



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

**CIVIL DIVISION**

**CIVIL SUIT NO. 314 OF 2009**

**GEORGE ROY OWOUR & 270 OTHERS.....PLAINTIFFS**

**VERSUS**

**1. KENYA RAILWAYS CORPORATION**  
**2. RIFT VALLEY RAILWAYS (K) LTD.....DEFENDANTS**

**R U L I N G**

1. This ruling concerns two applications for dismissal of the Plaintiffs' suit for want of prosecution. The first application is **notice of motion dated 24<sup>th</sup> March 2011** by the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant's application is **notice of motion dated 24<sup>th</sup> August 2011** which has an alternative prayer to strike out the Plaintiff's suit as against the 1<sup>st</sup> Defendant for failure to comply with **section 87** of the **Kenya Railways Act, Cap 397**.

2. The grounds for the application for dismissal for want of prosecution appearing on the faces thereof include –

- (i) That no step or action whatsoever has been taken by the Plaintiffs since close of pleadings towards hearing of the suit.
- (ii) That the delay has prejudiced the fair trial of the action.
- (iii) That the continued pendency of the suit has gravely prejudiced the Defendants.

The 2<sup>nd</sup> Defendant's application is supported by an affidavit it sworn by its Company Secretary, **Rebecca Mbithi**. That of the 1<sup>st</sup> Defendant is supported by an affidavit sworn by its advocate, **Charles Agwara**.

3. In response to the notice of motion dated 24<sup>th</sup> March 2011 the Plaintiffs filed a **notice of preliminary objection dated 9<sup>th</sup> May 2011**. The "point of law" raised is that

**"the (2<sup>nd</sup>) Defendant has refused and/or failed to agree or disagree with statements of agreed issues prepared by the Plaintiffs and served...and continues to retain and/or detain the issues, a fact that has stalled the proceedings herein".**

The use of the word "fact" by the Plaintiffs is interesting. It betrays that this is indeed an issue of fact, not law! No replying affidavit was filed.

4. The Plaintiffs did not file anything at all in response to the notice of motion dated 24<sup>th</sup> August 2011.

5. Parties filed written submissions which they subsequently highlighted. The 2<sup>nd</sup> Defendant filed its submissions on 19<sup>th</sup> August 2011, while those of the 1<sup>st</sup> Defendant were filed on 13<sup>th</sup> December 2011. The Plaintiffs filed their submissions on 2<sup>nd</sup> November 2011. I have considered the submissions, including the cases cited. I have also perused the court record.

6. The record of the court shows that pleadings in this case closed in August 2009. The suit was filed on 10<sup>th</sup> June 2009. Apart from that act of filing the plaint the Plaintiffs have done nothing at all towards advancing the suit towards trial. They have not filed their list and bundle of documents. They have not even filed their witness statements.

7. Even after the Defendants' applications to dismiss the suit for want of prosecution, the Plaintiffs have not woken up from their slumber. They continue sleeping! Apart from a spurious notice of preliminary objection in response to the 2<sup>nd</sup> Defendant's application, they have not filed any response to the applications.

8. When the 2<sup>nd</sup> Defendant filed its application there was already delay in prosecuting the suit of over a year. By the time the 1<sup>st</sup> Defendant's application was filed the delay had extended to about two (2) years. The delay in the circumstances of this suit is inordinate and has not been explained. There was no attempt to explain the delay as no relying affidavit was filed. The delay cannot be explained from the bar as the Plaintiff's learned counsel attempted to do in his submissions.

9. I find absolutely no reason to permit this suit to keep hanging over the Defendants' heads. They have pleaded that a fair trial of the action will no longer be possible on account of the delay, and they have demonstrated how that is so.

10. In the circumstances I will allow both applications. The Plaintiffs' suit is hereby dismissed for want of prosecution with costs to the Defendants. It is so ordered. I will not consider the alternative prayer in the 1<sup>st</sup> Defendant's application.

**DATED AND SIGNED AT NAIROBI THIS 26<sup>th</sup> DAY OF NOVEMBER 2013**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER 2013**