



REPUBLIC OF KENYA

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

Civil Case 659 of 2005

JAX KENYA LTD .....PLAINTIFF

V E R S U S

SOUTH AFRICAN MUTUAL LIFE ASSURANCE  
SOCIETY .....DEFENDANT

### R U L I N G

Upon an application by the Defendant for dismissal of the Plaintiff's suit for want of prosecution, the court (Ombijah, J) ordered as follows on 31<sup>st</sup> July, 2003:-

**“.....I order that the plaintiff take all the necessary steps to have this matter heard within the next twelve (12) months from the date hereof. In default the suit against the defendant be deemed as dismissed with costs .....”**

As it happened, the suit was not heard within twelve (12) months from 31<sup>st</sup> July, 2003 or at all. But no application for an order to deem the suit as dismissed was filed. What there is is an application by notice of motion dated 4<sup>th</sup> May, 2006 by the Plaintiff for an order to extend the time limited by the order of 31<sup>st</sup> July, 2003 within which the suit should be set down for hearing.

The Defendant has opposed that application upon the grounds of opposition dated and filed on 23<sup>rd</sup> June, 2006. The Defendant also raised a preliminary objection to the application by notice dated 4<sup>th</sup> May, 2007. The grounds set out in the notice of preliminary objection strongly echo the grounds set out in the grounds of objection; in some instances they are virtually identical. The grounds set out in the notice of preliminary objection are:-

1. That the application is misconceived, misconstrued and not maintainable.
2. That the suit stands or is deemed dismissed with costs in accordance with the order of 31<sup>st</sup> July, 2003.
3. That twelve (12) months after the aforesaid order lapsed on 31<sup>st</sup> July, 2004, and the Plaintiff failed **“to take all necessary steps to have the matter heard”**; the suit against the defendant is therefore deemed dismissed with costs.
4. That on 24<sup>th</sup> October, 2006 when the Plaintiff's application for discovery dated 5<sup>th</sup> and filed on 9<sup>th</sup>

August, 2004 came up for hearing the Defendant objected to the same as the suit was “**deemed as dismissed with costs**”; notwithstanding that objection and the notice of preliminary objection dated 9<sup>th</sup> and filed on 11<sup>th</sup> November, 2005, the Plaintiff did not file its present application until 5<sup>th</sup> May, 2006- more than 18 months after the Defendant’s preliminary objection. There has been further delay of over 4 months.

5. That the Plaintiff is guilty of laches and has delayed inordinately in making the present application.
6. That the suit (which was commenced in the year 2000) is deemed as dismissed with costs.
7. That the Plaintiff is guilty of intentional and continuous disobedience to the court’s directions and orders, and is thereby disentitled to obtain the relief sought.
8. That the Plaintiff did not apply for extension of time before expiry of the period allocated by the court.
9. That as late as December, 2004, the Plaintiff had not made complete mandatory discovery under Order X Rule 11A of the Rules.
10. That from the date of the order of 31<sup>st</sup> July, 2003 it took the Plaintiff more than eleven (11) months before preparing the list of documents, and more than 1 year and 4 months to file a supplementary list of documents. This means that almost 5 years after the order of 31<sup>st</sup> July 2003 the Plaintiff was still not ready to proceed with the hearing of the suit.
11. That the Plaintiff, by its earlier application dated 5<sup>th</sup> August, 2005 (which itself was filed more than 2 years after the order of 31<sup>st</sup> July, 2003 and more than one year after the suit was deemed as dismissed), was still by its conduct indicating to the court that it was not ready to proceed to hearing.
12. That the Plaintiff has failed to have the suit heard even within 12 months after:-
  - (a) amendment of the plaint;
  - (b) filing of its earlier application dated 5<sup>th</sup> August, 2005; and
  - (c) the filing of the Defendant’s preliminary objection to the Plaintiff’s application dated 5<sup>th</sup> August, 2005.

As can be clearly seen from these grounds, there is no pure point of law raised. With these grounds the Defendant actually joins issue with the Plaintiff upon this one important point to be determined in the present application, that is, **whether or not the Plaintiff took all the necessary steps to have the suit heard within twelve (12) months from 31<sup>st</sup> July, 2003** as ordered by the court. That, surely, is an issue of fact and not law. It cannot be determined in a preliminary objection. It must be determined in the application at hand upon the affidavit evidence placed before the court and the record of the court.

The preliminary objection is entirely misconceived. It is not well-taken at all. It is hereby overruled with costs to the Plaintiff. It is so ordered.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF MAY, 2008**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 23<sup>RD</sup> DAY OF MAY, 2008**