



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 87 OF 2008

DAIMA BANK LIMITED (IN LIQUIDATION).....PLAINTIFF

- VERSUS -

AMBOSELI ESTATES LIMITED.....1ST DEFENDANT

LUCY W. KAIRU.....2ND DEFENDANT

EDWARD KIHARA MUTTU.....3RD DEFENDANT

JOHN P. MUNGE.....4TH DEFENDANT

STEPHEN R. KARUNDITU.....5TH DEFENDANT

RULING

1. The suit was dismissed by the court on 17th June 2015. The reason given by the court for the dismissal of the suit was that there had been an inordinate delay of one (1) year since the last step was taken in the case.
2. The plaintiff drew the attention of the court to the fact that by the 17th of June 2015, when the suit was dismissed, a period of one year had not yet lapsed since the last step was taken in the case.
3. It is common ground that the case was, on 11th July 2014, certified ready for hearing. That is the last procedural step before a case can be set down for hearing. Therefore, at any time after 11th July 2014, the parties could fix a date for the hearing of the case.
4. But for almost a year, there does not appear to have been any steps taken by any of the parties to fix a hearing date.
5. On 17th June 2015 Kiarie J. dismissed the suit for want of prosecution. The order of dismissal was premised on Order 17 Rule 2 of the Civil Procedure Rules. The said rule reads as follows;

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction may dismiss the suit?.

6. I agree with the defendant that that Rule does not expressly require the court to serve the notice on the parties. However, the notice needs to be given in writing.

7. There is no evidence that the parties were given any notice in writing, before the suit was dismissed.

8. Secondly, the learned Judge expressly noted that service of the notice had been effected, to show cause why the suit should not be dismissed.

9. Regrettably, there is no proof that any notice was served. Therefore, the learned Judge erred by concluding that the parties had not given any satisfactory response to a Notice which had been served upon them, when there was no proof of such service.

10. Finally, and of the greatest importance is the fact that the order for the dismissal of the suit was premature. The period of one (1) year had not yet lapsed by the time the suit was dismissed.

11. Accordingly, the suit ought not to have been dismissed. It must therefore be reinstated, because anything short of that would sustain an irregularity.

12. In the result, the court is obliged to set aside the order made on 17th June 2015.

13. The suit is hereby reinstated.

14. The defendants are ordered to pay to the plaintiff the costs of the application dated 10th August 2015. I so order because I hold the considered view that the defendants' opposition to the application was wholly unwarranted, in the face of the fact that one year had not yet lapsed by the time when the court dismissed the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of November 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Miss Oloo for Macharia for the 1st Defendant

Miss Oloo for Macharia for the 2nd Defendant

No appearance for the 3rd Defendant

No appearance for the 4th Defendant

No appearance for the 5th Defendant.