



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 860 OF 2006

PETER EZEKIEL OWUOR.....PLAINTIFF

VERSUS

DEL MONTE KENYA LIMITED.....DEFENDANT

RULING

1. Before me is the Defendant's Notice of Motion dated 23rd May, 2014. It is expressed to be brought under Order 17 Rule 2(3) and Order 51 Rule 1 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act. The Defendant seeks that this suit be dismissed for want of prosecution.
2. The motion is premised on the grounds that were set out on the body of the motion and in the Supporting Affidavit of Elizabeth Gicheru sworn on 23rd May, 2014. She averred that this suit was filed on 24th July, 2006. Pleadings closed and the suit was set down for hearing on 18th October, 2012. On that date the matter was not cause listed. She stated that two years have since lapsed yet the Plaintiff has taken no step to prosecute the suit and laments that the continued pendency of this suit is causing the Applicant a lot of anxiety and urged that this suit be dismissed for want of prosecution.
3. Ms. Ng'ang'a, Learned Counsel for the Defendant reiterated the averments in the Supporting Affidavit and submitted that Order 17 Rule 2(3) allows for dismissal if no step is taken within one year. She urged that this application be allowed.
4. The Plaintiff swore a replying affidavit on 30th October, 2014 in opposition to the motion. He attributed the delay in prosecuting the suit to several issues. He stated that the representatives of both parties visited the registry for purposes of fixing hearing dates on 30th January, 2013, 4th February, 2013 and 28th February, 2013, respectively when judiciary staff were away on a retreat; that the file could not be traced and there were no dates available. He stated that he has since instructed the firm of Mbugua Mureithi and Company Advocates to continue prosecuting this matter on his behalf which is a clear indication of interest on his part to have the matter brought to its logical conclusion.
5. Mr. Olewe Learned Counsel for the plaintiff submitted that there was a change of advocates in March, 2014. That an attempt to get the file from the plaintiff's former advocates had been fruitless. He urged that there seem to have been a mistake on the part of the previous advocate which mistake should not be visited on the plaintiff. He further urged that this is a labour matter and should be referred to the industrial court.
6. I have considered the affidavits on record and the submissions of the parties. In such an

- application, the principles to be considered are whether there has been inordinate delay in prosecuting the suit, if so, whether the delay has been explained to the satisfaction of the court, and finally whether the delay has caused any prejudice to the opposite party.
7. Has there been a delay? According to the Applicant, there has been no action on the part of the Plaintiff since 18th October, 2012. That will make it approximately one (1) year and seven (7) months between the time of the last step and the time the application was made. However, the Respondent contends that the last time there was action was January and February, 2013, respectively when the Plaintiff's former Advocates invited the Applicant's Advocates to the court registry for fixing a date for hearing. It was alleged that on both occasions, no dates were taken as the judiciary staff were in a retreat and thereafter the court diary for that year had been closed. Two letters dated 21/01/2013 and 06/2/2013 were produced. Although they did not have a court stamp, they were both received by the Applicant's firm of Advocates, Judy Thongori & Company on 29/01/2013 and 18/02/2013, respectively.
 8. To my mind that was a clear intention on the part of the Plaintiff to have the suit prosecuted. There was no denial on the part of the Applicant's Advocates on the explanation given as to why no dates were given in January and February, 2013.
 9. I note however, that no action was taken between February, 2013 and May, 2014 when the present application was made. That was a period of over fourteen (14) months. That period in my view constituted inordinate delay.
 10. Has that delay been explained? The Plaintiff contends that when no date for hearing was forthcoming he changed his advocates. The present Advocates came on record on 3rd March, 2014. I note that, as at that time, one year provided for under Order 17 Rule 2 had already elapsed.
 11. I note that the current application was filed on 27th May, 2014. I will excuse the Plaintiff for the period between March, 2013 and March, 2014 as the failure to take action has been attributed to the previous Advocates who were promptly sacked for that delay. The current Advocates have explained that there had been challenges in retrieving the original file for this case from the said Advocates, I note that between the said March, 2014 and 27th May, 2014 when the present application was filed, it was only two (2) months. It has been explained that the current Advocates for the Plaintiff could not take action then as the original file from the previous Advocates had not been retrieved. In this regard, I am satisfied that the delay has been explained.
 12. As regards prejudice, none has been shown to have been suffered by the Applicant. Accordingly, I decline to accede to the application and dismiss the same with no order as to costs.
 13. I note that this is a matter arising out of an industrial relation between the parties. Accordingly, I direct that the matter be transferred to the Industrial Court for hearing and determination. The file should be mentioned before the Head of that court (Presiding Judge) on 11th December, 2014 for his directions as to the hearing and determination.

It is so ordered.

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A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 5th day of December 2014

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D. ONYANCHA

JUDGE