



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL CASE NO. 2648 OF 1995**

**DINNERS CLUB AFRICA LTD.....PLAINTIFF**

**VERSUS**

- 1. GALOT INDUSTRIES LTD**
- 2. MOHAN GALOT**
- 3. SANTOSH GALOT.....DEFENDANTS**

**RULING**

1. The Plaintiff's suit herein was dismissed on 16<sup>th</sup> October 2000 for want of prosecution. The delay was about two years.

2. On 4<sup>th</sup> July 2001 the Plaintiff filed **notice of motion dated 27<sup>th</sup> June 2001** seeking, *inter alia*, the setting aside of the order of dismissal and revival of the Plaintiff's suit. That application has remained unprosecuted.

3. On 16<sup>th</sup> February 2012 the Defendants filed **notice of motion dated 9<sup>th</sup> February 2012** seeking dismissal of the Plaintiff's notice of motion dated 27<sup>th</sup> June 2001 for want of prosecution. That application is the subject of this ruling.

4. The application is stated to be brought under **Order 9, Rules 9 and 10** of the **Civil Procedure Rules, 2010** (the **Rules**). **Section 3A** of the **Civil Procedure Act, Cap 21** (the **Act**) is also cited.

5. The application is supported by the annexed affidavit of the 2<sup>nd</sup> Defendant. It sets out the history of the litigation.

6. The Plaintiff opposed the application by replying affidavit filed on 24<sup>th</sup> May 2012 which is sworn by one **Miller Wanjala Bosire**, an advocate in the law firm representing the Plaintiff. Grounds of opposition raised include –

(i) That after adjournment of the notice of motion dated 27<sup>th</sup> June 2001 in the year 2007, “the Plaintiff together with the advocates on record for the Defendants commenced negotiations with a view to settlement of the matter by consent”.

(ii) That the last negotiations in the matter were held on 5<sup>th</sup> March 2010 “with the result that the Defendants' advocates would revert to the Plaintiff with the trial proposal on settlement”.

(iii) That, in effect, the Plaintiff has been waiting for the final proposal on settlement from the Defendants' advocates.

(iv) That in effect also, the Plaintiff "is willing and keen to see the matter to conclusion and it will be only fair and just to permit the matter to be handled to completion and vindicate the rights of the may debtors of the Plaintiff... who are still waiting for payment of their monies...".

7. In response to the replying affidavit the Defendants filed a supplementary affidavit, again sworn by the 2<sup>nd</sup> Defendant. He depones, *inter alia* –

- i. That the negotiations collapsed on or about 9<sup>th</sup> September 2009, "when the Defendants' then advocates on record wrote to the Plaintiff's advocates a letter dated 9<sup>th</sup> September 2009 but received no response thereto". The said letter is annexed to the Plaintiff's replying affidavit aforesaid.
- ii. That the said letter of 9<sup>th</sup> September 2009 was a follow-up to a previous letter dated 2<sup>nd</sup> October 2008 written by the Defendants' advocates.
- iii. That the Plaintiff "has never been keen on resolving this matter whether amicably or through the court process".
- iv. That after the negotiations collapsed in September 2009 the Plaintiff "should have moved swiftly" to prosecute the notice of motion dated 27<sup>th</sup> June 2001 which had then been on record for over eight (8) years.

8. I have considered the submissions of the learned counsels appearing, including the cases cited.

9. It must be remembered that here we are not dealing with prosecution of the suit itself. There is no longer any suit; the same was dismissed with costs for want of prosecution on 16<sup>th</sup> October 2000. What we are dealing with is an application to set aside that order of dismissal in order to revive the suit, which application was filed on 4<sup>th</sup> July 2001! By the time the present application was filed (on 16<sup>th</sup> February 2012) that application had remained unprosecuted for nearly eleven (11) years! It is now over twelve (12) years.

10. Even granted that there were negotiations towards settlement (and I will not comment about the absurdity of negotiating to settle a suit that had long been dismissed for want of prosecution!), those negotiations, I am satisfied, ground to a halt in September 2009. Why did the Plaintiff then not move to prosecute its application dated 27<sup>th</sup> June 2001?

11. I find no good or credible reason why the notice of motion dated 27<sup>th</sup> June 2001 has remained unprosecuted, now for over twelve (12) years. The same is hereby dismissed with costs to the Defendants. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF AUGUST 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST 2013**