



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 589 OF 2010

KUGURU FOOD COMPLEX LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

KENYA PIPELINE COMPANY LIMITED..DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 14th July 2016 brought under Order 12 Rule 7, Order 17 Rule 2 and Order 51 Rule 15 of the Civil Procedure Rules and Section 1A, 1B, 3A and 63 (c) & (e) of the Civil Procedure Act.

2. It seeks order:-

(1) Spent

(2) Spent

(3) That this Honourable Court be pleased to set aside the orders made by this honourable court on the 18th March 2015 dismissing this suit for want of prosecution.

(4) That this honourable court do reinstate this suit which was advertently dismissed.

(5) That costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs a to f.

4. The application is supported by the affidavit of Mugo Kamau, Advocate for the plaintiff/applicant sworn on the 14th July 2016.

5. The application is opposed. There are grounds of opposition filed by the defendant/respondent dated 6th March 2017. There is also a replying affidavit sworn by legal officer of the defendant/respondent, sworn on the 30th April 2017.

6. On the 3rd May 2017, the court directed that the application be canvassed by way of written submissions.

7. It is the plaintiff's/applicant's submissions that the parties did not receive any notice to show cause why the suit should not be dismissed for want of prosecution. The plaintiff's/applicant's counsel at all the time had the erroneous impression that the file was with Honourable Lady Justice Gitumbi pending a ruling.

8. Section 3A of the Civil Procedure Act, vests in the court inherent power to make any orders as may be necessary for the ends of justice to be met. The power has been broadened by the introduction of overriding objective in Section 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution.

9. It is the defendant's/respondent's submission that there is no requirement for the court to serve a notice to show cause why the suit should not be dismissed. Listing the matter in the cause list or posting in the court's official website constitutes sufficient notice. They have relied on the case of **Fran Investments Limited vs G4S Security Services Limited [2015] eKLR and Mwangi S Kaimenyi vs Attorney General & Another [2014] eKLR**

10. The plaintiff/applicant has not placed any urgent evidence before this court to explain the prolonged delay in prosecuting the matter. Since instituting the suit in 2010, the plaintiff/applicant has not taken any step to prosecute the suit based on merit. They have also relied on the case of **Savings and Loan Limited vs Susan Wanjiru Muiriti Nairobi (Milimani) HCCC No. 397 of 2002 and Moses Mbugua vs British American Tobacco Ltd (2014) eKLR.**

The delay was deliberate, inordinate, unexplained and inexcusable. Reinstating the suit will cause serious prejudice to the defendant/respondent. They pray that the application be dismissed with costs.

11. I have considered the notice of motion and the affidavit in support. I have also considered the grounds of opposition and the replying affidavit, the written submission of counsel and the authorities cited.

The issue for determination is whether this application is merited.

12. I have gone through the court’s record. The plaintiff/applicant was previously represented by the firm of M/S Naragwi & Associates. It is also not in doubt that on 10th December 2013, the notice of motion dated 24th May 2013 came up for highlighting of submissions before Hon. Lady Justice Gitumbi. The Honourable Judge thereafter directed parties to take a further mention date in the registry for purposes of taking a ruling date in the new term.

13. It is not clear what happened until 18th March 2015 when the suit was dismissed for want of prosecution. The above scenario is admitted in paragraph 8 of the affidavit of Gloria Khafafa, a senior legal officer of the defendant/respondent. This confirms that the defendant/respondent was aware that the matter was pending ruling.

14. I have considered the circumstances leading to the dismissal of the suit for want of prosecution. I find that the plaintiff/applicant deserves a chance to prosecute its claim. I find that no prejudice will be occasioned to the defendant/respondent if this suit is reinstated. In the case of **Mwangi S. Kaimenyi vs Attorney General and Another [2014] eKLR** the court held that:

“The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus even if delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time”

15. I find the explanation given by the plaintiff for delay reasonable. The delay is excusable. The plaintiff/applicant deserves a chance to prosecute its case to conclusion. It is however urged to set down the suit for hearing at the earliest opportunity.

16. I find merit in the application and grant the orders sought namely:-

(a) That the orders made by this Honourable Court on the 18th March 2015 dismissing this suit for want of prosecution are hereby set aside.

(b) The suit herein is hereby reinstated.

(c) That costs of this application be borne by the plaintiff/applicant

It is so ordered.

Dated, signed and delivered in Nairobi on this 11TH day of DECEMBER 2018

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant