



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 32 OF 2010

LUDWIG ALLNOCH.....CLAIMANT

VERSUS

SAVANNA INTERNATIONAL LIMITED.....RESPONDENT

RULING

By a Notice of Motion dated 20th February 2014 and filed in court on 21st February 2014 the Respondent /Applicant seeks the following orders:-

1. That this Honourable Court be pleased to dismiss this suit for want of prosecution with costs to the Respondent/Applicant.

The application is made under Order 17 Rule 2 (1) of the Civil Procedure Rules 2010. Section 3A of the Civil Procedure Act, Section 12 of the Industrial Court Act and all Enabling provisions of the Law. It is grounded on the affidavit of LIOUBOR MAKCHINA sworn on 20th February 2014 and on the following grounds:-

- a. That the Claimant has not taken any steps towards prosecuting this matter.
- b. That this suit is vexatious and an abuse of the court process and should be dismissed in the interest of justice.
- c. That the Claimant herein is not desirous of prosecuting this suit as it is now more than one year since the matter was in Court and the matter has never been fixed for hearing.

The Claimant filed grounds of opposition as follows:-

1. The application is bad in law as it is founded on provisions of the Civil Procedure Act and Rules, which are inapplicable in the Industrial Court.
2. Under Rule 15 of the Industrial Court Rules the Respondent has an equal obligation to set down the case for hearing a duty it has failed to observe and would rather blame it on the Claimant.
3. The Respondent has filed a counterclaim in the suit and whereas it wants the Claimant's suit dismissed it is silent about the counter-claim which it has not set down for hearing.
4. The delay by the Claimant to set down the case for hearing has been occasioned by the fact that he has been residing out of the Country.
5. The Claimant is now ready to prosecute his Claim.
6. It will be against the rules of natural justice to deny the Claimant a chance to be heard.

The Claimant also filed a replying affidavit of Geoffrey Orao Obura sworn on 7th March 2014.

The application was argued on 7th April 2014. Mr. Anyona instructed by Kamere & Co. Advocates represented the applicant/respondent while Mr. Mburugu instructed by Obura Mbeche & Company advocated represented the Claimant who is the Respondent in the application.

The Respondent's case is that the claim should be dismissed as the Claimant has not taken any steps to fix the case for hearing since 2nd November 2012 when the case was last in court. That the Respondents advocates wrote to the claimant's advocates severally requesting them to fix a hearing date for the case but the Claimants advocates failed to do so for more than one year. That this caused the Respondent to reach an opinion that the claimant was not interested in prosecuting his case.

The Claimants case is that the Claimant is out of the country as he works in Uganda as a farm Manager and was not able to give his advocates instructions to file reply to counter-claim. That the claimant has not lost interest in prosecuting his case and that the Claimant has now filed his list of documents and a Reply to the Supplementary Reply to the claim and that the delay is not inordinate. The Claimant further argues that having filed a counter-claim the Respondent was equally under a duty to fix the case for hearing. The Claimant relied on the case of Njoroge V Mbau [2005]eKLR where the court held that in any case where there is a counter-claim the Defendant had a duty to take action to have the suit heard.

The Industrial Court Act and the Industrial Court Procedure Rules do not provide for the procedure for dismissal of suits for want of prosecution. In such an instance where there is a gap in the Industrial Court procedures, the parties are permitted to apply the procedure in the Civil Procedure Rules the Order 17(2) (3) permit either party to a case to apply for dismissal of a suit for want of prosecution.

In the present case the last time the case was in court was on 2nd November 2012 when the Claimant was granted leave to file supplementary documents. The Claimant was also directed to pay court adjournment fees, which seem not to have been paid.

In this case the Respondent filed a counter-claim. A counter-claim is a suit on its own. In the application the Respondent has not stated what should be done with the counter-claim. A party who has filed a counter-claim is under a duty to fix the counter-claim for hearing. Since the Respondent did not fix its counter-claim for hearing and has not proposed to withdraw the counter-claim should the Claimant's suit be withdrawn for want of prosecution it is reasonable to presume that the Respondent is also in default to set down the counter-claim for hearing.

I do not find the Claimant's Counsels argument that it did not fix the case for hearing because the Claimant lives in Uganda as a valid reason for failure to set down the suit for hearing. The Claimant having brought the Respondent to court must prosecute its case or withdraw it.

However, since the Respondent also chose to file a counter-claim I find that both parties were in default. As stated in the case of Njoroge V Mbau [2005] eKLR cited by the Claimant, both parties were under a duty to set down the case for hearing.

For this reason I find the application lacks merit and dismiss it.

Costs of the application will in the cause.

Both parties are directed to take steps to fix the case for hearing within 30 days fairly which both claim and counter-claim will stand dismissed for want of prosecution.

Orders accordingly.

Read in open court this 13th day of May, 2014.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Read in the presence of

Ms. Obiayo holding brief Mr. Obura for Claimant

Anyona for Respondent