



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 105 OF 2016

NATIONAL BANK OF KENYA LTD.....APPLICANT

VERSUS

AMISI ONYANGO MUKOYA.....RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 26/2/2018 and filed on 6/3/2018. The Applicant – **NATIONAL BANK OF KENYA** – is the Defendant in the suit and is wrongly or mistakenly stated to be the Respondent in the application. The Respondent – **AMISI ONYANGO MUKOYA** – is the Plaintiff in the suit and is erroneously or wrongly stated to be the Applicant. The application is brought under order 17 Rule 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act (cap 21) and other enabling law.

2. The Applicant, as Defendant, is accusing the Respondent, as Plaintiff, of taking too long to prosecute the suit. To the Applicant, the Respondent instituted the suit and has done nothing to prosecute it since 19/7/2017. The Applicant therefore wants the suit dismissed (prayer a) and also to get costs of this application (prayer b).

3. The suit herein was filed on 30/6/2016. Contemporaneously with the suit was also filed an application seeking, in the main, temporary restraining orders. That application was canvassed by way of written submissions and a ruling was subsequently delivered on 19/7/2017. To the application under consideration, the Respondent filed a replying affidavit expressing, *inter alia*, interest to prosecute his case and accusing the Applicant of rushing to file this application while ignoring its obligation to comply first with pre-trial preliminaries.

4. Both sides canvassed the present application by way of written submissions. The Applicant filed submissions on 10/3/2018. In the submissions, the Applicant gave some antecedents and background to the case. The applicable law was then expatiated on and the facts arising were said to favour the dismissal of the case.

5. The Respondent's submissions were filed on 14/5/2018. According to the Respondent one year has not expired since action was last taken in the case. To the Respondent, it would be wrong to say that there has been a period of inaction for at least one year. The case is therefore not ripe for the kind of application filed here by the Applicant.

6. I have considered the application, the response made, rival submissions, and the pleadings as filed. I have already pointed out that an application was filed together with the suit. That application was determined on 19/7/2017. During its pendency, it would be wrong to treat that period as one of dormancy; for it's during that period that the Applicant responded to the application and submissions to dispose of it were filed. And before all this was done, the court had earlier on handled the application *exparte* in the early stages.

7. This application was filed on 6/3/2018. As pointed out earlier the determination of the earlier application took place on 19/7/2017. The period between these two dates is about 8 or 9 months. It is plain therefore that one year had not expired.

Order 17 Rule 2(1) of Civil Procedure Rules, 2010, states as follows:

Order 17(2)(1): 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.

8. It is plain that the period required by law is at least one year. It is under one year in this case. The law also require that no application should have been made within the one year or that no other action should have been taken. What this means is that anybody looking at the matter would readily notice that it has been totally inactive for at least one year. The Applicant should have waited for one year to expire. It should also have tried to demonstrate that it was ready for hearing on its part. What is on record shows that the Applicant has not yet honoured its pre-trial obligations to ensure that the matter is ready for hearing.

9. It is therefore easy to agree with the Respondent that the Applicant acted abit too early. The application is premature. The requisite period for mature or proper filing of the application had not yet expired. The Applicant expounded on the applicable law well but got it completely wrong on facts.

10. The application herein is therefore found unmeritorious and is hereby dismissed with costs.

Dated, signed and delivered at Busia this 9th day of October, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant:

Respondent:

Counsel of Applicant:

Counsel of Respondent: