



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 473 OF 1998

1. MBARUK KHAMIS MOHAMED
2. ZIREDI MBARUK MOHAMED PLAINTIFFS

V E R S U S

1. AMIR KHAN SARDAR KHAN
2. AKBER KHAN SARDAR KHAN
3. GURMINDER SINGH GREWAL
4. JOSEPH MUTERO KIRINGA
5. SAMUEL MUKIA KIARIE
6. KANTIBHAI CHLOTABHAI PATEL
7. MOHAMED JAMIL CHAUDREY
8. DULIP KUMAR NAGPAL
9. PRAVIN KUMAR NAGPAL
10. KULTHUM LEUTH
11. KHALID GULMUHAMAD KHAMIS SHAPI
12. GAZI BEACH INVESTMENTS LIMITED
13. CHITAKOO LIMITED
14. KUMARPAL MAGANANLAL DOSHI

DEFENDANTS

RULING

1. The Court is considering an application by way of Notice of Motion filed by the 3rd and 7th Defendants. It is dated 1st September 2011. It is brought under Order 17 rule 2 (3) of the Civil

Procedure Rules 2010. By that application the Defendants seek an order for the dismissal of the Plaintiffs suit as against them for want of prosecution. Order 17 rule 2(3) enables a party to seek for the dismissal of a suit where the Plaintiff has not taken action for more than a year.

2. As the title of this case will show this case was filed in 1998. In the original plaint the Plaintiff had only sued two Defendants those are the 1st and 2nd Defendants in this suit. The Plaintiff amended its plaint on 7th September 2000 and by that amendment brought in the 3rd Defendant into these proceedings. By yet another amendment to the Plaint made on 29th January 2001 the Plaintiff added the Defendants making in total fourteen Defendants in this case. The Plaintiffs and 10th and 11th Defendants filed issues for the determination of this Court on 25th October 2002.
3. The 10th and 11th Defendants filed an application dated 7th October 2003 seeking for the dismissal of this suit as against them for want of prosecution. That application was necessitated by the fact that the Plaintiffs had failed to set down the suit for hearing. That application was withdrawn on 20th November 2003. That was the last time that the Plaintiff took active action in this matter. The lull in this case was broken by the application by the firm of Khatib & Co. Advocates dated 14th December 2009 whereby that firm sought the leave of the court to cease to act for the Plaintiffs. The Court granted that leave on 12th February 2010. The Plaintiffs are now represented by the firm of Paul O. Buti Advocates.
4. The above details give a background of this case. In the affidavit in support of the application under consideration the learned counsel for the 3rd and 7th Defendants deponed as follows-
 10. ***That since the said date, the 20th November 2003, the Plaintiffs in this suit have made no efforts to have this matter heard nor have they taken any necessary steps as required or at all to have this matter prosecuted.***
 11. ***That it is now over thirteen (13) years since the suit was instituted by the Plaintiffs and over eight (8) years since the matter last came up before the Court.***
 12. ***That the Plaintiffs appear to have lost interest in the prosecution of the suit.***
 13. ***That the Plaintiffs' inactivity in the prosecution in this suit is flagrant, inexcusable and inordinate and the Defendants have been gravely prejudiced in that they may now not be able to trace their witnesses or evidentiary records for the purpose of their defence in this case.***
 14. ***That the default on the part of the Plaintiffs is such that there is a substantial risk that a fair trial would not be possible if this suit is allowed to continue.***
5. The Plaintiff is always under an obligation to ensure that a case is prosecuted without delay. This was what was stated in the case of **Mukisa Biscuit Co. -Vs- West End Distributors [1969] E.A. 696**. The Court in that case also stated-

“The 2nd matter relates to the undoubted delay in the hearing by the High Court of this case. It is the duty of the Plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty by saying that the Defendant consented to the position.”

6. As stated above the Plaintiffs having delayed in the prosecution of this suit that delay as deponed in the Defendants affidavit is causing the 3rd and 7th Defendants prejudice. The Court in the case **Agip (Kenya) Ltd -Vs- Highland Tyres Ltd [2001]KLR 630** set out the principles that should guide the Court when considering an application for dismissal for want of prosecution. The principles are as follows-

“(a) The delay is inordinate;

b. *The inordinate delay is inexcusable;*

or

c. *The Defendant is likely to be prejudiced by the delay.*

4. Delay is a matter of fact to be decided on the circumstances of each case.”

7. Although the Plaintiffs' Counsel was served with the present application he did not attend Court on the date set for hearing. The Plaintiffs did not also file any affidavits or any other documents in opposition to the application. It is therefore my finding that the Plaintiffs have lost interest in this very old case and it is just that it be dismissed.

8. The Plaintiffs' suit as against the 3rd and 7th Defendants is hereby dismissed for want of prosecution with costs to the 3rd and 7th Defendants. The 3rd and 7th Defendants are also awarded costs for the Notice of Motion dated 1st September 2011.

Dated and delivered at Mombasa this 6th day of September, 2013.

MARY KASANGO

JUDGE