



CIVIL PRACTICE AND PROCEDURE

*** Dismissal for want of prosecution**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 555 OF 1993

TOPSISTER NAMALWA FWAMBA.....PLAINTIFF

VERSUS

COAST AGENCY.....1ST DEFENDANT

JULIUS J. MWASARU.....2ND DEFENDANT

RYCE MOTORS LIMITED.....3RD DEFENDANT

RULING

This case related to the fatal accident of ***Dawon Mulamba Mwawasi (deceased)***. It was filed by his wife ***Topsister Namawalwa Fwamba***. The case was filed on 6th September 1993. It was filed on behalf of the estate of ***Dawon Mulamba Mwawasi (deceased)***. Other than the service of the summons on the defendants there has been no meaningful action by the plaintiff in this matter.

The plaintiff from the record in this file passed away on **15th September 1999**. A limited grant of letters of Administration colligenda in respect of the plaintiff's estate was issued on **19th October, 2000** to Adam Bonny Mwawasi. However, before he was substituted in this action as the plaintiff, he too died on **19th December, 2001**.

On **16th April, 2004**, this court allowed the deceased plaintiff to be substituted by ***Rachael Mwariwa Mwawasi*** and ***Andrew Kilungu Mwawasi***. Since that date, that is **16th April, 2004**, there has not been any action taken on behalf of the plaintiff in this matter. Even the pleadings have not been amended to reflect the names of the persons who substituted the deceased plaintiff.

The defendants in this matter have filed two previous applications seeking this suit to be dismissed for want of prosecution but the record is not clear what became of those applications. I am now considering the Notice of Motion dated **27th January, 2011** filed by the 1st and 2nd defendants. It is an application seeking the dismissal of this suit for want of prosecution.

In the affidavit in support of the application the deponent has stated that it is now 18 years since this suit

was instituted and it is now 7 years since it was last before court. That the plaintiffs failure to prosecute this case is in excusable inordinate and gravely prejudices the defendants. A replying affidavit was sworn by the learned counsel representing the plaintiffs in this matter. The reason given for failure to act was that the defendant sought and obtained leave to appeal against the ruling that substituted **Rachael** and **Andrew** for the deceased plaintiff.

My response to that argument is that there was no stay granted of these proceedings. There is therefore no excuse for not prosecuting this case. Order 17 Rule 2 (3) of the Civil Procedure Rules 2010 provides that any party to a suit may apply for the dismissal of such a suit as provided under order 2 (1) provides as follows:

“2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

The one principle which guides the court when faced with an application for dismissal of a suit for want of prosecution is whether the delay would cause prejudice to the party making the application. In this case, the case was filed 18 years ago. The accident itself occurred in 1992. In all probability the servants or agents who worked for the 1st and 2nd defendants may not still be in the employment with those defendants. There is therefore no doubt that those defendants would suffer prejudice if this case did proceed for hearing and they were unable to produce their witnesses. In consideration of that prejudice and the fact that no cause has been shown why this suit should not be dismissed I find that the application should be granted. To continue to sustain this suit would in my view go against the spirit of section 1A of the Civil Procedure Act Cap 21. The orders of the court are as follows:

- 1. This suit is hereby dismissed against all the defendants with costs of the suit been awarded to those defendants.***
- 2. The 1st and 2nd defendants are awarded costs of the notice of motion dated 27th January, 2011 to be paid by the plaintiff.***

JUDGMENT BY:

MARY KASANGO
JUDGE

DATED and DELIVERED at MOMBASA this 1st day of December, 2011.

R. MWONGO
JUDGE