



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

Civil Suit 45 of 2002

YUSUF MOHAMEDALI JIWA
.....PLAINTIFF

VERSUS

COMMISSIONER OF LANDS

**THE PRINCIPAL REGISTRAR OF TITLES MAYUNGU REAL ESTATES
LTD.....DEFENDANTS**

R U L I N G

By an application by way of Notice of Motion dated 31st January 2008, pursuant to the provisions of Order XVI Rule 5(d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act; the applicant seeks orders:

1. That this suit be dismissed with costs for want of prosecution.
2. That costs of this application be borne by the plaintiff

The application is based on the grounds:

1. That this suit was last in court on 22nd June 2005, when it was adjourned generally
2. That since then the plaintiff has neither fixed the suit for hearing nor taken any other steps to prosecute the same.
3. The plaintiff has lost interest in the suit for inaction for a period of two years.
4. The existence of the suit prejudice the defendant.
5. It is in the interest of justice that the suit should be dismissed.

The application is predicted upon the annexed affidavit of **Timothy Njeru** sworn on the 31st day of January 2008.

On behalf of the applicant, it was argued that; the matter last came up in court on 2nd June 2005 when, it

was adjourned generally. That since then the plaintiff has never set this suit down for hearing or otherwise taken any steps, as discernible from the record, to prosecute the same. That since filing the suit has remained unprosecuted for more than two (2) years. It is thus clear from the conduct of the suit that the plaintiff has lost interest in the matter. That the inaction on the part of the plaintiff is prejudicial in that the company has had to make provision for the debt as a liability in their books. The delay of 2½ years is inordinate and hence inexcusable. In the interest of justice the suit ought to be dismissed for want of prosecution.

The respondent filed grounds of opposition dated 21st February 2008. The thrust of the respondent's argument is that, the application is not merited in that, neither party has complied with Order X Rule IIA of the Civil Procedure Rules. That in any event the previous listing of this matter, for hearing on 1st March, 2007, was irregular as same was/is not ready for hearing.

I have gone through the court record. What clearly emerges is that the suit was filed on 10th May 2002. Summons to enter appearance were issued on the same day. Appearance was entered, by the 3rd defendant, on 20th May 2002. Written statement of defence filed by 3rd defendant on 5th June 2002. Request for judgment against first and second defendants, in terms of Order IXA Rule 7, was filed on 11th July 2002.

The Attorney General entered appearance on 30th July 2002. Then a notice of change of advocates was filed on 25th May 2006 by the plaintiff. The firm of Maranga Maosa & Associates took over from Nzamba Kitonga & Company Advocates. Since then the said firm has taken no action to set down the suit for hearing.

Order VI Rule 11 of the Civil Procedure Rules provides:

“The pleadings in a suit shall be closed fourteen days after service of reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”

The pleadings in this case closed when the defence of the 3rd defendant was served. The defence of the 3rd defendant, as is discernible from the court record, was filed on 5th June 2006. There is no evidence when service thereof was effected on the plaintiff. However, from the time of filing defence by the 3rd defendant, to the date when this application was filed, is in excess of five years.

The parties have not complied with the mandatory provisions of Order X Rule 11A which provides:

“11A (1) Notwithstanding anything contained in rule 11, within one month after the pleadings are closed in a suit in the High Court, every party shall make discovery by filing and serving on the opposite party a list of the documents relating to any matter in question in the suit which are or have been in possession or power.

(2) Any party on whom a list of documents is served under subrule (1) may, give notice to the party making discovery requiring the verification on affidavit of the list of documents and the affidavit shall be filed and served within fourteen days of the request.

(3) On the default of a party to comply with subrule (2), application may be made to the court for the fixing of a time limit within which the party must comply with subrule (1).

Issues have not been framed. The applicant went to sleep so to speak. See **FITZ PATRICK VS. BATGER & CO. LTD [1967] 2 ALL E.R 657 at page 658.**

On the promises, there is glaring evidence of laxity on the part of the respondent plaintiff which is unexplained or capable of reasonable explanation on the evidence before me. There is no reason shown

to me why the suit has not been set down for hearing all this while. Laxity on the part of litigants cannot be condoned by the courts. See **DEVSHI V. DIAMOND CONCRETE CO. LTD [1974] E.A page 493.**

I would be failing in my duty, on the evidence before me and the record of proceedings, if I were to fail to dismiss this suit after the plaintiff has exhibited such prolonged and inexcusable delay.

In the light of the foregoing circumstances, I order that the suit herein be and is hereby dismissed **as against the 3rd defendant.** There shall however be no orders as to costs by reason of the fact that the applicant equally took too long to bring the application for dismissal of the suit.

DATED and delivered at Malindi this 21st day of May 2008.

N. R. O. Ombija

JUDGE