



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 1693 OF 2001**

**DIVERSEYLEVER EAST AFRICA LTD.....PLAINTIFF**

**-VERSUS-**

**1. MOHANSONS FOOD DISTRIBUTORS LTD**

**2. PRITPAL SINGH.....DEFENDANTS**

**RULING**

1. The defendants, *Mohanson Food Distributors Ltd* and *Pritpal Singh*, have filed a notice of motion dated **19th February, 2019**. By that application they seek the setting aside of this court order of **26th November, 2018** which order closed the defence case. They also seek that they be granted leave to re-open their case and to adduce evidence.

2. The affidavit in support of that application, is sworn by *Sandeep Singh Kndhari* the Manager of the 1st defendant. In that affidavit, the deponent stated that when this case came up for defence hearing on **26th November 2018**, he was ill. To prove he was ill he annexed doctors notes written on the *Coast General Hospital Mombasa* headed paper. They are two. Both of those notes are written in medical jargon and I am unable to fully comprehend what the doctor was saying thereof. Those notes indeed did not assist me in the exercise of my discretion. The said deponent's illness is the only basis the two defendants seek to set aside the order closing their defence.

3. The application was opposed by the plaintiff through the replying affidavit of *James Tugee* learned advocate for the plaintiff. The said advocate gave a detailed background of what has occurred in the past in this case.

4. The plaintiff closed its case on **11th June 2014**. The defence hearing did not take place even though it was fixed for hearing on various dates. On **26th June 2014**, during a mention, to fix the defence hearing, the defendant's learned advocate informed the court that the defendant was out of the country. On **2nd December, 2014**, when the defendants' hearing was fixed to commence, the defendants applied for an adjournment on the basis that the defendants' witness father was unwell and the witness could not attend court. On **19th February 2015**, the defence hearing did not take place because the defendants advocate was indisposed. On **21st April 2015**, the defendants advocate again sought an adjournment on the basis that he was indisposed. On **8th July 2015**, because the parties were negotiating, the matter was adjourned. On **21st March 2016**, when the defence case came up for hearing and because the defendants were absent, the court recorded that the defendants case was closed. The court deemed that the defendants had chosen not to tender evidence. The parties consented to set aside the order marking the defence case as closed and that consent was adopted by the court on **30th May 2016**. The defence case was once again fixed for hearing on **23rd May 2017**. The case did not proceed to hearing because the defence advocate had informed his clients that the case was listed as a mention and therefore he directed them not to attend court. The case was fixed for hearing on **31st May 2017** but it was adjourned because the defendants advocate had not served the plaintiff with the witness statement. On **19th December 2017** the defence case which was due to commence was adjourned because the defendants advocate was out of the country. When the defence case was next fixed for hearing, on **18th October 2018**, the defendant sought and obtained an adjournment on the basis that the defendants witness was taken ill. The case was adjourned to **26th November, 2018**, to enable the defendants advocate get the medical report of that witness. On **26th November, 2018**, the advocate for the defendant again informed the court that the defendant was unwell and therefore sought for an adjournment. Because he did not have the medical report that had been requested by the court previously, the case was adjourned shortly to allow him obtain the medical report. The matter was called up later at 10.50 am in the absence of the defendant advocate. In view of that absence, the court proceeded to mark the defence case as closed.

**ANALYSIS**

5. The above chronology clearly shows the casual manner with which the defence has handled this case.

6. Of interest is that the deponent of the affidavit in support of the application, describes himself as the manager of the defendant presumably 1st defendant. If he is the manager, and if he is the witness for the 1st defendant, there is no explanation as to why the 2nd defendant did not

attend court on **26th November 2018**, when the defence case was fixed for hearing. The allegation of sickness of the 1st defendant's manager does not explain the absence of the 2nd defendant, Pritpal Singh. Further, the manager of the 1st defendant, as stated before, provided medical notes, written in medical jargon to explain his absence on **26th November, 2018**. Those notes fail to explain his absence because I cannot read what is written thereon.

7. The defendants indeed have very casually dealt with this matter as can be seen from the above. Even when the defence case was closed by the court on **26th November 2018**, the defendant did not file their present application until **20th February, 2019**. That is almost three months delay after the defence was marked as closed.

8. The defendants when their lethargy and in-activity in this matter is considered wholesomely leads me to find that they are not deserving in the exercise of my discretion in their favour. To allow the orders that are sought, is to prolong the conclusion of this case which was filed in the year 2001. There is a lack of care on the part or the defendants in concluding this case. The defendants do not deserve the prayer they seek. Because the application lacks merit they will also bear its costs.

9. In conclusion, the notice of motion dated **19th February, 2019** is dismissed with costs to the plaintiff. At the reading this ruling the court will give directions on the filing of the final submissions.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>TH</sup> day of JULY, 2019.**

**MARY KASANGO**

**JUDGE**

***Ruling Read and Delivered in Open Court in the presence of:***

Sophie.....**COURT ASSISTANT**

.....**FOR THE PLAINTIFF**

.....**FOR THE DEFENDANTS**