



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(COMMERCIAL AND TAX DIVISION)

CIVIL CASE NO. 666 OF 2005

H.S. SAGOO.....1ST PLAINTIFF
I.S. SAGOO.....2ND PLAINTIFF
AIRDUCT ENGEINEERING.....3RD PLAINTIFF
KUHNEZUG INTERNATIONAL AFRICA.....4TH PLAINTIFF

VERSUS

LOCHAB TRANSPORT LIMITED.....DEFENDANT

RULING

On 29th November, 2005 the plaintiffs filed a case against the defendant seeking a mandatory injunction directing the defendant, its agents and/or servants to stop the sale of its equipment under the provisions of the **Disposal of Uncollected Goods Act** as well as general damages. Together with the plaint the plaintiffs also filed an application seeking, *inter alia*, a temporary injunction to restrain the defendant from disposing of the said equipment pending the hearing and determination of the suit.

The defendant filed a statement of defence on 19th December, 2005. The interlocutory application was heard and a ruling delivered on 11th October, 2006. The defendant was restrained from selling the plaintiff's equipment under the provisions of the **Disposal of Uncollected Goods Act**.

After delivery of the said ruling nothing much was done regarding disposal of the suit. On 30th September, 2011 the defendant filed an application seeking dismissal of the plaintiff's suit for want of prosecution. The application was supported by an affidavit sworn by **Mr. Billing**, an Advocate practicing in the name and style of Guram & Company Advocates, who are on record for the defendant.

Mr. Billing stated that on 5th May, 2008 the defendant filed an application dated 22nd April, 2008 seeking, *inter alia*, that the pleadings filed by the plaintiff's advocates be struck out. The application was by consent withdrawn on 29th January, 2009. Since then no action has been taken by either the plaintiffs

or their advocates to prosecute the suit.

A replying affidavit was filed by **Mr. Mathew Oseko**, an Advocate practicing in the manner and style of Oseko & Company, which firm is acting for the plaintiffs. He stated that subsequent to the filing of the defendant's application dated 5th May, 2008 both the 1st and 3rd plaintiffs and the defendant initiated direct discussions and negotiations with a view to settling the dispute out of court. As a result of those negotiations the defendant's application aforesaid was withdrawn. However, since then no compromise has been arrived at.

Mr. Oseko added that in early 2010 or thereabout the 1st plaintiff suffered a severe stroke and became incapable of continuing with the negotiations. The 1st plaintiff has been hospitalized in India, a fact which is known to the defendant's director, T.S. Lochab, counsel added. He further stated that the 1st plaintiff is the only person who can give further instructions in this matter but is still medically incapacitated. He urged the court to consider the interim orders on record and accord the plaintiffs an opportunity to prosecute the suit.

This application was argued on 2nd November, 2011. Mr. Oseko referred to several persuasive decisions in urging this court not to dismiss the suit for want of prosecution. In **FRANCIS GITHINJI KAROBIA v STEPHEN KAGENI GITAU [2006] eKLR**, Waweru, J. summarized the applicable principles in considering an application of this nature as follows:

- “1. The court should always be slow to dismiss a suit for want of prosecution where it is satisfied that the suit can be heard and justice done to the parties without further undue delay.**
- 2. Unless the delay is prolonged, flagrant and inexcusable and is such as to do grant injustice to the defendant, or indeed to both the plaintiff and the defendant, the court will not dismiss the suit. Put another way, the court will not dismiss a case for want of prosecution unless it is satisfied that the default has been intentional and contumelious or that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or is such as is likely to cause or have caused serious prejudice to the defendant.**
- 3. The court's duty is to decide the fundamental issues in dispute between the parties without undue regard to technicalities.**
- 4. Each case will depend on its own peculiar facts and circumstances.”**

In the exercise of its discretion, the court must therefore take into account the length of the delay and the explanation advanced by the plaintiff for that delay. In this matter, since 29th January, 2009 when the defendant's application seeking to strike out the suit was withdrawn no attempt was ever made to set down the suit for hearing. That is a period of nearly three years to date. The reason given for that delay is that before 2010 the 1st and 3rd plaintiffs were involved in negotiations with the defendant. The other reason is that the 1st plaintiff fell ill sometimes in 2010.

In my view, the period of delay is inordinate and the reasons advanced are not satisfactory. It appears to me that after obtaining the interlocutory injunctive orders in October, 2006 the plaintiffs felt secure and exhibited very little interest in prosecution of their suit.

Regarding the alleged negotiations, I must state that negotiations cannot be opened ended and no court

can allow negotiations to go on indefinitely. In most instances, cases are filed in court because parties have been unable to settle their disputes amicably. Once a case has been instituted in court and thereafter parties demonstrate keenness to enter into negotiations with a view to settling the matter amicably, the parties and/or the court should set a time frame within which those negotiations are to run. If after lapse of some reasonable time no compromise is arrived at, parties should let the court proceed to decide the matter, one way or the other. Parties and their advocates must remember that the Supreme Law of the land, the **Constitution of Kenya**, categorically states at **Article 159 (2) (b)** that “**justice shall not be delayed**”. The Constitution requires the court to promote alternative forms of dispute resolution, including reconciliation, mediation and arbitration but where such methods do not yield any fruit within a reasonable period of time, the court must discharge its constitutional mandate – to hear the dispute and determine the same expeditiously.

The overriding objective of the **Civil Procedure Act** and the rules made thereunder as stated under **Section 1A** thereof is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. Efficient disposal of court business is a virtue that Kenyans are crying for. While I appreciate that justice cannot be sacrificed at the alter of expedience, it is equally true that justice delayed is justice denied. Justice has to be administered to all the parties in a dispute. The court has to consider the peculiar facts of each case.

In this matter, way back on 16th November, 2005 the defendant advertised the sale of the plaintiffs’ equipment under the Disposal of Uncollected Goods Act. The defendant alleged in its defence that it wanted to sell the goods to recover unpaid arrears of rent. That advertisement prompted the plaintiffs to file this suit shortly thereafter, on 29th November, 2005. The plaintiffs obtained an interim injunction to restrain the defendant from disposing of their equipment nearly six (6) years ago but since then they have shown no interest in prosecuting their suit.

Even if the 1st plaintiff is unwell, Mr. Oseko did not explain why instructions cannot be given by any of the other three plaintiffs. Does it mean that for as long as the 1st plaintiff is incapacitated by illness the suit cannot proceed? I do not think so. There are three other plaintiffs. There is no reason why the 2nd, 3rd & 4th plaintiffs have not, either, finalized the negotiations with the defendant or proceeded to prosecute the suit.

Having found the delay in prosecution of the suit to be inordinately long and the reasons thereof unsatisfactory, I hereby dismiss this suit for want of prosecution. The plaintiffs shall bear the costs of this application and the suit. Needless to state, the interim orders of injunction earlier granted are vacated.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2011.

D. MUSINGA

JUDGE

In the presence of:

Muriithi – Court Clerk

Mr. Oseko for the Plaintiff

No appearance for the Defendant