



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 854 OF 2009

CFC STANBIC BANK LIMITED.....PLAINTIFF

- VERSUS -

JAMES KABATHA MAINA.....DEFENDANT

RULING

1. The defendant wants the court to dismiss the plaintiff's suit for want of prosecution.
2. It is the defendant's contention that although the suit was filed more than one year ago, the plaintiff has not shown any earnest desire to have the case fixed for hearing.
3. Secondly, the suit is said to have abated by operation of the law. That submission is founded upon the fact that by the time the plaintiff collected the summons to enter appearance, the said summons were no longer valid.
4. But the plaintiff has explained that it did collect the original summons within the prescribed period of time. However, the plaintiff was unable to trace the defendant, so as to be able to effect service of the summons.
5. As a result of the delay in tracing the defendant, the original summons expired.
6. The plaintiff filed an application in court on 20th February 2012, seeking an extension of the validity of the summons.
7. That application was heard by Kimondo J. on 19th March 2012. The learned Judge ordered as follows;

“The summons to enter appearance have expired. I shall enlarge the time within which the application for extension should be made. I will also extend the validity of the summons for a period of six months from today's date.

Fresh summons to issue. Costs shall be in the cause”.

8. According to the defendant, he was served with the Plaintiff and Summons in June 2012. In effect, service was effected within 3 months of the issuance of the order extending the validity of the summons.

9. The new summons which the defendant has exhibited, was dated 14th June 2012. That would imply that the plaintiff collected the summons and thereafter served the same upon the defendant during the month of June 2012.
10. In the result, the suit had not abated by the time the defendant was served with summons to enter appearance.
11. The Defence was filed on 2nd July 2012.
12. The court records reveal that on 20th June 2014, the plaintiff's advocates wrote to the defendant's advocates, inviting them to attend at the Registry for the purposes of fixing a Hearing date.
13. I have noted that that letter was stamped by the advocates for the defendant, which signifies that they received the letter.
14. However, that letter was sent almost 2 years after the Defence was filed.
15. The plaintiff also exhibited another letter dated 10th June 2013. That letter was also an invitation to attend at the Registry to fix a date for trial.
16. Although that particular letter did not have the stamp of the defendant's advocate's it is to be noted that the defendant's lawyers did not deny receipt of the letter. It is therefore safe to presume that the defendant's advocates were duly invited to the Registry for the purposes of fixing a Hearing date.
17. That would imply that the plaintiff was not dormant for two years, as has been suggested by the defendant.
18. It is, however, true that the plaintiff could have been much more pro-active in the prosecution of the suit.
19. Nonetheless, as the claim is based on contract, which is, presumably, documented, the delay in prosecution cannot, in my humble opinion, cause such a prejudice to the defendant that would result in an injustice.
20. I therefore reject the defendant's application to dismiss the suit for want of prosecution. But the plaintiff will still pay the costs of the application. I so order because, as I have already intimated above, the plaintiff could have been more pro-active. The slow pace at which the plaintiff was moving prompted the defendant to try and get the suit dismissed. Hopefully the scare will now force the plaintiff onto the fast lane.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of December 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the Plaintiff.

.....for the Defendant.

Collins Odhiambo – Court clerk.

