



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANICOMMERCIAL COURTS
Civil Case 470 of 2007**

**D.C.K. VORA & COMPANY LIMITED.....PLAINTIFF
VERSUS
EMCO LIMITED.....DEFENDANT**

RULING

1. The notice of motion dated 18th February 2010 was taken out by the Defendant it is under the provisions of Order 16 rule 5A of the Civil Procedure Rules. The Applicant seeks for the Plaintiff's suit to be dismissed for want of prosecution on the grounds that pleadings in this matter closed on 27th June 2008. The Plaintiff has made no attempts to set the suit down for hearing. The pendency of the suit is causing the defendant anxiety and as the Defendant has to continue maintaining the suit as a liability in its books of accounts for years. The law clearly provides that if a suit remains pending for three months, it should be dismissed; this suit has remained dormant for over two years. It is in the interest of justice to dismiss it.

2. This application was opposed by the Plaintiff. Counsel relied on the replying affidavit sworn by **Diana Ongura** on 2nd March 2010. It is contended that the application is pre-mature because the suit is not ready for hearing, discovery and inspection of documents has not been done. The Plaintiff drew and filed its list of documents on 24th February 2010 and the Defendant has not yet done discovery on their part. Moreover, there were negotiation for an out of court settlement and the delay was caused by an attempt by the parties to settle the matter out of the court. It is also to be noticed that the court diary for 2009 and 2010 were closed early. There are letters by the Plaintiff's advocates attempting to fix the matter for hearing.

3. Under the provisions of Order 16 rule 5, it is provided as follows:

“If, within three months after –

- (a) the close of pleadings; or
- (b) in the High Court, an order for the hearing on a summons for directions; or
- (c) the removal of the suit from the hearing list; or
- (d) the adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.”

A glance at the court's record shows that the Plaintiff has compiled and filed their list of documents on 24th February 2010. On the other hand the Defendant has not filed their list of documents. The Plaintiffs also contends that the court's diary has not been available for parties to fix matters which is a fact, caused by the perennial problem of shortage of Judges. For that reason I will exercise my discretion and allow the Plaintiff to fix the matter for hearing. Considering that this is a 2007 matter, it should be given a priority date after the parties have complied with mandatory requirement of discovery.

The Defendant shall have the costs of this application.

RULING READ AND SIGNED ON 7TH MAY, 2010 AT NAIROBI

M. K. KOOME

JUDGE