



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**COMMERCIAL CAUSE NO. 80 OF 2006**

**JOHN GAITA .....PLAINTIFF**

**VERSUS**

**SEAFFORTH SHIPPING KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**KENYA PORTS AUTHORITY .....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. JOHN GAITA while being represented by the firm of Gatheru Gathemia Advocate filed this case on 15<sup>th</sup> August 1996 against the defendant alleging that his motor vehicle that he purchased in Dubai on 23<sup>rd</sup> April 1995 which he shipped through the first defendant and was discharge at the port of the 2<sup>nd</sup> defendant was not delivered to him. He therefore prayed for the delivery of that vehicle or in alternative its value
2. The 1<sup>st</sup> defendant by Notice of Motion dated 14<sup>th</sup> July 1999 sought the dismissal of the plaintiff's suit for want of prosecution. That Notice of Motion was premised on the ground that two years after parties had settled the issues for court's determination the plaintiff had not set down the suit for hearing.
3. On 28<sup>th</sup> July 2000 the firm of Gachiri Kariuki & company advocate took over the conduct of this suit on behalf of the plaintiff from the firm of Gatheru Gathemia advocates.
4. On 17<sup>th</sup> October 2000 in the absence of the plaintiff's advocate the court entertained the application for dismissal for want of prosecution and did dismiss the suit.
5. The suit was reinstated on the ground that the suit was dismissed when the plaintiff's advocate had shortly walked out of the court. The suit was reinstated on 21<sup>st</sup> April 2004. On being reinstated the case was fixed for hearing on 12<sup>th</sup> July 2006, which was two years after reinstatement.
6. On 21<sup>st</sup> April 2004 the plaintiff applied for an adjournment on the ground that the plaintiff has failed to attend court with his documents. That application for adjournment was opposed by the first defendant. The court did grant the plaintiff the adjournment. The plaintiff did not fix this case for hearing thereafter.
7. It does look like the 1<sup>st</sup> defendant got tired of waiting for the plaintiff to fix this case for hearing and has by the Notice of Motion dated 14<sup>th</sup> April 2011 sought, once again, for the dismissal of the plaintiff's suit for want of prosecution. the 1<sup>st</sup> defendant through the affidavit in support of the application deponed that it has suffered due to the plaintiff's inactivity in the prosecution of this case and that there is

substantial risk that a fair trial would visit the 1<sup>st</sup> defendant if this suit continued to remain on record.

8. The plaintiff opposed the application. In opposing plaintiff's learned counsel admitted that this case has been pending since 1996. That the fixing of the case could not proceed because the file was misplaced by the court registry. That defendants also had an obligation to fix the case for hearing and they had not shown sufficient why they had not fixed the case for hearing.

### **ANALYSIS AND DETERMINATION.**

9. This case was filed in 1996 looking at the record in this file it becomes clear that the plaintiff lost interest in this case quite some time back. Even after pleadings closed two years later the plaintiff having not fixed this case for hearing prompted the 1<sup>st</sup> defendant to seek for its dismissal for want of prosecution. Although it was dismissed it was reinstated. On being reinstated the plaintiff waited for two years to obtain a hearing date. When that date came, that is 17<sup>th</sup> July 2006 the plaintiff applied for an adjournment on the grounds he did not have, in court, his document. All this does not paint a picture of a party eager to proceed with his case.

10. The overriding objective in Section 1A of the Civil Procedure Act came into force in the year 2010. That objective under subsection (3) requires parties to assist the court to further the overriding objective that is to facilitate the just, expeditious proportionate and affordable resolution of civil disputes. The court of appeal had an opportunity to discuss the overriding objective popularly referred to as double 'O' Principle in the case **MRADULA SURESH KANTARIA AND SURECH NANILLAL KAPTARIA CIVIL APPEAL NO. 277 OF 29005.** (unreported) where the court observed as follows-

***"In this regard, we believe one of the principal purposes of the double "OO" principle is to enable the court to take case management principles to the centre of the court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap."***

11. There is no doubt that the plaintiff has failed to assist this court to attain the overriding objective. It is not an answer to that failure for the plaintiff to state that the defendants had equally failed to fix this case for hearing. The plaintiff is solely obligated to get on with his case. After all he is the one who filed this case, the defendants do not have a counter claim. In arguing as the plaintiff's learned counsel argue it showed his ignorance of a often quoted case. **Fitz Patrick -v- Batger & co. Ltd (1967) 2 ALL ER 657** where Lord Denning, citing his decision in **Reggentine vs Beechome Bakeries Ltd (1967) 111 sol. Jo.216,** said as follows-

***"it is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition ... the delay is far beyond anything we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution."***

12. The 1<sup>st</sup> defendant submitted that it had suffered prejudice due to the delayed prosecution of this case. That can well be appreciated that a case filed 19 years ago would be prejudicial to a corporation which it would be expected would have made provision for this case in its annual account, now 19 years later. That prejudice would affect also the 2<sup>nd</sup> defendant.

13. I have looked at the plaintiff's replying affidavit and I reject the deposition that the file was missing and therefore the case could not be fixed for hearing. Such deposition would be accepted if the courts do not allow reconstruction of lost files. Courts do allow such reconstruction and the plaintiff cannot be excused on that ground. In any case the documents plaintiff relies on, the letter dated 27<sup>th</sup> October 2014 to the deputy registrar of this court requesting assistance to find the file and registry file requisition form are dated the years 2014 and 2015 respectively. So what did the plaintiff do from 12<sup>th</sup> July 2006 to the year 2014 to - try to fix this case for hearing. The answer is, nothing.

**CONCLUSION**

14. The plaintiff failed to move with diligence to fix this case for hearing and accordingly I grant the following orders:

**(a) This suit is hereby dismissed with costs as against both defendants.**

**(b) The 1<sup>st</sup> defendant is granted costs to the Notice of Motion dated 20<sup>th</sup> April 2011.**

Dated and delivered at Mombasa this 24<sup>th</sup> day of August 2015

**MARY KASANGO**

**JUDGE**

24.8.2015

Coram

Before Justice Mary Kasango

C/Assistant –

For: Plaintiff:

For 1<sup>st</sup> Defendant:

For 2<sup>nd</sup> Defendant:

Court

The judgment is delivered in their presence/absence in open court.

**MARY KASANGO**

**JUDGE**