



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 909 OF 2009**

**DAMCO LOGISTICS LIMITED.....APPLICANT**

**VERSUS**

**NEW OCEAN TRANSPORT LIMITED.....1<sup>ST</sup> DEFENDANT**

**LESK INVESTMENTS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Ruling emanates from a Notice To Show Cause which the court issued to the plaintiff, requiring it to demonstrate why the suit should not be dismissed for want of prosecution.
2. Ms **TERRY NGURE** swore an affidavit on behalf of the plaintiff, explaining that the main reason why there had been a delay in the prosecution of the plaintiff's case was that there was a pending appeal which was filed by the 1<sup>st</sup> Defendant.
3. The said appeal was filed after Kimaru J. ordered the defendants to deposit the sum of Kshs. 1,766,967/- into a joint interest-earning account. In the alternative, the defendants were directed to have the motor vehicle which is the subject matter of the suit preserved.
4. The deposit of funds or, in the alternative, the preservation of the subject matter of the suit was intended to provide the appropriate security to the plaintiff.
5. After Kimaru J. made the order in issue, on 23<sup>rd</sup> April 2010, the 1<sup>st</sup> Defendant lodged an appeal before the Court of Appeal. The said appeal is **NEW OCEAN TRANSPORT LIMITED VS. DAMCO LOGISTICS KENYA LIMITED & LESK INVESTMENTS LIMITED CIVIL APPEAL NO. 141 O 2010.**
6. The appeal was filed on 18<sup>th</sup> June 2010, and by the time when this matter came up before this court, the appeal was still pending.
7. According to the plaintiff, the parties were all waiting for the Court of Appeal to notify them of the hearing dates. Secondly, the plaintiff pointed out that at the moment, there were numerous matters which were still pending before the Court of Appeal, so that the plaintiff realistically expected that court to soon invite the parties to go forth and argue the appeal in issue.
8. It was the request of the plaintiff that this suit ought to be preserved pending the outcome of the appeal. Once the appeal was determined, the plaintiff says that it will be ready to prosecute this suit.
9. Finally, the plaintiff reasoned that the preservation of the suit whilst the parties awaited the determination of the appeal, would not be prejudicial to the parties. On the other hand, the dismissal of the suit, in the current circumstances, was described as a step that would seriously prejudice the plaintiff; as it would constitute a miscarriage of justice.
10. For those reasons, Mr. Komu, the learned advocate for the plaintiff asked this court to find that the

- plaintiff had shown sufficient cause why the case ought not to be dismissed for want of prosecution.
11. Meanwhile, Mr. Inyangu, the learned advocate for the 1<sup>st</sup> defendant, pointed out that the existence of the pending appeal did not constitute a stay of the proceedings in this case. Therefore, the 1<sup>st</sup> defendant submitted that the plaintiff ought to have taken steps to prosecute the case.
  12. Secondly, the 1<sup>st</sup> defendant said that the plaintiff had never taken out summons to enter appearance. Therefore, the suit is said to have abated.
  13. Mr. Gachomo, the learned advocate for the 2<sup>nd</sup> defendant, associated himself with the submissions of Mr. Inyangu. He also added, that his client's vehicle was attached pursuant to the Ruling made on 23<sup>rd</sup> April 2010.
  14. The vehicle in issue was still in the hands of the Kenya Revenue Authority, at Eldoret, said Mr. Gachomo.
  15. For those reasons, the 2<sup>nd</sup> defendant asked the court to dismiss the suit.
  16. When called upon to reply, Mr. Komu advocate indicated that the plaintiff had every intention of seeking an extension of the summons, as soon as possible.
  17. In determining this issue, I remind myself that it was the court which required the plaintiff to Show Cause. Neither of the defendants had moved the court for the dismissal of the suit.
  18. In my considered view, the issues concerning the failure by the plaintiff to take out summons to enter appearance or the continued long detention of the 2<sup>nd</sup> defendant's vehicle could only have been relevant if the defendants had used them as swords, in their own applications targeting the dismissal of the suit.
  19. In this case the defendants appear to be telling the court that besides the concerns which the court itself had, when it called upon the plaintiff to show cause, there were other reasons why the case should be dismissed. By raising those other reasons, the defendants were extending the scope of what the court had required the plaintiff to respond to.
  20. In effect, the plaintiff was no longer simply required to respond to the Notice to Show Cause, which the court had served upon it.
  21. If the court proceeded to determine the issue on the basis of anything other than that which the plaintiff was required to respond to, it would no longer be a determination of the Notice to Show Cause.
  22. In my considered view, the plaintiff has shown that it was under the illusion that the further prosecution of this suit ought to await the finalization of the pending appeal. I have called that an illusion because there is no order staying the proceedings in this case, to await the determination of the pending appeal. Secondly, and in any event, I do not see how the determination of the appeal would impact directly on the substantive reliefs sought in the plaint.
  23. If the appeal were to be allowed, it would only result in the release of the attached vehicle. Such a development would not end the plaintiff's case in which they were seeking payment of money, which they have been required to pay to the Kenya Revenue Authority, on account of the mistakes attributable to the defendants.
  24. The plaintiff has not demonstrated to me why therefore, it had to wait for the appeal to be determined before the plaintiff could prosecute the case.
  25. In effect, the plaintiff has failed to show cause why the suit should not be dismissed for want of prosecution.
  26. The case remained inactive for over two years, and the plaintiff has not given any explanation for its failure to take steps to prosecute the suit.
  27. The continued wait, in the prevailing circumstances was prejudicial to all the parties, but more particularly so to the 2<sup>nd</sup> defendant, whose vehicle has remained attached for over 4 years.
  28. Accordingly, the suit is now dismissed for want of prosecution. However, as this action has been taken at the instance of the court, each party will bear his own costs of the suit.

**DATED, SIGNED and DELIVERED at NAIROBI this 10<sup>th</sup> day of December 2014.**

**FRED A. OCHIENG**

**JUDGE**

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

Komu for the Plaintiff

Inyangu for the 1<sup>st</sup> Defendant

Inyangu for Gachomo for the 2<sup>nd</sup> Defendant

Collins Odhiambo – Court clerk.