REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 357 of 2004

RUTH WANJIRU WAKAPA ……………………………..PLAINTIFF

VERSUS

TOTAL KENYA LIMITED …………………………..DEFENDANT

RULING

The application is a Notice of Motion dated 10th December 2007. It is brought under Order XVI rule 5(a) of Civil Procedure Rules and Section 3A of Civil Procedure Act. It seeks to have the Plaintiff's case dismissed with costs of the suit and of the application to the Defendant.

The grounds for the Application are that since 11th January, 1999 when this suit was filed, the Plaintiff has neglected to set it down for hearing. The Applicant contends that the delay in having the suit determined has prejudiced the fair determination of the suit. There are more grounds explained in the supporting affidavit of FRANKLIN JUMA, the Legal Officer of the Defendant's Company. I have considered these grounds.

The application was unopposed as the Plaintiff filed no grounds for opposition or replying affidavit. The Plaintiff's Advocate however sent Counsel to seek adjournment on his behalf, which was rejected for the simple reason that the same reasons advanced in support of the adjournment were same ones advanced on 9th November, 2006 by the same Advocate through a Counsel holding his brief, when a similar application was to be heard.

The reasons advanced for adjournment on both occasions have a bearing to the suit and the Plaintiff's intention as far as the case is concerned. It was alleged in November, 2006 that the Plaintiff was ailing and was outside the Country and so could not attend Court or proceed with the suit. No documents were ever presented to support the ailment whether in 2006 or on the 13th May, 2008 when the application was heard. These grounds reflect something of the Plaintiff's character and conduct of this case. It does appear that the Plaintiff's intention is to obstruct the hearing and finalization of this case. Alternatively it is clear there is no intention on the Plaintiff's part to prosecute the case.

I am guided by the case of **IVITA VS KYUMBU [1984] KLR 441, 449** where **CHESONI J,** as he then was observed:

"***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.

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When inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying, which will never wear out however often said that, justice delayed is justice denied.”

This suit was filed in 1999 and summons to enter appearance served on the Defendant’s on 11th January, 1999. Appearance was entered on 21st January, 1999. The defence and counterclaim was filed on 3rd February, 1999. Effectively, the pleadings in this matter closed in 1999. A consent order was made on 23rd March, 2004 before **Ochieng, J** allowing all prayers in an application dated 24th June, 2002. I am unable to trace the application, as the file seems to have been reconstructed after the original one got lost. The terms of the consent are therefore unknown. Since that date, no further step has been taken in the matter. It is over four years since.

The Court’s discretion to dismiss is unfettered. It has however to be exercised judicially. I have considered the application before court, submissions by Counsel and the circumstances of this case. I am satisfied as indicated that the Plaintiff does appear to have lost interest in this matter. It would be aiding indolence to allow this case to remain in abeyance. The Respondent has indicated that it is suffering prejudice due to the delay in having this case heard.

Going by the pleadings, this matter involves several documents. The claim lies in contract, which means the contractual terms will need to be testified to and interpreted.

I also note that part of the claim will depend on banking documents and therefore institutional memory is an important factor. It also means that the longer the matter delays the more the memory will fade or be altogether lost.

Having considered this application I am satisfied that the Plaintiff has no intention of prosecuting the matter. I am also satisfied that the Defendant is suffering prejudice and that the delay involved may prevent a fair trial. It is for this reason that I find the application merited and allow it as prayed in terms of prayer 1 and 2.

Dated at Nairobi this 23rd day of May, 2008.

LESIIT, J.

JUDGE

Ms Njui holding brief Mwangi for Applicant.

N/A for Respondent.

LESIIT, J

JUDGE