



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Suit 64 of 2000 RD**

**VITALIS OBIERO OWINY.....PLAINTIFF**

**VERSUS**

**AKAMBA PUBLIC ROAD SERVICES.....DEFENDANT**

**RULING**

The defendant, Akamba Public Road Services Limited, by its application dated 28<sup>th</sup> January 2008 seeks an order that the plaintiff's suit be dismissed for want of prosecution. The application is brought under Order XVI Rules 5 and 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Section 3A is incorrectly invoked as there are express provisions of the Civil Procedure Rules under which the relief sought by the defendant can be made.

Under Order XVI Rule 5 (d), if within three months after the adjournment of the suit generally, the plaintiff or the court of its own motion on notice to the parties does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal. The defendant by this application has chosen the latter option. There are two grounds for the application on the face of the application namely that since 29<sup>th</sup> May 2002 neither the plaintiff nor his advocate has set the suit down for hearing and that the existence of the suit is causing inconvenience and injustice to the defendant.

The application is supported by an affidavit sworn by Abdulhamid Aboo counsel for the defendant. The affidavit merely substantiates the said two grounds.

The plaintiff has opposed the application on the basis of a replying affidavit sworn by Veronica Waheti Maina his advocate. In the affidavit the plaintiff avers that the defendant is not candid in its application as it is aware that when the suit came up for hearing on 29/5/2002, it was stood over generally to await the results of a test case being Mombasa HCCC no. 36 of 2002. According to counsel for the plaintiff, he became aware of the results of the test case on 1<sup>st</sup> March 2005. In the premises, the plaintiff contends that this application has not been filed in good faith particularly as the liability of the defendant is beyond question.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The defendant has not filed a supplementary affidavit, in response to the plaintiff's replying affidavit. The factual position as given by the plaintiff in that affidavit must therefore be taken to be true. It would appear therefore that the defendant has not been candid that the plaintiff has taken no step to have the suit fixed for hearing since 29<sup>th</sup> May 2002. The plaintiff has

however not satisfactorily explained the delay between 1<sup>st</sup> March 2005 and 5<sup>th</sup> February 2008 when this application was lodged. The delay involved is therefore of nearly 3 years. That in my view is a long delay. But in the circumstances of this case it is not inordinate or prolonged. I say so because liability of the defendant has been determined. What remains to be determined is the question of quantum. At this stage of these proceedings, I consider it unjust to accede to the defendant's application. The court should always endeavour to determine issues between parties upon a proper hearing of the dispute. Although the defendant has contended that the existence of this matter is causing prejudice and injustice to the defendant, the nature and character of the prejudice and injustice is not disclosed. Even if the defendant will be occasioned prejudice or injustice, I do not think that the prejudice and injustice is such that costs cannot adequately compensate the defendant.

In the premises, I am inclined to give the plaintiff a chance to prosecute his suit. The defendant's application is declined. The plaintiff shall however pay the defendant costs of this application. The plaintiff should immediately complete pre trial procedures and on conclusion thereof a hearing date be given on priority basis.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF MAY 2008.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:

Bwile H/B for Maina for the plaintiff and Adhoch H/B for Aboo for the defendant.

**F. AZANGALALA**

**JUDGE**

**22<sup>ND</sup> MAY 2008**