



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL SUIT NO.56 OF 1999

KENYA COMMERCIAL BANK ::::::::::: PLAINTIFF

VERSUS

- 1. SKY WAYS INTERNATIONAL)**
- 2. JOHN MUCHEMI)**
- 3. PHILIP ARAP KIRUI)**
- 4. JOHN KIPRONO KETER)**
- 5. REUBEN KOSKEY BETT)::::::::::::**

: DEFENDANTS

R U L I N G

This is a ruling on the defendants' notice of motion dated 8th February 2008 seeking for dismissal of suit for want of prosecution. The grounds supporting the application are that the plaintiff has not bothered to fix the suit for hearing since 11/05/06 and that the delay of the suit has caused the defendant to suffer prejudice. Mr Murunga argued the application for the Defendants and relied on the case of **E.T. Monks Co Ltd Vs Evans HCCC no.77 of 1971** Nairobi where the court held that where the delay is inordinate and inexcusable then the suit ought to be dismissed.

Mr Milimo for the defendants submitted that the defendant in this case has not suffered any prejudice by the delay as was the case in E.T. Monks Case. For that reason he urged the court to allow the plaintiff to have his suit fixed for hearing.

Order XV1 Rule 5(1) provides that if the plaintiff does not fix the suit for hearing within three (3) months from the time the matter is taken out of the hearing list or adjourned generally, the defendant may either fix the suit for hearing or apply for dismissal.

The court record shows that the matter last came for hearing on the 11/05/06 when it was adjourned generally. Since that date, the plaintiff has not taken any action towards prosecuting his case. This is a period of four and a half (4 ½) years. The plaintiff is a banking institution and from the Replying affidavit sworn by its counsel Simiyu Makokha there is no reason given for the delay. The counsel only pleads that his client be allowed to fix the suit for hearing.

The defendant ought to have explained why the suit has not been prosecuted for so long. This is 1999 case being over a decade old. I disagree with the plaintiff that no prejudice has been suffered by the

defendant. The existence of a suit against the defendant for eleven (11) years is disturbing. The plaintiff must have lost interest in the suit over the years and failed to withdraw the same. Since 27/07/99 the suit has been mentioned severally. This is a lengthy delay which is now crowned with over four years of inaction by the plaintiff.

In the case of **E.T. Monks** which I find relevant herein the court held that delay must be reasonable and inordinate for the court to exercise its judicial discretion. In the case before me, the delay is lengthy, inordinate and inexcusable. The plaintiff has not shown any reason why this court should exercise its discretion in his favour. He has failed to expedite the hearing of his case.

I find that the application is merited and I allow it as prayed. The plaintiff's case is hereby dismissed with costs to the defendant.

**F.N. MUCHEMI
JUDGE**

Ruling dated and delivered on the 8th day of March 2011 in the presence of Mr Makokha for plaintiff and Mr Murunga for 2nd defendant.

**F.N. MUCHEMI
JUDGE**