



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**LAND CASE NO.150 OF 2012**

**NYANDO MILLERS LIMITED .....PLAINTIFF**

**VERSUS**

**SBI INTERNATIONAL HOLDINGS AG (KENYA) .....DEFENDANT**

**RULING**

1. **SBI International Holding company Limited**, the Defendant, filed the undated notice of motion on the 18<sup>th</sup> May 2016 seeking to have the suit filed by **Nyando Millers Limited** the Plaintiff, through the plaint dated 20<sup>th</sup> December 2012 dismissed for want of prosecution with costs. The Defendant set out six grounds on the notice of motion which is supported by the affidavit of Prof. Albert Mumma, counsel for the Defendant, sworn on the 18<sup>th</sup> April 2016. The fourth ground is to the effect that the matter was last in court on 8<sup>th</sup> October 2013 while paragraph 5 of the supporting affidavit is to the effect that matter was last in court on 15<sup>th</sup> July 2014.

2. The application is opposed by the Plaintiff through the replying affidavit sworn by Eng. Maxwell Otieno Odongo, the Plaintiff's managing director, sworn on 20<sup>th</sup> June 2016 in which he deposes that interlocutory judgment has been entered after Defendant's failed to file and serve a defence after entering appearance. That the Plaintiff had severally attempted to have the suit fixed for formal proof in the early months of this year and on 19<sup>th</sup> May 2016, the file could not be traced in the registry.

3. The notice of motion filed on 18<sup>th</sup> May 2016 came up for hearing on the 23<sup>rd</sup> June 2016 when Mr. Kamande and Omay, counsel for the Defendant and Plaintiff respectively made their submissions.

4. The following is the main issue for the court's determination,

- a) Whether a period of one year has passed without any steps being taken by the Plaintiff to prosecute this suit, and if so whether the suit should be dismissed for want of prosecution.
- b) Who pays the costs of the notice of motion?

5. The court has after considering the grounds on the notice of motion, the rival affidavit evidence, the submission by both counsel and on perusing the court record come to the following findings;

- a) That this suit was commenced through the plaint, dated 20<sup>th</sup> December 2012 filed contemporaneously with a notice of motion of even date of which prayer 2 was granted *exparte* on 20<sup>th</sup> December 2012. That the *exparte* orders were subsequently extended on 4<sup>th</sup> January 2013, 21<sup>st</sup> February 2013 and 25<sup>th</sup> April 2013.

b) That the Defendant is yet to file a reply to the said notice of motion as none was traced on the court record. That notwithstanding, the Plaintiff is yet to move the court to treat the notice of motion dated 20<sup>th</sup> December 2012 as unopposed and ex parte orders confirmed.

c) The Defendant entered appearance through the memorandum of appearance dated 19<sup>th</sup> February 2013 through M/S Prof. Albert Mumma & Co. Advocate. The Plaintiff then applied for the interlocutory judgment vide their letter dated 8<sup>th</sup> April 2013 after the Defendant failed to file their defence within the time required.

d) That the interlocutory judgment was entered on the 18<sup>th</sup> December 2015 and on 4<sup>th</sup> February 2016 the suit was fixed for formal proof on 28<sup>th</sup> April 2016 when it was stood over generally for absence of the parties and counsel.

e) That the Defendant then filed the statement of defence dated 4<sup>th</sup> May 2016 on the 23<sup>rd</sup> June 2016 which is the date the application for dismissal was being heard. That the said statement of defence was filed outside the time stipulated by the law and without the leave of the court in view of the interlocutory judgment of 18<sup>th</sup> December 2015 which is still in force. The said statement of defence is improperly on record and is hereby expunged from the court record on the motion of the court to avoid abuse of the courts process.

f) That contrary to the Defendant's contention on ground 4 of the notice of motion and paragraph 5 of the supporting affidavit, this matter was last in court 28<sup>th</sup> April 2016 when it was stood over generally. That by the time the notice of motion dated 18<sup>th</sup> May 2016 for dismissal was filed and a hearing date fixed, a period of less than one month had passed from the date the matter was last in court. That period does not suffice for purposes of **Order 17 Rule 2(3) of the Civil Procedure Rules** and the notice of motion must fail.

6. That flowing from the foregoing, the notice of motion by the Defendant which is undated but filed on 18<sup>th</sup> May 2016 has no merit and is dismissed with costs to the Plaintiff.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2016**

In presence of;

Applicant            Absent

Respondent        Absent

Counsel            Mr Omayo for Plaintiff/Respondent

Mr Kamande for Defendant/Applicant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**28/9/2016**

28/9/2016

S.M. Kibunja J.

Oyugi Court Assistant

Parties absent

Mr. Omayo for the Plaintiff/Respondent

Mr. Kamande for Defendant/Applicant

Court: Ruling delivered in open court in presence of Mr. Omayo for Plaintiff/Respondent and Mr. Kamande for Defendant/Applicant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**28/9/2016**