REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 248 OF 1996

MOBIL OIL KENYA LIMITED.....PLAINTIFF

-VERSUS-

SHARIFF ABNOOR alias SHARIFF ABDINOOR MOHAMMED

T/A A.S. MOHAMMED INVESTMENTS.....1ST DEFENDANT

CALTEX OIL KENYA LIMITED.....2ND DEFENDANT

RULING

1. The plaintiff, then known as ***Esso Kenya Limited***, filed this case on ***1st February 1996***. That is exactly 22 years ago. Since filing this case, the 1st defendant died. The only remaining defendant is ***Caltex (K) Limited***.

2. From the record, it is clear that the pleadings in this case closed on ***27th April 1996***.

3. The plaintiff filed two applications dated ***15th October,1997*** and the other dated ***20th April 2004*** both seeking the same order, that is, to amend the plaint to reflect the change of the name of the plaintiff as ***Mobil Oil Kenya Limited***. The Order to amend the plaint and to change the name of the plaintiff was granted on ***30th July 2004*** and the amended plaint was filed on ***16th August 2004***.

4. A notice to show cause why the suit should not be dismissed for want of prosecution under Order 17 Rule 2 (1) of the Civil Procedure Rules was issued on ***15th June 2015*** by the court and following the plaintiff's learned advocate's plea that the plaintiff be granted opportunity to proceed with this case the court fixed a mention on ***23rd June 2015***.

5. On ***23rd June 2015***, there was no attendance before the judge by any party. The matter was adjourned.

6. From the court record, this case has only been fixed for full hearing once, on ***16th July 2014***. The plaintiff on that occasion successfully applied for an adjournment but was condemned to pay court adjournment fee of Ksh 2000. There is no evidence that the plaintiff ever made any payment towards that adjournment.

7. It is in that background that the 2nd defendant filed a notice of motion dated ***23rd March 2017*** for dismissal of this suit for want of prosection. The notice of motion is brought under Order 17 Rule 1 (2) and (3) of the Civil Procedure Rules.

8. The plaintiff by a replying affidavit sworn by its advocate deponed that the plaintiff has severally changed its name from ***Esso Kenya Limited*** to ***Mobil Oil Kenya Limited*** (in 1997) to ***Tamoil Kenya Limited*** (in 2006) and finally to ***Libya Oil Kenya Limited in 2007***. That those changes involved internal staff changes and it is only recently that the plaintiff reconstructed its internal files and is now keen to proceed with the case.

9. I have perused this file and I have noted that the plaintiff filed two chamber summons on two separate dates to change the plaintiff's name from ***Esso Kenya Limited*** to ***Mobil Oil Kenya Limited***. There is no other application on record to change names of the plaintiff as alleged by the plaintiff's learned advocate. Those changes are not sufficient reasons for the plaintiff's failure to set this suit for hearing. There is indeed no excuse or explanation why this suit which is 22 years old has only been fixed for full hearing once on ***16th July 2014***. Even on that date,the plaintiff was not ready to proceed with the hearing. After obtaining an adjournment on that date, the plaintiff did not fix this case for hearing.

10. I ask myself a rhetorical question. Is there any reason why this case should not be dismissed for want of prosecution? The answer must be; there is none. The plaintiff filed this case in 1996 and went to sleep. Having slept on this case, I will borrow the words stated in the case

Ironside Auto Spares Ltd v Mutsui O. Lines thro' Inchcape Shipping Services Ltd & another [2008] eKLR where the Court stated sleeping dogs should be left to lie. This is what was stated in that case:

> *"**Fitzpatrick –vs- Batger & Co. Ltd. [1967] 2 AII ER 627**. Both Deenning, M.R and SALMON, LJ found and held that a party who goes to sleep for a long time should bear the consequences of his sleep. SALMON LJ said the following at p.....*
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> ***"I entirely agree.....grossly inordinate delay of the kind which has occurred in this case is quite inexcusable and ought not to be tolerated. It is of the greatest importance and in the interest of justice and these actions should be brought to trial with reasonable expedition.... It is said in this case that the action is not to be dismissed, because the defendants might have taken out a summons.....much earlier than they.....did. They no doubt, however, were relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to suppose that a dog which had remained unconscious for such long periods as this one, if left alone, might well die a natural death at no expense to themselves ...I am not surprised that they did not apply earlier, and I do not think that the plaintiff's advisers should be allowed to derive any advantage from that fact. The plaintiff is not being deprived of compensation because...he has an unanswerable claim....for negligence....I am quite satisfied that, in the circumstances of this case,where there has been such grossly inordinate delay without any real excuse...I have no doubt but that the proper order is to dismiss the action for want of prosecution."***

11. The case sums up the facts of this case. In conclusion, I hereby dismiss this suit for want of prosecution with costs to the 2nd defendant. The 2nd defendant is awarded the costs of the notice of motion dated ***23rd March 2017***.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of October, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE