



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 250 OF 2014**

**SUCHAM INVESTMENTS LTD**

**T/A TIWI BEACH RESORT.....PLAINTIFF**

**VERSUS**

**TRIDENT INSURANCE COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**GATEWAY INSURANCE COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By an application dated 11<sup>th</sup> April 2017 the 1<sup>st</sup> defendant asked the Court to dismiss the suit for want of prosecution.
2. Thereafter, the 2<sup>nd</sup> defendant filed an application dated 24<sup>th</sup> August 2017, also seeking the dismissal of the suit for want of prosecution.
3. The Plaint in issue, is dated 9<sup>th</sup> May 2014 and was filed in court on 12<sup>th</sup> June 2014.
4. According to the 1<sup>st</sup> defendant, **TRIDENT INSURANCE COMPANY LIMITED**, there had been no steps taken by the plaintiff in the case, since 27<sup>th</sup> July 2015 when the 2<sup>nd</sup> defendant filed its Defence.
5. The plaintiff does not deny the fact that no steps had been taken in the case since July 2015. It therefore follows that by the time the 2<sup>nd</sup> defendant brought its application for the dismissal of the suit, a period of almost 2 years had lapsed.
6. The 2<sup>nd</sup> defendant submitted that the inertia on the part of the plaintiff was contrary to the Overriding Objective of the Court, which requires cases to be determined expeditiously.
7. In the considered opinion of the 2<sup>nd</sup> defendant, the plaintiff had become disinterested in the suit.
8. Secondly, the 2<sup>nd</sup> defendant submitted that the delay by the plaintiff, in prosecuting the suit was not only inordinate but also inexcusable. The basis for that contention was that the plaintiff had failed to provide any credible excuse for the delay in prosecuting its case.
9. In view of the delay, the 2<sup>nd</sup> defendant asserted that it was no longer possible for justice to be done.

10. Meanwhile, the 1<sup>st</sup> defendant submitted that it had been prejudiced by the plaintiff's delay in prosecuting the suit.

11. The 1<sup>st</sup> defendant pointed out that it had been compelled to constantly maintain the sum of Kshs. 4,231,062/- in a Reserve, in order to cater for any potential liability against it.

12. The amount of money which the 1<sup>st</sup> defendant has cited is equivalent to the plaintiff's claim.

13. When it is compelled to hold the said amount of money in a Reserve, the 1<sup>st</sup> defendant felt greatly prejudiced as it was thereby deprived of its right to use its resources in such manner as it deemed more appropriate.

14. In answer to the applications, the plaintiff explained that it had been hampered in its quest to prosecute the suit, by virtue of the fact that the Court File had been missing for a considerable period of time.

15. The plaintiff did provide copies of letters dated 22<sup>nd</sup> May 2016 and 10<sup>th</sup> February 2017, to show that it had asked the Deputy Registrar to assist in tracing the Court File.

16. It was the plaintiff's case that at all material times, it was keen on prosecuting its case against the defendants.

17. In my considered view, the failure of the plaintiff to copy its letters to the defendants cannot render such letters illegitimate.

18. Of course, the best course of action is to always copy to the other parties in the case, any communication which one or more of the parties writing to the Deputy Registrar. The practice of a party or his advocate writing to the court only, but without copying such communication to other parties in the case, should be discouraged completely.

19. Transparency is a hallmark of Justice. It demonstrates the openness which cannot therefore allow any hidden or secret dealings between the court and any party.

20. However, as I already stated, the plaintiff's failure to copy its letters to the defendants, did not render the letters a nullity.

21. In my considered view, the fact that the plaintiff had sought the assistance of the learned Deputy Registrar, in tracing the Court file is significant.

22. By its letter of 22<sup>nd</sup> June 2016, the plaintiff said that it needed assistance to trace the Court file, which had

**“gone missing for quite some time now”.**

23. The plaintiff did explain that it was seeking assistance to trace the file because it wished to move forward the case.

24. By its letter dated 10<sup>th</sup> February 2017, the plaintiff, once again, sought assistance in tracing the Court file.

25. Obviously, if the plaintiff had lost interest in the court case, as was suggested by the defendants, it would not have concerned itself with the search for the court file.

26. And the said search was not simply a private affair, undertaken by the plaintiff.

27. There is evidence on record, to show that the plaintiff actively sought the assistance of the Deputy Registrar, in tracing the Court file.

28. For as long as the file had not been traced, it would not have been possible for the parties or the court to take any steps in the case.

29. In the circumstances, I find that the explanation provided by the plaintiff, for its failure to prosecute the suit with greater expedition than it did, was plausible and reasonable.

30. I further note that the suit herein was filed alongside a Witness Statement and the documents which the plaintiff was relying upon.

31. On its part, the 1<sup>st</sup> defendant also find a Defence together with a List of the Documents which would support its case.

32. Thereafter, the 2<sup>nd</sup> defendant filed its Defence together with the documents which it will utilize to support the said Defence.

33. The point I am making is that each of the parties have already identified its witnesses and also its documentary evidence.

34. It does appear to me that the case will be determined primarily through the interpretation of the documentary evidence.

35. In the circumstances, I find that the case can still proceed to trial in such manner as would render justice to all the parties.

36. Meanwhile, I note that both applications sought the dismissal of the suit. Neither of the applications was limited to seeking orders which would only impact on the plaintiff's suit against one or the other defendant.

37. In effect, if the court had granted the reliefs sought by the 1<sup>st</sup> defendant, the whole suit would have been dismissed.

38. Therefore, it appears to me that the 2<sup>nd</sup> defendant had no reason to bring the second application, dated 24<sup>th</sup> August 2017.

39. I also agree with the plaintiff, that once the application by the 1<sup>st</sup> defendant was filed in court, and was being prosecuted, that meant that some steps had been taken in the case.

40. Therefore, by the time the 2<sup>nd</sup> defendant brought its application dated 24<sup>th</sup> August 2017, the period which had lapsed, after the last step was taken in the case, was less than that which could trigger a dismissal of the suit for want of prosecution.

41. Accordingly, the application dated 24<sup>th</sup> August 2017 is dismissed and the applicant is ordered to pay costs to the plaintiff.

42. Meanwhile, the application dated 11<sup>th</sup> April 2017 is also dismissed. However, because the plaintiff had failed to make the applicant aware of the efforts it was making to trace the court file, I find that it would not be right to award costs of that application to the plaintiff.

43. Each of the parties will meet its own costs of the application dated 11<sup>th</sup> April 2017.

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> day of January 2018.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Ms. Ithondeka for Wanam for the Plaintiff

Ongicho for Morara for the 1<sup>st</sup> Defendant

Ongicho for Juma for the 2<sup>nd</sup> Defendant

Collins Odhiambo – Court clerk.