafter, the applicant approached the court through the application seeking to set aside the dismissal orders, this time by an advocate who did not hold a valid practicing certificate. That application was withdrawn leading to the current application.

5. As I have stated above, the case has been in court registry shelves for almost twenty years now.

The defendant and third party submits that the continued pendency of the suit in court has greatly prejudiced them, and no good reasons whatsoever have ever been advanced for the inordinate delay.

As stated in the case **Ivita vs Kyumbu (1984) e KLR,** the test whether or not to dismiss a suit for want of prosecution were stated, among them whether Justice can be done despite the prolonged delay. As no excusable reasons for the delay of 19 years have been tendered, I find no justice whatsoever to keep this very old case hanging over the defendants and third parties necks and more so that the plaintiff has exhibited lack of interest in his prosecution. It is upon the plaintiff to prosecute his case and not to wait to be awoken by the defendant or the court.

6. In **Agip (Kenya) Limited vs Highlands Tyres Ltd (2001) e KLR** the court held that delay is a matter of fact to be decided on the circumstances of each case, and where reason for delay is offered the court should allow the plaintiff an opportunity to have the case determined on merit.

I have not seen any demonstration of interest in the case by the plaintiff contrary to the plaintiff's Advocate's submissions.

7. **Article 159 of the Constitution 2010** enjoins courts to dispense justice without undue delay and to accord all parties equal opportunity to have their cases heard on merit. I have noted that all through, the court accorded the plaintiff opportunity to list the case for hearing but that was never done.

Litigation has to come to an end. There is no justification why a case filed 19 years ago has never been fixed for hearing.

I find no merit in the plaintiff's application dated 20th July 2015 and in particular prayer 2 seeking leave to file a fresh application seeking to set aside this court's orders of dismissal of the suit issued on the 18th May 2012, four years down the line. The application is dismissed with costs to the defendant and the third parties.

Dated, signed and delivered in open court this 14th day of July 2016

JANET MULWA

JUDGE