



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 557 of 2003**

**SUNFLAG TEXTILE & KNITWEAR MILLS LTD..... PLAINTIFF**

**VERSUS**

**SHARPER IMAGES LIMITED.....DEFENDANT**

**RULING**

The defendant filed a notice of motion pursuant to the provisions of **Order XVI Rule 5 (a)** of the **Civil Procedure Rules** seeking to have the suit herein dismissed for want of prosecution. The defendant contends that the plaintiff had failed, neglected or refused to take any steps to set the matter for hearing since pleadings were closed on 22<sup>nd</sup> March 2004. The defendant states that the inordinate delay by the plaintiff in fixing the matter for hearing has occasioned it great inconvenience and prejudice. The application is supported by the annexed affidavit of Judy Thongori, the advocate for the defendant. The application is opposed. Peter Kisengi Kivasu, a clerk at the firm of Mssrs D. V. Kapila & Co. Advocates and Caroline Kimeto, an advocate at the firm of L. M. Mbabu & Co. Advocates swore replying affidavits in opposition to the application.

At the hearing of the application, I heard rival submissions made by Miss Machio for the defendant and by Miss Kimeto for the plaintiff. Having considered the facts of this application, the issue for determination by this court is whether the defendant established a case to entitle this court dismiss the suit herein for want of prosecution. I have perused the court record herein. The plaintiffs filed suit on 10<sup>th</sup> September 2003. The defendant entered appearance on 3<sup>rd</sup> October 2003. The defendant filed a statement of defence and counterclaim on 21<sup>st</sup> of October 2003. The plaintiff filed reply to defence and defence to the counterclaim on 29<sup>th</sup> October 2003. Pleadings were therefore closed fourteen (14) days after the filing of the last pleading. On 22<sup>nd</sup> March 2004, the plaintiff filed a statement of agreed issues in court. The said statement was not signed by the defendant.

Since then, no further step has been taken by either party. The next step that was taken was the filing of the present application by the defendant in 2009. The plaintiff attempted to explain its failure to fix the suit for hearing by alleging that it had been prevented from fixing the case for hearing because the court file had gone missing. Strangely, the plaintiff did not exhibit any document in form of correspondence to the court to support its contention that the court file had been so misplaced. The plaintiff failed to satisfy this court that it took action to move the court to reconstruct the alleged missing file for a period of over five years. It is evident that the plaintiff has been indolent.

Under **Order XVI Rule 6** of the **Civil Procedure Rules** this court has jurisdiction to dismiss any suit for want of prosecution if no step is taken to prosecute the case within a period of three years from the time when the matter was last mentioned in court. The explanation offered by the plaintiff for its failure to fix the case for hearing is not excusable. Similarly, apart from pointing a finger at the plaintiff, the defendant did not give an explanation for its failure to fix its counterclaim for hearing. The principles to be considered by this court in determining whether or not to dismiss a suit for want of prosecution were enunciated by the Court of Appeal in **Salkas Contractors Ltd vs Kenya Petroleum Refineries Ltd CA Civil Appeal No.250 of 2003 (Mombasa) (unreported)**. Applying the said principles in this case, it is evident that this suit is ripe for dismissal.

It is hereby dismissed with costs for want of prosecution. The counterclaim of the defendant is similarly dismissed with costs for want of prosecution. It is so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE 2009**

**L. KIMARU**

**JUDGE**