

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 779 of 1992

KOKILABEN B. PATEL.....PLAINTIFF

VERSUS

SAMKEN LTD.....DEFENDANT

RULING

In their Notice of Motion brought under Order 16 Rule 5(c) of the Civil Procedure Rules, the 1st, 2nd and 3rd defendants seek the dismissal of this suit for want of prosecution. It is based on the ground that since the closure of pleadings over 16 years ago, this case has not been heard. Although the hearing has been adjourned even at the instance of the court, the delay has mainly been occasioned by the plaintiffs who have changed lawyers four times.

On the application of the 1st, 2nd, and 3rd defendants' it was on 23rd August 2000 dismissed for want of prosecution but it was on 23rd October 2002 reinstated. For the last 15 months the plaintiffs have not taken any step to set down for hearing. Since 17th September, 2007 when it was last fixed for hearing but there is no indication why it did not go on, the plaintiffs have not bothered to fix it for hearing.

The application is opposed on the ground that the delay of 15 months is not in ordinate and that in any case the applicants were also obliged to set the suit down for hearing. Counsel for the plaintiffs further argued that it is a draconian thing to dismiss a suit for want of prosecution.

I have read the pleadings in this case and considered these rival submissions. The powers given to the court to dismiss a suit for want of prosecution under Order 16 Rule 5(c) or to strike out pleadings under Order 6 Rule 13 of the Civil Procedure Rules are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, I agree with counsel for the plaintiffs that the court should be wary to exercise them. It is, however, the policy of the court that litigation should come to an end. Therefore where it is shown that the plaintiff has been indolent and even lethargic, the suit should be dismissed. How do these principles apply to this case?

The cause of action giving rise to this suit arose on 3rd January, 1990. The suit itself was filed on 28th December 1992. Although the hearing has been adjourned even at the instance of the court, the delay has mainly been occasioned by the plaintiffs who have changed lawyers four times. On the application of the 1st, 2nd, and 3rd defendants' this suit was on 23rd August 2000 dismissed for want of prosecution but it was reinstated on 23rd October 2002. On 17th September, 2007 it was fixed for hearing but there is no indication as to why it did not go on. Instead of saying why they have, since then not fixed it for hearing the plaintiffs' counsel had the audacity of arguing that the applicants are also obliged to fix the case for hearing.

I find that the plaintiffs have been lethargic and indolent in the prosecution of this case. Consequently I allow this application and hereby dismiss this suit in its entirety for want of prosecution. The defendants shall have the costs of this suit but the 1st, 2nd and 3rd defendants shall in addition have the costs of this application.

DATED and delivered this 21st May, 2009.

D.K. MARAGA

JUDGE.