



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 307 of 2007

MOHAN MEAKIN LIMITED.....PLAINTIFF

VERSUS

MOHAN MEAKIN (KENYA) LIMIT.....1st

DEFENDANT

LONDON DISTILLERS (KENYA) LIMITED.....2ND

DEFENDANT

R U L I N G

This Notice of Motion dated 19th December, 2008 has been brought by the two Defendants in this suit. It has been brought under Section 3A of the Civil Procedure Rules and Order XVI rule 5(d) of the Civil Procedure Rules. It seeks to have the suit dismissed with costs for want of prosecution.

The application is based on two grounds.

- 1. The Plaintiffs have neglected and/or otherwise failed to set down the suit for hearing.**
- 2. The Plaintiffs have otherwise failed to take any steps to prosecute the same for a period of over three months.**

The application is supported by an affidavit sworn by MOHAN GALOT, the Chairman of the two Defendants.

The application is opposed by an affidavit sworn by LAWRENCE A. OROWE, the Plaintiff's advocate.

I have considered this application, the affidavits filed herein and submissions by counsel. I have also considered the cases cited by both counsels. The principles applicable in an application for dismissal of a suit for want of prosecution were set out in the leading case of **IVITA V. KYUMBU [1984] KLR 441**. Chesoni J, as he then was, in the cited case held as follows:

“A defendant who has waived or acquiesced in delay is not entitled to a dismissal of the action for want of prosecution but mere inaction on the part of such defendant does not amount to a waiver or acquiescence.

The test applied by the courts is an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, 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 available time. It is a matter in the discretion of the court."

The test to be applied in an application of this nature is whether the delay in issue in the case is prolonged and inexcusable and whether justice can still be done despite the delay. The conduct of the Defendant must also be considered so that where it is found that the Defendant has waived or acquiesced in the delay, the suit should not be dismissed.

Is there inordinate and prolonged delay in prosecuting this matter? This application was filed by the Defendants on 19th December, 2008. The pleadings in this case closed 15 days after 23rd October, 2007 when the defence was filed. The period of delay is therefore 13 months. On the question of delay the Defendant relies on the case of **Basil Criticos v AFC & Another, Milimani HCCC No. 1497 of 1996**. That case can be distinguished from the instant one on grounds the delay in cited case was five years. Defendant also relied on **Nationi Mayika Lumbasi v Indech Mukundu & Another, Kakamega HCCC No. 183 of 1991**. Again the delay in cited case was 3 years and therefore the case is distinguishable from the instant one. The Defendant relied on the case of **Dipak Shah & Others v. Akiba Bank Limited Milimani HCCC No. 34 of 2003** where the suit was dismissed for delay of 1 year and 11 months. Reliance was also placed on the case of **Afraha Education Society and Another vs. Ezekiel Karanja Ndune & Others. Milimani HCCC No. 660 of 2001**, where the suit was dismissed for a delay in prosecuting it for a period of 3 years.

All the cited cases involve a far much longer period of delay than the instant case. Nothing has been placed before the court to demonstrate that 13 months is prolonged and inordinate delay in prosecuting this suit. It is the burden of the Defendant to show that there has been delay in prosecuting the matter. Until delay is established, the Plaintiff should not be required to give any explanations regarding delay. Even if I may be wrong in finding there is no inordinate delay in prosecuting the case, the Defendant had another burden to demonstrate the prejudice it has suffered or is likely to suffer due to the alleged delay. Paragraph 9 of the supporting affidavit is the only paragraph dealing with the issue of how the Defendants are affected by the delay. In that paragraph it is averred that the prolonged delay continues to occasion anxiety, worry, inconvenience and uncertainty to the Defendants. There has not been any substantiation of the averment made in this paragraph. With due respect to the Defendants, the averment does not assist the Defendants in demonstrating the prejudice the Defendants have suffered or may suffer due to the delay in the prosecution of the case.

In the supplementary affidavit of the Defendant, the Defendants have devoted several paragraphs to address the issue of prejudice. This of course was informed by the line of questions directed at the Defendants Advocate by the court on 20th February, 2009, when the said Advocate gave his first round of submissions in the matter. The supplementary affidavit was filed on 26th February, 2009. Despite the obvious advantage the Applicants have had in the matter, I will nonetheless consider the prejudice deponed to. It is averred that due to the filing of this suit, the Defendants' Company resolved to halt any further expansions of its businesses in the country. The other prejudice averred is that the Defendants are forced to keep all witnesses in their employ as long as the suit remains pending. These two grounds are not prejudices as recognized in the **IVITA case**, supra. The prejudice has to do with loss of memory, witnesses or documents of the case or some other prejudice which would demonstrate that the continued delay in the matter means justice may not be done to the parties in the suit.

I have come to the conclusion that there is no inordinate or prolonged delay in the matter and further that justice can still be done despite the delay. I will dismiss the Defendants' application with no order as to costs.

In addition I order:

1. The Plaintiff should file and serve both its list of documents and the documents it proposes to rely on in this suit within 60 days from today.

- 2. The Defendants to file and serve their list and documents within Sixty (60) days from date of service with the Plaintiff's documents.**
- 3. The Plaintiff should take dates for the hearing of this case in any event before the end of this year 2009.**
- 4. Parties to agree on the issues and file them before the date set for the hearing of the case.**

These are the orders of the Court.

Dated at Nairobi this 30th day of April, 2009.

LESIT, J.

JUDGE

Read, signed and delivered in presence of:-

Ms. Mburu holding brief Kithii for the Applicants

Mr. Orowe for the Respondent

LESIT, J.

JUDGE