



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 1487 OF 2005

EDWARD A.H. ONYANDO.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

RULING

1. By this application (**notice of motion dated 24th September 2013**) the Defendant seeks an order for dismissal of the Plaintiff's suit for want of prosecution under **Order 17, rule (3) of the Civil Procedure Rules, 2010** (the **Rules**). Under that rule a defendant may apply for dismissal of a suit for want of prosecution in any suit in which no application has been made or step taken for one year towards prosecution of the case. There is a supporting affidavit which is sworn by the Defendant's advocate, **Kennedy O Ochieng**.

2. The Defendant's case is that this suit was filed in December 2005 and the cause of action refers back to the years 1993, 1994 and 1995; that the Defendant entered appearance and filed defence in January 2006; that the Plaintiff filed his reply to defence in February 2006 and the pleadings closed on or about 15th March 2006; and that the last time the case was before a judge was on 13th November 2008 when the matter was adjourned at the instance of the Plaintiff. It is the Defendant's further case that thereafter the Plaintiff went to sleep and has not taken any step towards hearing of the suit for well over four (4) years.

3. The Defendant has further pleaded that pendency of the case for so long has been prejudicial to it, and further, that a fair trial of the action can no longer be possible in the circumstances of this case as there has been a major turn-over in the staff of the Defendant, and that for those witnesses that will be available (if any), the events giving rise to the suit having occurred in the years 1979, 1993 and 1994, such witnesses will no longer be able to give an accurate account of the events.

4. The Plaintiff has opposed the application by his replying affidavit filed on 2nd December 2013. Grounds of objection arising therefrom include –

(i) That the present application is an abuse of the process of the court, the Defendant having made a similar application dated 15th April 2013, which application is still on record, notwithstanding that the Defendant purported to withdraw the same by notice.

(ii) That the delay in prosecuting the case was caused by the Plaintiff's previous advocates, and it took some time for him to instruct his new advocates because he

did not have the necessary funds.

(iii) That since he was served with the present application the Plaintiff has complied with Order 11 of the Civil Procedure Rules (pre-trial requirements). The Defendant has not.

(iv) It is in the interests of justice that he be given an opportunity to prosecute his case.

5. I have considered the submissions of the learned counsels appearing, including the cases cited by the Defendant.

6. I will first consider the issue of abuse of process. Indeed there was a previous similar application by the Defendant by notice of motion dated 15th April 2013. That application was opposed by the Plaintiff who filed a replying affidavit on 16th September 2013. The application came up for hearing on 25th September 2013. The matter was taken out by consent of the advocates for the parties and fixed for hearing on 4th December 2013. It was further ordered that parties may file and exchange written submissions before that date. On 26th September 2013 the Defendant filed notice of withdrawal/discontinuance of application dated 24th April 2013. The notice does not cite any rule under which it was given. It is common ground that no order was entered upon it.

7. The issue then with regard to this notice of withdrawal/discontinuance is whether the notice is valid and took effect or whether that previous application by notice of motion dated 15th April 2013 is still in place.

8. As already noted, the notice itself does not cite any rule under which it was purportedly given. As far as I am aware, there is no specific rule that deals with withdrawal or discontinuance of applications. **Order 25** of the Rules deals with withdrawal and discontinuance of suits. Assuming that Order 25 applies to applications, it will be noted that under rule 2 thereof a suit that has been set down for hearing may be discontinued or any part of the claim withdrawn, **upon the filing of a written consent signed by all the parties. Otherwise leave of the court would be required** to discontinue the suit or withdraw any part of the claim.

9. The notice of motion dated 15th April 2013 had already been fixed for hearing for 4th December 2013 when the application was purportedly withdrawn by notice filed on 26th September 2013. The application had been fixed for hearing the previous day, 25th September 2013. It was not open to the Defendant to withdraw the application without the consent of all parties or without leave of the court. The notice of withdrawal/discontinuance of the application was null and void and of no effect. **The notice of motion dated 15th April 2013 is thus still on record unprosecuted.**

10. In the circumstances the present application by notice of motion dated 24th September 2013 is not properly before the court and is an abuse of the process of the court. It is hereby struck out.

11. This however does not exonerate the Plaintiff from the inordinate delay in prosecuting his suit. I note that the Plaintiff has now complied with pre-trial requirements. The Defendant is yet to do so. Let the parties now proceed as they may wish. They will also bear their own costs of the present application. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF JULY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 4TH DAY OF JULY 2014