



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 975 OF 2004

- 1. DUNCAN M MUNYITHYA**
- 2. DANIEL KANGETHE**
- 3. JOYCE MUNYAO**
- 4. JACKSON M MWAHTI**

(Suing on behalf of others and themselves..... **PLAINTIFFS**)

VERSUS

- 1. EAST KENYA BOTTLERS LTD**
- 2. NAIROBI BOTTLERS LTD..... DEFENDANTS**

RULING

On 7th March 2005, the following consent order was recorded:-

“By consent:-

- 1. Proceedings in this case be and are hereby stayed pending payment of costs by the Plaintiffs to the Defendants in Machakos HCCC No. 45 of 2004.**
- 2. The chamber summons application dated the 22nd December, 2004 be and is hereby withdrawn**
- 3. Costs in the cause.”**

The Plaintiffs have not paid the Defendants costs in the Machakos case, and the Defendants are apparently unable to recover the costs by normal execution.

On the other hand, that order, as long as it is in place, prevents the Plaintiffs from prosecuting the present case. An application for dismissal of the suit for want of prosecution against them therefore cannot succeed. See the ruling herein dated 5th and delivered on 6th November 2009 (Waweru, J). The Plaintiffs' are apparently content to sit pretty doing nothing. But the Defendants do not want the suit to hang over their heads indefinitely.

The Defendants have therefore applied by **notice of motion dated 28th September 2011** for an order to vary the aforesaid order of 7th March 2005. The variation sought is to require the Plaintiffs to pay to the Defendants their costs in respect of Machakos HCCC No. 45 of 2004 within 30 days of such variation, and in default this suit to be dismissed with costs. The application is brought under **sections 1A, 1B and 3A** of the **Civil Procedure Act, Cap 21**.

The grounds for the application are: -

1. That the Plaintiffs have failed, neglected and/or refused to comply with the aforesaid order of 7th March for over six years.
2. That prosecution of this case has thus been delayed to the prejudice of the Defendants.
3. That maintenance of the order in its present terms is unjust and oppressive to the Defendants as the Plaintiffs appear bent not to honour it.

The supporting affidavit elaborates these grounds.

Despite service upon them, the Plaintiffs have not filed any papers in response to the application.

The order of 7th March 2005 was informed by the fact that the present suit was filed subsequent to the Machakos suit which was discontinued, and before payment of the costs of the discontinued suit.

Under section 1A(1) of the **Act**, the **overriding objective** of the Act and the Civil Procedure Rules is to facilitate the **just, expeditious, proportionate and affordable resolution** of the civil disputes governed by the Act. Under sub-section(2) of that section, the court must exercise its power under the Act in such a way as to give effect to the overriding objective. And under sub-section (3) parties to civil proceedings and their advocates are under a duty to assist the court to further the overriding objective of the Act.

The just, expeditious, proportionate and affordable resolution of the present suit surely cannot be facilitated by an order whose effect is to stay the suit indefinitely while the Plaintiffs sit pretty and refuse to pay costs in the discontinued case.

In the circumstances, I will allow the present application. The order of 7th March 2005 is hereby varied by the addition of the following words in clause 1 of the order:

“The Defendants costs in the Machakos case shall be paid (if already taxed or agreed) within 30 days of delivery of this ruling, or within 30 days of taxation (if not already taxed). In default of such payment this suit shall stand dismissed with costs to the Defendants”.

The Defendant shall have costs of this application.

It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF FEBRUARY, 2012

H. P. G. WAWERU

J U D G E

DELIVERED THIS 3RD DAY OF FEBRUARY, 2012