



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

**AT MOMBASA**

**CIVIL SUIT NO. 5 OF 2004**

**EDMUND JILAN SADI ..... PLAINTIFF**

**V E R S U S**

**KENYA PORTS AUTHORITY ..... Defendant**

**RULING**

1. Plaintiff filed this case on 15<sup>th</sup> January 2004. The Plaintiff's claim is for damages for breach of contract of employment.
2. Defendant filed its defence on 18<sup>th</sup> February 2004 and pleadings closed fifteen (15) days thereafter (Order VIII Rule 10 of the Repealed Civil Procedure Rules).
3. Although previous dates had been taken for hearing of this suit it was not until 16<sup>th</sup> May 2006 that hearing commenced. The case was adjourned part heard. Fresh dates were fixed for further hearing on 20<sup>th</sup> September 2006. Plaintiff's learned Counsel successfully applied for adjournment on that day on the ground that-

**“... because the witness who was to testify today is held up in Rwanda.”**

4. On 7<sup>th</sup> June 2007 the hearing resumed and the Plaintiff continued to give evidence in chief. The case was part heard and was fixed for further hearing on 9<sup>th</sup> April 2008 when parties agreed to adjourn the matter by consent. That was the last time Plaintiff took any action in this matter.

**DEFENCE APPLICATION**

5. Defendant has filed a Notice of Motion dated 17<sup>th</sup> January 2014 seeking the dismissal of Plaintiff's case for want of prosecution. When that application came for hearing on 19<sup>th</sup> March 2014 Plaintiff's Counsel sought an adjournment to file response to the application on the ground that he had not **“reached his client in Rwanda.”** That adjournment was denied and the application proceeded for hearing with the learned Counsel of the Plaintiff stating in response; **“I leave it to Court.”**
6. The application is brought under Order 17 Rule 2 and 3 of the Civil Procedure Rules 2010. Rule 2(1) provide-

**“2. (1) In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**

**(2) If cause is shown to the satisfaction of the Court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**

3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.
4. The Court may dismiss the suit for non-compliance with any direction given under this Order.”

7. Defendants by its supporting affidavit stated-

**“That the Defendant’s employees have left the employment of the Defendant and keep moving and it will be difficult to keep tracing their whereabouts.”**

What presumably Defendant means is that the employees who are potential witnesses in its defence have left its employment and it has become difficult to locate them.

### **COURT’S ASSESSMENT AND FINDING**

8. The suit was last in Court on 9<sup>th</sup> April 2008. The Plaintiff since then has made no effort to fix this case for hearing or to take any other necessary step. In my view Defendant has shown that it will suffer prejudice if this case continues to subsist because it has lost or is losing contact with its witness due to passage of time. That in my view is the type of prejudice talked about in the case **IVITA –Vs- KYUMBO (1984) KLR 441**. The Court in that case stated-

**“Justice is Justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the Judge too, because it is no easy task for the documents and/or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting in lapse of time.”**

9. Further the Courts have in the past found that it is the Plaintiff’s responsibility to fix the case for hearing. In the case **REGGENTINE –Vs- BEECHOLME BAKERIES LTD [1967] 111 SOL. JO. 216** the Court stated-

**“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 ...”**

10. It is now exactly six (6) years since this case was last in Court.

there is no reason I can find why this case should continue to be on record when the Plaintiff has shown lack of interest in prosecuting it. It is for that reason I grant the following orders-

- a. **This suit is hereby dismissed for want of prosecution with costs to the Defendant.**
- b. **The costs of Notice of Motion dated 17<sup>th</sup> January 2014 are awarded to the Defendant.**

**DATED and DELIVERED at MOMBASA this 9<sup>TH</sup> day of APRIL, 2014.**

**MARY KASANGO**

**JUDGE**