

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 47 of 1999(RD)

P.N. MASHRU LIMITED PLAINTIFF

- Versus -

**MOI UNIVERSITY
DEFENDANT**

R U L I N G

By this application, the Defendant/Applicant seeks orders that the suit herein be dismissed for want of prosecution, and that the costs of this application and the suit herein be borne by the plaintiff.

The application is brought under Order XVI rule 5(c) and (d) and Order L rule 1 of the Civil Procedure Rules. It is supported by the annexed affidavit of Donald B. Kipkorir, an Advocate in the firm of Kipkorir, Titoo & Kiara, Advocates, who have the conduct of this case on behalf of the Applicant. It is premised on the grounds that –

- (a) The matter last came up for hearing on 15th November, 2006 and the court could not reach it.
- (b) The plaintiff has failed to take any or any material step to prosecute its claim
- (c) The continued existence and uncertainty of the suit is prejudicial to the defendant.

Opposing the application, the Plaintiff/Respondent, filed replying affidavits sworn on 21st April, 2008, one by their Transport Manager, one Lennox K. Shalo, and another by George Otieno, a legal clerk in firm of V.W. Maina & Co., the respondent's advocates.

When the application came for hearing, Ms. Amenge held brief for Mr. Kipkorir and told the court that Mr. Kipkorir wished to rely on the grounds set out on the face of the record, and also on his supporting affidavit. On his part, Mr. Ojode for the Respondent also said that he relied exclusively on the replying affidavits of George Otieno and Lennox Shalo.

I have considered the application and the rival affidavits filed by the parties. According to the supporting affidavit of Mr. Kipkorir, this matter last came to court for hearing on 15th November, 2006. Unfortunately it could not be reached and therefore it was stood over generally. Since then, the plaintiff has not rescheduled the suit for hearing. From the calendar, that was one and a half years ago. In his replying affidavit, Mr. George Otieno alludes to an attempt to take a hearing date late in February, 2008. However, his attempt to accomplish that mission was frustrated when he went to the Registry to take a hearing date only to find that this application had already been filed.

Mr. Otieno's account is corroborated by the court record. By a letter dated 25th February, 2008, M/S V.W. Maina & Co., Advocates for the plaintiff, wrote the defendant/applicant's Advocates inviting them to attend the Registry on 4th March, 2008 with a view to taking a hearing date for this matter. Meanwhile, even though this application is dated 11th January, 2008, it was not filed until 29th February, 2008. When Mr. Otieno went to the Registry on 4th March, 2008, his access to a date had been blocked by this application.

Against that background, should this application be dismissed for want of prosecution? Even though neither counsel cited any authority, it is clear from, inter alia, IVITA v. KYUMBU [2004] KLR 441 that the test to be applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can still be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed. On the facts of this case, no doubt there has been some unexplained delay of slightly more than one year. But the plaintiff has adequately demonstrated that it is still interested in prosecuting this suit, and did not require any prodding by the defendant to demonstrate that interest. More importantly, in the circumstances of this case, I think that it is still possible to do justice in this matter, and that is the primary concern of the court.

Being of that persuasion, I think that the interests of justice will be served better by giving the plaintiffs a chance to fix this case for hearing. I therefore direct that this case be fixed for hearing within one year from today.

The application herein is accordingly dismissed. However, since the plaintiff, by its conduct, invited this application, it will bear the costs thereof in any event. It is so ordered.

Dated and delivered at Mombasa this 30th day of May, 2008.

L. NJAGI

JUDGE