



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

Civil Case 3462 of 1995

THE OFFICIAL RECEIVER LIQUIDATOR OF CONTINENTAL.....PLAINTIFF

VERSUS

RAMJI SHAH & OTHERS.....DEFENDANTS

R U L I N G

The Notice of Motion herein, under Order 16 Rule 5(c) (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, dated 31/8/05, seeks the following orders:

1. Dismissal of the Plaintiff's suit against the Defendants for want of prosecution.
2. Costs be awarded to the 6th Defendant/Applicant.

The application is on the grounds that: there has been inordinate delay by the Plaintiffs in prosecuting their case for over ten years; the disinterest of the plaintiffs in prosecuting the case is inexcusable and the Defendant should not be kept in indefinite abeyance by the Plaintiff's reluctance in prosecuting their suit.

In opposition, the Respondents aver, **inter alia**, that contrary to the applicant's allegations, the suit was fixed for hearing on 10th and 11th December 2003 but due to the many interlocutory applications by various parties herein, during 2004, the hearing could not take off before disposing of those applications first.

On 20/2/2008, after many adjournments,

and after the formal hearing and final submissions on the application by counsel for both sides, the parties signed a consent by which the suits against the 3rd and 4th Defendants were withdrawn, with no orders as to costs. The consent was vide a letter dated 5/11/07, and recorded in court on the 20/2/08.

I have perused through the massive pleadings and considered the submissions by the battery of seven counsels, including the authorities cited and relied upon, by both sides. I have reached the following findings and conclusions.

The suit dates back to 1995, a very long time indeed by whatever standard for a dispute to be adjudicated for the benefit of all the parties concerned. But given the number of parties involved – two Plaintiffs and seven defendants – even the procedure and the question of when the pleadings closed, becomes difficult to determine with certainty. These myriad of factors have been exploited by virtually every party to the dispute. One example should suffice. The applicants/defendants have submitted that for all the duration

that this case has been pending, since the suit was filed, it has been fixed for hearing only one. Hence their claim that the Plaintiff/Respondent have not been interested in prosecuting the case and the need for dismissal of the suit.

The above position is not borne out by the record before me. The period complained of, when no action was being taken by the Respondent/Plaintiffs, is between 2004 and 2005. That is the period during which the case was listed only once, but the matter was not confirmed during the call over.

Other than the period 2004-2005, the Record shows that the suit was fixed for hearing more than four times as under: – 22/7/02; 20/11/02; 10/6/03, 10/12/03 and 3/5/04.

The record also shows that the hearing could not take off owing to the various interlocutory applications filed by several of the parties in the suit, which had to be disposed off first, before the suit could be set down for hearing.

I have also taken note of the fact that the interested parties herein are by and large purchasers for value of the property in dispute in this suit. Given the sentimental value attached to land (property) in this country, disputes involving such assets should, where possible, be heard and determined on merit, rather than on legal technicalities.

In brief, I find and hold that whereas the Plaintiffs/Respondents have not moved their case with the requisite speed and diligence, the delay is both explained and understandable given the many parties involved in the dispute.

Accordingly, the application for dismissal of the suit would not be in the interest of justice under the circumstances of this case.

I therefore order as follows:

1. The application is dismissed with no order as to costs. Each party to bear their own costs for this application.
2. The Plaintiffs/Respondents to fix the suit for hearing within the next (60) sixty days from today's date, failing which the suit to stand dismissed with costs in favour of the Defendant/Applicants and against the Plaintiff/Respondents.

It is so ordered.

DATED and delivered in Nairobi this 29th Day of April, 2008.

O.K. MUTUNGI

JUDGE