



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 159 OF 2008

B E T W E E N:

EURASIA INTERNATIONAL TRADING COMPANY LIMITED...PLAINTIFF/RESPONDENT

VERSUS

DIAMOND TRUST BANK KENYA LTD.....1ST DEFENDANT/APPLICANT

ASHIF KASSAM.....2ND DEFENDANT/APPLICANT

AZIM VIRJEE.....3RD DEFENDANT/APPLICANT

RULING

1. The Application before the Court is brought by all the Defendants to the suit. It was filed on 17th November 2016. It is brought under Order 17 Rule 2(3) and Order 51 Rule 1 of The Civil Procedure Rules 2010 and Section 1A, 1B and 3A of The Civil Procedure Act and all enabling provisions of the law. The Application seeks the following Orders;

1. **THAT** this Honourable Court be pleased to dismiss the Plaintiff's suit for want of prosecution.
2. **THAT** the costs of the suit and this application be borne by the Plaintiff/ Respondent.

2. The Grounds relied upon are:

(a) The matter was last in court on 3rd March 2009 before Honourable Lady Justice J. Lesiit for the hearing of a Chamber Summons Application dated 24th February 2009

(b) On 3rd March 2009 the Honourable Lady Justice J. Lesiit set aside any interim orders granted to the Plaintiff/Respondent owing to the fact that Honourable Lady Justice P. M. Mwilu on 27th January 2009 had already made a substantive ruling, which ruling was read out by Honourable Lady Justice Khaminwa on 13th February 2009.

(c) The Plaintiffs and/or their Advocates thereafter have not taken any further steps to set the main suit for hearing.

(d) *The delay is over five (5) years and (4) months, in which case is inordinate and inexcusable on the part of the plaintiff.*

(e) *Due to the delay it is not possible to have a fair trial on the issues in action as the material facts may have been forgotten by any credible witness and/or the witnesses are no longer available to testify.*

(f) *The matter has substantially been overtaken by events.*

(g) *The continued pendency of this suit is prejudicial to the Defendants/ Applicants as it is incurring legal costs.*

(h) *It is in the interest of justice that litigation once commenced should come to end within reasonable time.*

(i) *The Plaintiff has abused the Court process.*

(j) *Such other and/or further grounds as shall be adduced at the hearing thereof.*

3. The Application is dated 7th August, 2015 and filed on 17th November 2016

4. The Application is Supported by the Affidavit of Stephen Kadumbe who states that he is the Company Secretary of the 1st Defendant/ Diamond Trust Bank Kenya Limited. He exhibits his Letter of Authority. The Supporting Affidavit sets out the history of the suit. At paragraph 2 he says that the Plaintiff has not taken any steps to prosecute the main suit since 3rd March 2009 when the Interim orders were set aside. The Supporting Affidavit was also sworn on 7th August 2015

5. The Grounds and Affidavit set out that since the suit was issued an Interim Order was made and then discharged by a Ruling read out on 13th February 2009, a Receiver has been appointed who realized the assets. Further the Plaintiff has failed to take any further steps to set down the suit for trial. The Suit was filed on 27th March 2008. The Defence was filed on 6th May 2008. The Application relies on the fact that no steps were taken since 3rd March 2009. The Application was heard on 7th May 2008 and the Ruling of the Lady Justice P.M. Mwilu was delivered on 29th January 2009. On 24th February 2009 the Plaintiff filed a said application, by Chamber Summons.

6. Later the Plaintiff changed Advocates but a Notice of Change could not be filed because the Court file was not available. That is not surprising as it was pending Ruling during August, 2008. However, the File went missing in 2014.

7. From the Court File it is clear that no steps were taken since the matter was stood over generally on 3rd March 2009. The Plaintiff did not appear at that hearing, so in fact the last step taken was prior to that.

8. The Application is premised on **Order 17 Rule 2 (3)** that provides:

Notice to show cause why suit should not be dismissed.

(3) Any party to the suit may apply for its dismissal as provided in sub –rule 1.

However, it is necessary to look at the provisions in the whole and the context of the steps set out. Firstly, the Court needs to be satisfied that no step has been taken for a period of 12 months. Although

there appears to be no record of when the file disappeared and then reappeared, it is submitted that it was found in 2014, which was more than 12 months ago. The Rule provides the Court may give the Party notice to show cause why the suit should not be dismissed. The Defendant/ Applicants are asking the Court to dispense with that step and dismiss the Suit now.

9. Under the overriding objective, the Court is required to handle all matters to ensure just efficient and timely disposal of matters. In this case there appears to have been developments which could have disposed of the subject matter of the Suit. {However, this is a case where a Receiver was appointed neither Party has filed a Report from the Receiver }, setting out the processes and procedures undertaken and/or completed. The Application was served on 17th November 2 016 and was heard on 15th December 2016. The Plaintiff has neither responded, nor signified an intention to respond. Nevertheless the Plaintiff has a right of access to Justice and for that reason should be entitled to one last chance to either proceed with or discontinue the suit.

10. For those reasons, I order and direct that:

1. This Order to be served on the Plaintiff and its Directors personally within 7 days.
2. The Plaintiff to show cause why the suit shall not be dismissed.
3. The show cause hearing shall be before any Judge of this Division on 22nd February 2017
4. Costs in the cause.

Order accordingly.

FARAH AMIN

JUDGE

SIGNED AND DELIVERED AT NAIROBI this 21st day of December 2016.

In the presence of:

Mr. Mbugua for Applicant

No Appearance for Respondent



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