



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 117 of 2002

GANIJEE GLASS MART LIMITED

(In Receivership)1ST PLAINTIFF

PAN AFRICAN GLASS INDUSTRIES LIMITED

(In Receivership).....2ND PLAINTIFF

IJAZ HUSSEIN GANIJEE.....3RD PLAINTIFF

VERSUS

FIRST AMERICAN BANK (K) LIMITED.....1ST DEFENDANT

ANDREW DOUGLAS GREGORY.....2ND DEFENDANT

ABDUL ZAHIR SHEIKH.....3RD DEFENDANT

R U L I N G

The application is a Notice of Motion dated 29th April 2008 brought under **Order XVI rules 5 and 6 and Order VI Rule 13(1) (a) of the Civil Procedure Rules**. It seeks two orders; that the Plaintiffs’ suit be dismissed for want of prosecution, and in the alternative that the Plaintiffs’ suit against the 2nd and 3rd Defendants be struck out.

The grounds of the application are that the Plaintiffs have not taken any steps to fix this matter for hearing since 5th November, 2004 when the matter was taken out of the hearing list for 11th of November, 2004. Secondly, that the Plaintiffs disclose no cause of action against the 2nd and 3rd Defendants.

There is a replying affidavit sworn by the 3rd Plaintiff in the suit in which he sets down the attempts made to have the suit set down for hearing. The affidavit also annexes a draft amended plaint in which it proposes to enjoin a 4th Plaintiff in the suit. The draft amended plaint also seeks to abandon the claim against the 1st, 2nd and 3rd Defendants and to enjoin three new Defendants to the suit.

The application was argued by **Mr. Fraiser**, Advocate to the 2nd and the 3rd Defendants.

I have considered the submissions made by both counsel. The gist of the submissions by the Applicant's Advocate is that there has been prolonged and inexcusable delay in setting down the suit for hearing, and he argues that in the circumstances, it should be dismissed. The learned counsel was not impressed by the excuses given by the Plaintiffs in the replying affidavit.

Regarding the 2nd and the 3rd Defendants, **Mr. Fraiser** submitted that they were named as Receivers of the 1st Plaintiff, but that there was no claim laid against them or relief sought against either of them. **Mr. Fraiser** submitted that in the circumstances the 2nd and 3rd Defendants should be struck out of the suit.

Mr. Issa for the Plaintiffs has opposed the application and relies on the replying affidavit of the 3rd Plaintiff and urges the court to find that as demonstrated in that affidavit, the Plaintiffs have not been indolent in setting down the suit for hearing. **Mr. Issa** for the Plaintiffs admitted that the Plaintiffs have no claim against the 2nd and 3rd Defendants and therefore, there is no cause of action against them. Counsel submitted that he was not opposed to having the alternative prayer to the Defendants' notice of motion, to have the Plaintiffs' suit against the 2nd and 3rd Defendants struck out.

I have considered the application and the submissions by counsel. In view of the undisputed facts that the Plaintiffs have no cause of action against the 2nd and 3rd Defendants, I do find that the alternative prayer in the Defendants' notice of motion is unopposed and should be allowed.

Regarding the dismissal of the entire suit, the power of the court to dismiss a suit for want of prosecution is discretionary. The court has to be satisfied that the delay complained of is not only inordinate but inexcusable and that it has caused or is likely to cause prejudice to the Defendants which prejudice or injury may not be compensatable by an award of damages. Apart from complaining generally about the delay in setting down the suit for hearing, the Defendants have not demonstrated the injury or prejudice that they have suffered or are likely to suffer due to the delay. No attempt was made to demonstrate that justice will not be done in spite of the delay. The Defendants have not claimed that they will suffer any injustice to warrant the court to exercise its discretion in their favour.

On the other hand, the Plaintiffs have demonstrated some effort made to have the matter fixed for hearing and the efforts are as late as 5th of April, 2007. It is my view that the delay in this matter is not inordinate and that in any event the explanation given by the Plaintiffs is cogent and acceptable.

In the result, the Defendants' application dated 28th of May 2008 succeeds in part. I do order that the Plaintiffs suit against the 2nd and 3rd Defendants be and is hereby struck out for lack of a reasonable cause of action against them. The Plaintiffs will bear the cost of application to the Defendants and the cost of the suit to the 2nd and 3rd Defendants.

Dated at Nairobi this 27th day of June 2008.

LESIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Fraiser for the Applicant/Defendant

Mr. Okumu holding brief for Mr. Issa for the Respondent

LESIT, J.

JUDGE