REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 95 of 2004

CHANDRAKANT RAJPUT
T/A SIM CASH & CARRY ..... 1ST PLAINTIFF
SIMABEN RAJDUT T/SIM CASH & CARRY ..... 2ND PLAINTIFF

VERSUS

MADISON INSURANCE ..... DEFENDANT

RULING

The application under consideration in this ruling is a Notice of Motion dated 16th February 2010. It is filed by the defendant. The defendant has brought the application under Order XVI Rule 5 of the Civil Procedure Rules. By that application, the defendant seeks the dismissal of the plaintiff's suit for want of prosecution. In the affidavit in support of the application, the legal officer of the defendant's company deponed that the plaintiffs filed this suit on 8th October 2002 in Meru Chief Magistrate Court Case No. 289 of 2002. That suit was later transferred to High Court at Meru. The defendant filed its defence on 14th November 2002. In that defence the defendant denied the plaintiff's claim. It was deponed on behalf of the defendant that on transfer of this suit to High Court at Meru, the plaintiff has failed to prosecute the suit expeditiously. On 14th November 2006, the plaintiff successfully applied for an adjournment when the case was due for hearing. The plaintiff on that date was condemned to pay costs to the defendant of Kshs. 5,000/=. Todate the plaintiffs have not paid those costs. It further deponed that the defendant has spent enormous somes of money in respect of its legal representation and witness expenses in this matter. The matter was fixed for hearing on 19th September 2007. The plaintiffs were absent from court. The court granted the plaintiff an adjournment and the court recorded that it was the last adjournment for the plaintiff in this matter. The matter was subsequently set down for hearing on 7th October 2009 but was removed by the court from the hearing list. It is deponed on behalf of the defendant that since that date, the plaintiff have failed to fix this case for hearing. In the

defendant's view, there is no excuse for the plaintiff's to fail to prosecute this suit. It should be noted that when the present application came for hearing on 21st June 2010, the plaintiff's learned counsel unsuccessfully applied for an adjournment to enable her prosecute first her application to withdraw from acting for the plaintiffs. The affidavit which was sworn by the advocate for the plaintiffs in support of the application dated 20th April 2010 seeking to cease to act for the plaintiff is very telling in regard to the plaintiff's attitude towards this suit. In the affidavit the learned advocate stated thus:-

"That we are unable to act for both plaintiffs since they have refused to cooperate with us to ensure that we successfully represent them in this suit.

That the said plaintiffs have not been furnishing us with proper instructions and have not been in our chambers inspite of numerous correspondence.

That we are unable to deal further with this matter without the cooperation of our clients hence this application for leave to withdraw from acting herein."

If there was doubt whether the plaintiffs have intention of prosecuting this suit that doubt is dispelled by their own advocate who has been unable to prosecute this suit for lack of instructions. The defendant relied on various authorities in support of its application.

1. ***Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) E.A.)*** where it was held:-

"That court had inherent power to dismiss the suit notwithstanding that the case did not fall within any of the specific provisions of the Civil Procedure (Revised) Rules 1948, which do not purport to be exclusive."

2. ***Sheik Vs. Gupta and Others [1969] E.A. 140*** where it was held:-

"There had been culpable and flagrant inactivity on the part of the plaintiff and a fair trial could not be had. Suit dismissed."

3. ***National Industrial Credit Bank Ltd Vs. Freshco International Ltd and Others [2005] e KLR*** where it was held:-

"The test applied by the Courts in an application for dismissal of a suit for want of prosecution is whether delay is prolonged and excusable, and if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the Court."

4. ***Meridian Properties Ltd vbs. Aspi Variava and Others [2006] e K.L.R.*** where it was held:-

".....The court in considering the application finds that the plaintiff has failed to take reasonable steps to prosecute this action which as the title shows is a 2002 case but on closer examination of the pleading show that this case was initially filed in 1997. That being the case, I accept the submissions made by the defendant that the continued subsistence of this case may be prejudicial to the defendant."

The application by the defendant in view of what is stated above is merited. I grant the following orders:-

1. ***That the plaintiff's case is hereby dismissed for want of prosecution with costs to the defendant.***

2. ***The defendant is awarded costs of the Notice of Motion dated 16th February 2010.***

Dated and delivered at Meru this 26th day of July 2010.

MARY KASANGO
JUDGE