



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Case 65 of 2008**

**SAID MOHAMED ANDALLAH**

**FAUD MOHAMED RAWEH**

**ABSUSALAM BIN SAID**

**(Suing as officials Chairman, Secretary and**

**Treasurer of Coast Stars Football Club.....PLAINTIFFS**

**-V E R S U S-**

**MOHAMED HATIMY**

**ERASTUS OKUL**

**AZIZ MOHAMED**

**(Sued as officials Chairman, Secretary and Executive**

**Committee member of Kenya Football Federation**

**(KFF”) Kenya Premier League Ltd.....DEFENDANTS**

**RULING**

1. The plaintiffs filed this suit on 25<sup>th</sup> March 2008. By this action the plaintiffs pleaded that the defendant failed to abide by the determination of the Independent Disciplinary Appeals Tribunal, whereby the Coast Stars Football Club had six points increased, That increase placed it 13<sup>th</sup> position which entitled it enter Kenya Premier League of 2008 season. When the plaintiffs first approached this court they filed an application under certificate of urgency which after prolonged hearing was determined by a Ruling of 25<sup>th</sup> June 2008. The court did not grant the mandatory injunction order the plaintiff sought.
2. This case to date has not been fully heard and hence why the 4<sup>th</sup> defendant filed the Notice of Motion dated 18<sup>th</sup> August 2014. By that application the 4<sup>th</sup> defendant seeks dismissal of this suit for want of prosecution. The application is filed on the ground that the plaintiffs have since 11<sup>th</sup>

- November 2010, when this case was last in court, has failed to fix this case for hearing.
3. The plaintiffs though served with hearing notice for the hearing of that application failed to attend court on 25<sup>th</sup> May 2015. The plaintiffs however relied on the replying affidavit sworn by the Said Mohamed Abdalla. By that affidavit the plaintiff blamed the defendants for the delay in obtaining pre trial directions to enable them proceed fix a date. The plaintiff deponed that they have been “anxious” to proceed with this case and to prove that, the plaintiff referred the pre trial questionnaire and witness statements they filed on 7<sup>th</sup> September 2012. The plaintiff also relied on the provisions of Article 159(2) (d) of the constitution and stated that Article provides the matters should not be determined on technicalities but be heard on merit and that accordingly the application should be dismissed.
  4. To the plaintiff’s submission I respond by saying there is no explanation on plaintiff’s part why since November 2011 this case has not been fixed either for pre trial directions or for full hearing. I will remind the plaintiff that obligation to fix the case for hearing lies squarely on them it is true that defendant can also fix the case for hearing but there is no obligation on the defendant to fix the hearing date.
  5. In case the plaintiff need an authority in this regard I refer to the case of.

**“Fitzpatrick Vs Batger & Co. Ltd (1967)2 ALL ER** where Lord Denning, citing his decision in **Reggentine Vs Beecholme 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.”**

6. The plaintiffs having failed to fix this case as required under Order 17 of the Civil Procedure Rules since November 2011 cannot cite article 159(2) (d) of the Constitution in their defence. In regard I refer to the case **TELKOM KENYA LIMITED – V- JOHN OCHANDA [2014] eKLR** where the court of appeal stated:

**“The respondents are seeking umbrage under Article 159(2) (d) of the Constitution which provides that *justice shall be administered without undue regard to procedural technicalities*. It does not avail them. We are content to state that the Constitutional provision is not meant to whitewash every procedural failing and it is not meant to place procedural rules at naught. In fact, what has befallen the respondents is proof, if any were needed, that there is great utility in complying with the rules of procedure. Such compliance is neither anathema nor antithetical to the attainment of substantive justice. As has been before, the rules serve as handmaidens of the lady justice.”**

7. I make a finding that the plaintiffs have failed to move with diligence in concluding this case. In the interest of justice this case shall be dismissed in respect of all the defendant because the plaintiff’ failure to conclude this case has equally affected all the defendants.

### **CONCLUSION**

8. I hereby grant the following orders:
  - a. **This suit is hereby dismissed with costs in respect of all the defendants for want of prosecution.**
  - b. **The 4<sup>th</sup> defendant is awarded costs of the Notice of Motion dated 18<sup>th</sup> August 2014.**

**DATED and DELIVERED at MOMBASA this 21<sup>ST</sup> day of AUGUST, 2015.**

**MARY KASANGO**

**JUDGE**

**Coram**

**Before Justice Mary Kasango**

**C/A .....**

**For Plaintiff:**

**For Defendant:**

**Court**

**Ruling delivered in their presence/absence in open court.**

**MARY KASANGO**

**JUDGE**