



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 237 OF 2014

MILIMAN RESORT LIMITED.....1ST PLAINTIFF

WALTER EDWIN OMINDE.....2ND PLAINTIFF

VERSUS

LE-SAVANNA COUNTRY LODGE & HOTEL.....DEFENDANT

RULING

1. Miliman Resort Limited and Walter Edwin Ominde, the Plaintiffs, under notice of motion dated 24th January “2017” and filed on the 9th February 2018, seek for the dismissal order of 15th December 2017 to be set aside and the suit be fixed for hearing and final determination. They also pray for costs. The application is based on the eight (8) grounds on its face and supported by the affidavit of Erickson Nyamweya Mogusu sworn on the 24th January 2018. That from the grounds and the affidavit in support, the Plaintiffs case is as follows;

a) That the delay in setting the suit down for hearing for more than one year was occasioned by the transfer of Kaniaru J out of the station, and the absence of the instructing client who had gone to India for treatment and only returned into the Country on or about 12th January 2017.

b) That after the replacement of Kaniaru J came to the station, the Deputy Registrar directed that no dates would be fixed for a period of seven months.

c) That the Plaintiffs have a legitimate claim with a high chance of success and should be heard on merit.

2. The application was reportedly served on 9th February 2018 and when it came up for hearing on the 18th September 2018, the Defendant had not filed any response. The application was then fixed for ruling.

3. The following are the issues for the Court’s determination;

a) Whether the Plaintiffs have given a reasonable explanation as to why they did not take any steps towards prosecuting their case for more than one year.

b) Who pays the costs of the application.

4. The court has after considering the grounds on the notice of motion, the affidavit evidence and the record come to the following findings;

a) That before the notice to show cause under **Order 17 Rule 2 of Civil Procedure Rules** dated 7th November 2017 for hearing on the 15th December 2015, was issued and served upon the Counsel on record for the parties, the suit had last been in court on the 5th August 2015 when Counsel had by consent agreed to take other dates in the registry on learning that the then trial Judge was on transfer.

b) That the current Judge reported and started working in this station in September 2015. That the claim that the Plaintiffs delay in taking steps to prosecute the suit was due to the transfer out of the station of Kaniaru J has no merit.

c) That there is no documentary evidence availed to confirm the claim that the Deputy Registrar had directed that hearing dates would not be fixed for seven months after the coming to the station of the current Judge. That in any case, if there was any such directions, the trial Judge would be aware. That what is a fact is that there were times upto the end of the year 2016 when the diary would get filled up and parties/counsel would wait for a time until the diary for the following year was availed and opened. That from the start of 2017 to today, the diary has always been availed and the Learned Counsel for the Plaintiffs should be aware of this

fact as he has been appearing before this court in other matters.

d) That though the Plaintiffs stated at ground 2 that ***“the instructing client had gone to India for treatment after ailing for some time and was back on or about 12th January 2017”***, there are no supporting documents, in form of medical reports and or copies of passport, annexed though so claimed at paragraph 3 of the supporting affidavit. That the name of the instructing client has not been disclosed and it would have been preferable if the said client is the one who deponed to that matter instead of Counsel.

e) That when the notice to show cause came up for hearing on the 15th December 2017, Counsel holding brief for Mr. Nyamweya for the Plaintiffs informed the Court that the Counsel had not been in touch with his clients for about two (2) months. That the Counsel also informed the court that he had received word that the client would be back from India by end of January 2018. That the application to put off the hearing of the notice to show cause a date after January 2018 was opposed by Counsel of the Defendant. That the Court declined the application and pointed out that there was no disclosure as to the time the client left for India and dismissed the suit for want of prosecution. That as was the case on the 15th December 2017, there is no disclosure of the date when the instructing client left for India.

f) That noting that the 1st Plaintiff is a limited company which must have directors and or other Management Officers through which it operates, and the 2nd Plaintiff is a human being, there is no reasonable explanation given as to why no person was available to work with the Counsel on record and ensure steps towards presenting the suit were taken between 5th August 2015, when the matter was last in court, and the 15th December 2017 when it was dismissed. That a period of about two years four months had lapsed without any action.

5. That flowing from the foregoing the court finds no reasonable explanation has been presented by the Plaintiffs as to why they delayed for over two years without taking any steps to prosecute their case. That further, there are no new facts that have been presented to enable the court vary or review its order of 15th December 2017, which was made after hearing Counsel for both parties. That accordingly the Plaintiffs notice of motion dated 24th January 2017 but file on the 9th February 2018 is without merit and hence dismissed with no order as to costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 21ST DAY OF NOVEMBER 2018

In the presence of:

Plaintiffs Absent

Defendant Absent

Counsel Mr. Nyamweya for the Plaintiffs

M/s Ayieta for Onyango for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE