



**TOPOSTER NAMALWA**  
**FWAMBWA.....PLAINTIFF**

**VERSUS**

**1. COAST AGENCY**

**2. JULIUS JAVAN MWASARU**

**3. RYCE MOTORS**

**LIMITED.....DEFENDANTS**

**Coram:**

**Mwera J.**

**Mrs. Umara for Plaintiff**

**N/A for 3<sup>rd</sup> Defendant**

**Court Clerk Furaha**

**RULING**

The 3<sup>rd</sup> defendant sought orders in its notice of motion dated 21<sup>st</sup> February, 2012, brought under the provisions of the Civil Procedure Rules and Civil Procedure Act – i.e Order 17 rule 2, Order 51 rule 1 and sections 1A, 1B, 3A. The main prayer was for dismissal of the plaintiff's suit for want of prosecution. It was stated in the grounds that this court had no jurisdiction to grant the prayers sought; for more than seven (7) years the suit had not been set down for hearing; the plaintiff had thus lost interest in this matter and so it should be dismissed for want of prosecution.

Mr. Michuki, advocate for the applicant averred in the supporting affidavit that the suit was filed on 26<sup>th</sup> August, 1993. Then the plaintiff filed a chamber summons, seeking substitution of the plaintiff. It was set down for hearing on 21<sup>st</sup> November, 1996 then on 11<sup>th</sup> November, 1997 when it was stood over generally. When that application came up on 19<sup>th</sup> March, 1999 it was adjourned to 26<sup>th</sup> October, 1999. It did not go on. An application to dismiss (not said by which defendant) the suit came up on 25<sup>th</sup> July, 2002. It was adjourned. In the meantime the suit abated because the plaintiff had died but on 9<sup>th</sup> September, 2003. The plaintiff applied for its reinstatement and the court granted that on 16<sup>th</sup> April, 2004. On 14<sup>th</sup> July, 2004 the 1<sup>st</sup> and 2<sup>nd</sup> defendants' application to appeal the order (reinstating the suit) came up for hearing. A notice of appeal was filed by those two defendants on 21<sup>st</sup> April, 2004 but that was all. Then on 31<sup>st</sup> October, 2011 – seven years down the line, a hearing notice was served on the applicant but apparently the hearing did not go on due to the short notice served. With this the 3<sup>rd</sup> defendant holds the view that the plaintiff has lost interest in the suit.

In the replying affidavit, the plaintiff's advocate, without saying anything of the period since the suit was filed in 1993, stated that on 19<sup>th</sup> October, 2000 a limited grant of administration was issued in favour of Adam Bony Mwawasi. Adam Bony Mwawasi passed on on 19<sup>th</sup> December, 2001. One Rachel Mariwa Mwawasi applied for a grant to administer the estate of Adam and one was issued to her on 31<sup>st</sup> March, 2003. This was followed by an application to reinstate the suit and substitute Adam. Such was granted on 16<sup>th</sup> April, 2004 by Khaminwa J. This was followed by a notice to appeal that order of reinstatement by the defendants. Then all stopped there. To the plaintiff the defendants seem to have lost interest in the intended appeal. He is interested in prosecuting the suit. The inordinate delay was regretted, though.

The plaintiff filed a short submission; the 3<sup>rd</sup> defendant did not do so on the appointed day. When the

matter came up on 30<sup>th</sup> April, 2012 Mr. Njeru for the defendants informed the court that the suit stood dismissed as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. It was not clear what then was done, if they applied for the suit to be considered abated. It has transpired that Khaminwa J. reinstated it on 16<sup>th</sup> April, 2004. The 1<sup>st</sup> and 2<sup>nd</sup> defendants lodged a notice of appeal against that reinstatement but did not pursue it further. In essence this suit is still alive against all the defendants.

To be precise even with the substitution of the plaintiff all along, the plaintiff acknowledges that there has been an inordinate delay in setting down this suit for hearing. The cause of action is in damages following the death of an unnamed person who was employed as a mechanic by the 3<sup>rd</sup> defendant/applicant.

To cut the whole story short, the parties are directed to file/exchange witness statements, bundles of paginated documents plus issues by the next mention after thirty (30) days with a view to give directions regarding trial. If the plaintiff defaults on this the suit will stand dismissed as against the 3<sup>rd</sup> defendant applicant. Costs of Shs. 5,000/= to be paid by the plaintiff to the applicant before mention. May parties be heard on the merits of the case. In sum this application is dismissed but costs as assessed above, go to the applicant.

Delivered on 30<sup>th</sup> August, 2012.

**J. W. MWERA**

**JUDGE**