



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 318 OF 2011

MASTER ALUMINIUM LIMITED PLAINTIFF

VERSUS

AFRILOG LIMITED DEFENDANT

RULING

1. The Application is a Notice of Motion dated 6th February 2014. It is brought under Order 17 Rule 2 (3) of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act. It is supported by the grounds on the face of it and the affidavit sworn in support by **EDNA OGINDA** dated 6th February 2014.

2. The application seeks for prayers:

- ***This Honourable Court be pleased to declare that the suit herein has abated.***
- ***In the alternative, this Honourable Court be pleased to dismiss the suit herein for want of prosecution with costs to the Defendant.***
- ***The cost of this Application be borne by the Plaintiff in any event.***

3. The Applicant's case is that the suit was filed against the Defendant on 20th day of July 2011. The Defence was filed on 18th August 2011 and the Reply to the Defence and Defence to Counter-Claim on 2nd September 2011. Since September 2011 the Plaintiff has gone to sleep and has not taken any steps to prosecute the suit. That, the Plaintiff's failure to take reasonable steps to prosecute and/or set down the suit for hearing is unreasonable, inordinate and inexcusable. It is only fair and just that the same be dismissed for want of prosecution and the Plaintiff is condemned to bear the costs of this Application. This is because litigation must come to an end, yet the same has been hanging on the Defendant's head as a liability.

4. The Application is opposed based on the Replying Affidavit sworn by **PROF. ALBERT MUMMA** dated 17th March 2014. The Respondent's case is that the suit was filed on 22nd July 2011. The Plaintiff was seeking for inter alia, Judgment for Kshs. Three Million and Ten Thousand Four Hundred and Thirty Seven (3,010,437.00), resulting from the Defendant's breach of contract. The Defendant entered appearance and filed their Statement of Defence and Counterclaim on the 15th August, 2011. Pleadings closed on 17th September, 2011 upon service of the Plaintiff's Reply to Defence and Defence to

Counterclaim. After the close of the pleadings, the Plaintiff invited the Defendant vide a letter dated 25th October, 2011 and meet their representative at the Court's registry for fixing of a suitable hearing date for the suit. However, on the 7th November 2011, when the clerk from the Plaintiff Advocate's office went to the Court's Registry to fix the matter for hearing, he was informed that the Court file was missing. On the 24th November 2011 after the file was traced, when the parties went to take a hearing date, they were informed that the Court diary for taking dates was closed. The diary opened and the Plaintiff was informed that, the matter would be given a hearing date upon directions by the Court confirming compliance with order 11 of Civil Procedure Rules 2010. On 2nd May 2012, the Court confirmed compliance with order 11 of Civil Procedure Rules 2010. The Plaintiff was directed to take a hearing dated on priority basis. The date was to be fixed at the registry. Subsequently, the Plaintiff consistently and on numerous occasions attempted to procure a hearing date for the suit but was informed by the registry staff that the Court file could not be traced to facilitate the issuance of a hearing date. Failure to receive any feedback from the registry as to availability of the Court file prompted the Plaintiff's law firm to invite the Defendant's Advocates to the registry in attempts to ascertain the availability of the said file. That, the Plaintiff's law firm has invited the Defendant to the registry on three different occasions and on all occasions, the Court file in the matter has been said to be missing. The Plaintiff submitted that, to the contrary, the Defendant too has not demonstrated that it has taken only step to prosecute its pending Counterclaim for them to be entitled to the Court's discretion. That, the Plaintiff has always been eager, to prosecute this suit and any delay in having the matter heard is by no means orchestrated by the Plaintiff and if any, it is due to circumstance beyond their control. The Responded argued that, the Court "ought" to safeguard its integrity and substantive justice, by dismissing the application herein with costs to the Respondents and allowing this suit to proceed to full trial.

5. The parties disposed off the Application by filing written submissions in which they cited several authorities. I have considered the prayers in the Application, the grounds and Affidavit in support, the Replying Affidavit, and the written submissions filed by the parties. I find the following issues require determination;

- ***Whether there has been inordinate delay on the part of the Plaintiff to prosecute matter.***
- ***Whether the delay is intentional, contumelious, and therefore, inexcusable.***
- ***Whether the Plaintiff has offered a reasonable explanation for the delay, (if any)***
- ***Whether the Plaintiff will suffer any prejudice if the suit is dismissed.***
- ***Whether the Defendant will suffer serious prejudice if the suit is not dismissed.***
- ***Whether it is in the interest of justice to dismiss the suit as prayed.***

6. I shall deal with the first issue. In so doing I wish to associate myself with the holding in the case ***AGIP (K) LTD vs. Highlands Tyres Ltd (2001) KLR***; where it was held that,

“Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for delay is offered, the court should be lenient and offer the Plaintiff an opportunity to have the case determined on merit. The court must also consider whether the defendant has been prejudiced by the delay

7. In the instant, the matter was last on 3rd July 2012 in Court before this Application was filled. On that day, the Plaintiff's Counsel applied for an adjournment because he was not able to reach his client. The Defendant had no objection to the adjournment. The matter was adjourned with direction that the parties fix a further hearing date in the registry. The next hearing was on 28th January 2016. The Plaintiff's Counsel applied to cease acting for the Plaintiff, vide a Chamber Summons dated 30th September 2015. The same was heard and allowed on 3rd March 2016.

