



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Civil Suit 80 of 1999**

**WEST KENYA WHOLESALERS LIMITED .....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED .....DEFENDANT**

**RULING**

The defendant vide its application dated 21<sup>st</sup> March 2012 prays for this suit to be dismissed for want of prosecution and alternatively the temporary orders of injunction issued on 3<sup>rd</sup> August 1999 be discharged.

The defendant states that no action has been undertaken by the plaintiff as from 24<sup>th</sup> February 2011. The last time this matter came up for hearing was on 27<sup>th</sup> June 2007 before my brother Justice Warsame.

The application is opposed by the plaintiff. The replying affidavit by **Juma Muchemi** sworn on 27<sup>th</sup> September 2012 speak much.

There is evidence that the plaintiff has been sick and has even undergone kidney transplant. There is evidence that parties have been negotiating with a view of setting this matter. The differences that can be deduced from the affidavit of the plaintiff is that they seemed to disagree on the exact figures payment.

A further glance at the proceedings shows that neither of the parties has taken any constructive steps to have this matter heard after being partially heard by Justice Warsame.

On 1<sup>st</sup> July 2009, 9<sup>th</sup> June 2010 and 24<sup>th</sup> February 2011 none of the parties were ready. It would therefore be hypocritical for the defendant to claim that the delay has been occasioned by the defendant who is of course enjoying temporary orders of injunction.

It was held in the case of **Allan =vs= Sir Alfred Mc Alphine & Sons (1968) ALL E. R.** that the principles governing application for dismissal for want of prosecution are:

- (a) **The delay is inordinate**
- (b) **The inordinate delay is inexcusable or**
- (c) **The defendant is likely to be prejudice by the delay”**

Further in Agip (Kenya) Ltd vs Highlands Tyres Ltd Visram J (as he then was) say:-

**“Delay is a matter of fact to be decided on the circumstances of each case. When a reason for the delay is offered the court should be lenient and allow the plaintiff an opportunity to have his case heard and determined on merit. Finally, the court must consider whether the defendant has been prejudiced by the delay. To achieve justice, the court must also consider the possible loss likely to be sustained by the plaintiff if his case is terminated summarily for a procedural default”.**

In my opinion both the plaintiff and the defendant should carry the blame. Nothing stooped the defendant from fixing this matter for further hearing and final determination.

I am further attracted by a similar application dated 20th March 2003 which todate remain unprosecuted.

For the foregoing reasons I shall disallow the application with no orders as to costs. The parties must fix this matter for further hearing within the next thirty (30) days from the delivery of this Ruling.

**Dated, signed and delivered at Kisumu this 24<sup>th</sup> day of October 2012.**

**H. K. CHEMITEI  
JUDGE**

**In the presence of:**

Miss Oluoch for Mutiso Advocate for the Plaintiff

Olel for Ohaga Advocate for the defendant

*HCK/aa0*