



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 575 OF 2010

NEW FOUR STAR PLUS LIMITED.....PLAINTIFF

VERSUS

KENYA RAILWAYS LIMITED.....DEFENDANT

RULING

The Defendant has applied by **Notice of Motion dated 12th March 2014** for dismissal of the Plaintiff's suit for want of prosecution. The application is brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act** (the **Act**) and **Order 17, rule 2(1), (3)** of the **Civil Procedure Rules, 2010** (the **Rules**). By these sub-rules((1) and (3)), 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.

The grounds for the application are that the Plaintiff has not taken any material steps to prosecute its claim yet the plaint was filed on 25th November 2010. It is the Defendant's case in this application that the continued existence and uncertainty of the suit is prejudicial to it. These grounds are buttressed by a supporting affidavit sworn by the Defendant's advocate, **Rose Onsare**.

The Plaintiff filed a replying affidavit on 29th August 2014 sworn by Counsel, **Kalvinder Singh Bhullar**. Grounds of opposition to the application emerging from that replying affidavit include –

- (i) That the application is malicious as written submissions with regard to an application for injunction dated 24th November 2010 were filed and the parties await ruling on the same.
- (ii) That he took the conduct of this matter in February 2014 and has invited the Defendant to fix the matter for ruling twice.
- (iii) That the mistakes of previous advocates should not be visited upon the Plaintiff who is keen on prosecuting the matter.
- (iv) That the Defendant has not demonstrated how it will suffer injustice if the Plaintiff is allowed to prosecute the matter.
- (v) That the Plaintiff has a claim well founded in law and it is in the interest of justice that it is granted the opportunity to prosecute its case.

The application was canvassed by way of written submissions. The court has considered those submissions together with the authorities cited.

The chronology of events in this case shows that since the institution of the claim which was accompanied by a chamber summons application under certificate of urgency, there have been numerous hurdles most of which are not due to the fault of either party. For instance, the file found itself before four Judges who issued orders for the application to be heard afresh or submissions filed and eventually it was stood over generally. It is evident that the parties had filed written submissions by 23rd February 2011 which was about three months after the filing of suit and the application.

Perhaps the only fault of the Plaintiff is that it did not persistently seek a date for ruling and seemed to have abandoned the matter (which has been explained as the interlude when it changed advocates). The new advocates since coming on record have invited the Plaintiff to fix the matter for 'hearing'. This has been exhibited in the replying affidavit.

The Defendant's supporting affidavit beyond stating that the continued pendency of the case is prejudicial to it, as it reflects as a liability in its books of accounts, there is not anymore. It has not been averred for instance that, because of the passage of time, a fair trial of the action will no longer be possible. It has not been alleged that witnesses or documents will no longer be available at the trial.

From the material now before the court, a fair trial of this suit is still possible without any further undue delay. It is therefore meet and just that the Plaintiff be accorded a last opportunity to prosecute its case.

It is in this spirit that the application at hand is declined. It is hereby dismissed. The Plaintiff is directed to take discernable steps within the next 30 days after delivery of this ruling in order to propel its case towards taking a date for ruling of the chamber summons and ultimately towards hearing of the main suit.

The Plaintiff shall bear the costs of the present application.

Orders accordingly.

Dated and delivered at Nairobi this 6th Day of May, 2015.

A.MBOGHOLI MSAGHA

JUDGE