8. In the meantime, the Applicant filed this Application dated 6th February 2014 in court on 14th February 2015. The Court record indicates that the said Application was to be heard 30th June 2015 but it was not heard and there are no reasons given for the same.

9. However, immediately the Plaintiff's Counsel was allowed to cease acting for the Plaintiff, the

Applicant applied for a hearing dated for their said Application and it was fixed for hearing on the 22nd March 2016.

10. From the above analysis, the suit was filed in Court on 22nd July 2011, defence was filed on 15th August 2011 and the Reply to the Defence and Defence to the Counterclaim on 17th September 2011. On 2nd May 2012 the Court confirmed the parties had complied with Pre-trial requirements and directed the suit be set down for hearing. The first hearing was on 3rd July 2012 and did not proceed, for reasons stated above.

11. Thus from the 3rd July 2012 to 28th January 2016 no active hearing of the matter took place. That is a period of Three years and four months. Can one conclude that, this period is inordinate and inexcusable? On the face value and without any reasonable excuse: **YES**. However, before I conclude the answer to this question, I shall deal with the other issues for determination above.

12. The question is whether delay if any, was intentional, contumelious and inexcusable? Has the Plaintiff offered a reasonable explanation for the delay if any? The reasons advanced for the delay are that: the Court file went missing, and that frustrated the numerous efforts made to fix the matter for hearing. Is this explanation supported? I have looked at the several letters annexed to the Replying Affidavit, and I find that on several occasions in particular, on the 25th October 2011, 16th November 2011, 4th May 2012, 5th July 2012, 28th February 2013, and 7th November 2013, the Plaintiff's Counsel invited the Defendant's Counsel to meet their representative at the Court Registry to fix the hearing date for the suit.

13. That is what transpired in the period of 25th October 2011 to 28th February 2013. Thus, from the last time the matter was in Court on 3rd July 2012, to at least 28th February 2013, the Plaintiff's made an effort to prosecute the matter. Therefore if there was a delay, then it is from 28th February 2013 to 28th January 2016 a period of 2 years and 11 months. Is this delay again in ordinate and inexcusable? Is there any explanation for the same? A further consideration of the correspondence attached to the Replying Affidavit, reveals that between the 12th November 2012 and 9th December 2013 the Plaintiff's Counsel wrote to the Deputy Registrar for confirmation that the Court file which had gone missing had been trace. These letters are not contested.

14. I therefore find that the Plaintiff at least made an effort to fix the matter for hearing. The only unexplained delay is for the period of the years 2014 and 2015. The Respondent has kept silent on what transpired during this period. However, the Chamber Summons dated 20th September 2015 seems to explain the same. In that Chamber Summons, the Plaintiff's Counsel seeks to be allowed to withdrawal from acting for the Plaintiff due to lack of instructions. In the affidavit in support of the said Application, the counsel seems to have tried to contact his client for instructions without success. An averment which the Applicant says shows that, Plaintiff lost interest in this matter. All in all, I find that, the Respondent has offered a reasonable explanation for the delay and effort made to remedy it.

15. I now turn to the issue as to whether the Defendant will suffer any prejudice if Application is not allowed. In support of the same, the Defendant submitted that its key witness Mr. Jimmy Jagatram Baburam is now deceased. Unfortunately, that allegation is not supported by any documentary evidence and neither does the Applicant explain how the death of the witness will impact on its own Counterclaim or what will become of it.

16. I now consider the issue, as to whether the Plaintiff be prejudiced if the Application is allowed? In answer to this question, the Plaintiff avers that the striking out of the suit will divests it of hearing of its suit, driving it from the Judgment seat.

17. I have now considered the entire Application and I find that it is in the interest of Justice to allow the suit go to a full hearing. In several authorities including but limited to the cases of : ***Ivita vs Kyumbu (1984) 441*** held that a suit be heard for just determination of the issues therein. In the case of : D.T

dobie Madan, J held that, it is important to evaluate reasons given for the delay and also determine if any party will suffer prejudice.

18. Similarly, the Court must not lose sight of the fact that the Plaintiff bears the primary responsibility to prosecute the suit. This was so held in the case of ***Mobile Kitale Services vs Mobil Oil Kenya Limited and Another***. In the instant case the Applicant too has a primary responsibility in respect of its counter-claim. Unfortunately the Applicant remained silent on this issue.

19. I have said enough. I consider that Articles 48, 50, and 159 of the Constitution of Kenya empowers the Court to allow parties litigate and expeditiously so it is against this background that I dismiss the Application herein on the following conditions;

(i) The Plaintiff to set down the suit for hearing within 45 days of this order;

(ii) Failure to comply with the order in (i) above will lead to the suit being deemed dismissed without resort to Court;

(iii) The costs of the Application to the Applicant who took the step to file this Application to revive the matter.

20. Those, then are the Court orders.

READ, DELIVERED AND DATED, AT NAIROBI THIS 18th DAY OF JULY 2016.

G. L. NZIOKA

JUDGE

Ruling Read in open court in the presence of:

Mr. Kamande for Plaintiff

Miss Kamande for Defendant

Teresia – Court Clerk