



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

Civil Suit 685 of 2004

STEPHEN OGAMBA PLAINTIFF/RESPONDENT

VERSUS

JIMMY ANGWENYI1ST DEFENDANT

THE STANDARD LIMITED 2ND DEFENDANT/APPLICANT

RULING

In this Notice of Motion dated 21st November, 2007 brought under Order XVI Rule 5(a) and Order L Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act the Applicant is praying for Orders that the suit filed against the Defendants by the Plaintiff in this matter where this application is filed, be dismissed for want of prosecution.

Grounds in a support of the Notice of Motion are that three years have lapsed since the close of pleadings yet no steps is being taken by the Plaintiff/Respondent to prosecute the suit; and that the delay in prosecuting the suit constitutes an abuse of the process of the court and has caused prejudice to the Defendant/Applicant. There is a supporting affidavit.

The Plaintiff/Respondent filed seven grounds of opposition but argued that though the delay complained of is there; their suit should not be dismissed in this draconian manner because the Plaintiff/Respondent is desirous to ventilate his case and there is no utter disregard to the prosecution of the suit, that no prejudice is being caused to the Applicants which the Applicant cannot be compensated for and that otherwise Applicants ought to have set the suit down for hearing. Other grounds were not argued by the Respondent's counsel Mr. Robert Mokaya. M/S Dar who had been recorded as appearing for both Defendants as shown in the Notice of Motion, clarified that she was appearing for the Second Defendant only and that therefore there was no appearance for the First Defendant. The Applicant therefore was the Second Defendant alone.

The delay is apparent and admitted in this suit filed on 25th June, 2004. On 27th April, 2006 there was change of the Plaintiff's Advocates which did not bring corresponding change in the non prosecution of the suit. The result, this Notice of Motion and one of the arguments of the Respondent is that the Applicant ought to have fixed the suit for hearing instead of bringing this Notice of Motion.

Borrowing what Mutungi J, said in Century Oil Trading company Ltd vs – Gerald Mwaniki Mbogo & Another (Milimani Commercial Court HCCC No. 367 of 2001 at page 9 which I fully agree with:

“I do not subscribe to the motion that order XVI rule 5(d) shifts the burden of expeditious prosecution of a suit from the Plaintiff to the Defendant.”

He quoted Lord Denning M.R. in the England case of Fitzpatrick – vs- Batger & Co., Ltd (1967) 2 ALL E.R. 657 at p. 658 stating:

“It is the duty of the Plaintiff to get on with the case. Public policy demands that the business of the Courts should be conducted with expedition. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution.”

The action before me has gone to sleep for three years as the filing of change of Advocate constituted no step to hearing. The action before Justice Mutungi had gone to sleep for one year. He also dismissed it. Other cases have been dismissed for going to sleep for even shorter periods. Such a period is frowned at because it is found to be “*inordinate delay and inordinate delay is in excusable*” unless a credible excuse is made out because justice delayed is justice denied.

Concerning prejudice to the Applicant M/s Dar has stated clearly saying that as time goes on things change including the availability of witnesses and their memory of what took place. That amounts to prejudice and no compensation comes in at that stage as the affected party loses the case because justice could not be done in the circumstances.

From what has so far happened in this suit, the Respondent as it is claimed, may be desirous to ventilate his suit (which is doubtful) but there can be no truth in saying that the Respondent has not disregarded the prosecution of the suit.

Concerning the framing of issues, that is not relevant in this application as what the Court of Appeal was saying in Kenya Power & Lighting Co., Ltd vs. Allan George Njogu Kamau, Civil Appeal No. 327 of 2002 does not apply in this application.

From what I have been saying therefore, the Respondent having made out no credible excuse the Notice of Motion dated 21st November, 2007 is hereby granted as prayed.

Dated and delivered at Nairobi this 7th day of March, 2008

J.M. KHAMONI

JUDGE