



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

(MILIMANI COMMERCIAL COURTS)

Civil Case 351 of 2007

LABH SINGH HARNAM SINGH..... PLAINTIFF

VERSUS

ALFA MOTORS LIMITED.....1ST DEFENDANT

INTERCITY SHUTTLES LTD.....2ND DEFENDANT

RULING

This ruling relates to a notice of motion filed by the 1st Defendant under Order XVI Rule 5(a) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act. The same seeks the following orders:

1. The suit herein be dismissed for want of prosecution.
2. The costs of this application and the main suit be borne by the plaintiff.
3. Any other order be made as this Honourable Court deems fit to grant.

During the hearing of the application, Mr. Ngwele, for the applicant, submitted that the same is supported by the affidavit of Harbinder Singh Bhogal that was sworn on 17th August, 2009. Further to the above, he also submitted that though the pleadings were closed on 10th December, 2007 no action has been taken since then by the plaintiff to prosecute the suit. The learned counsel's opinion is that the

plaintiff's action shows disinterest in the suit and therefore it was just and equitable for the suit to be dismissed. In addition to the above, the learned counsel also referred the court to Order XVI, rule 5(a) of the Civil Procedure Code which states that if within 3 months after the close of the pleadings, the plaintiff does not set the suit for hearing, then the court can be moved by any party for dismissal. Besides the above, Mr. Ngwele conceded that a similar application that was dated 12th May, 2009 was dismissed by Hon. Lady Lesiit. However, he pointed out that the said application was not heard interpartes and that the same was dismissed on a technicality. In conclusion, he submitted that the respondent has been indolent in pursuing his claim, and since no reasonable explanation has been given for two years, I should dismiss the suit with costs.

On the other hand, Mr. Kinyanjui, for the respondent has opposed the application while relying on the replying affidavit. Apart from the above, the learned counsel reminded the court that a similar application dated 12th May, 2009 had been dismissed by my predecessor. According to the learned counsel, the plaintiff has taken reasonable steps to prepare this suit for trial. In conclusion, he urged the court to permit the suit to proceed for trial.

This court has carefully considered the application together with the submission by the learned counsels. In the case of IVITA vs. KYUMBU [1984] KLR 441 page 449 Chesoni, J. (as he then was) held as follows: -

“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.”

On the other hand, in the case of Fitz Patrick vs. Batger and Co. Limited [1967] 2 ALLER 657 the court stated as follows: -

“... I said that it is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition.”

After considering this application carefully and the principles laid down in the above case, I am rather reluctant to dismiss this case. Instead, I wish to grant the plaintiff the last chance. However, the plaintiff will have to pay the defendant throw away costs to be determined by the Deputy Registrar.

MUGA APONDI

JUDGE

Ruling read signed and delivered in open court in the presence of:

..... Plaintiff's counsel

..... Defendants' Counsel

MUGA APONDI

JUDGE

11TH NOVEMBER, 2009