



REPUBLIC OF KENYA

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

Civil Case 1008 of 1998

IRONSIDE AUTO SPARES LTD.....PLAINTIFF

VERSUS

MUTSUI O. LINES thro'

INCHCAPE SHIPPING SERVICES LTD.....1ST DEFENDANT

KENYA PORTS AUTHORITY.....2ND DEFENDANT

RULING OF THE COURT

1. The plaintiff filed this suit on the 30/04/1998 claiming the following reliefs:-

(a) *Kshs.532082 as particularized in paragraph (.....) hereof.*

(b) *Costs of this suit plus interest thereon at court rates.*

(c) *Interest on (a) and (b) at the rate of 12% per annum or at court rates from the date of filing this suit until payment in full.*

(d) *Such further or other relief as this Honourable Court may deem just and reasonable.*

2. The Plaintiff's claim arose out of alleged negligence on a contract of common carriage between the plaintiff and the 1st defendant. The plaintiff alleged that the defendants jointly and severally failed to safely and securely perform their part of the contract which was to carry 54 cartons of spare parts from Kobe, Japan to Mombasa, Kenya within a reasonable time for reward. The 1st defendant filed its defence on 26/06/1998 and denied all the allegations made against it by the plaintiff. The 2nd defendant filed its amended defence on 13/07/1999 and averred that it (2nd defendant) received only 31 packages of the manifested cargo which it safely delivered to the plaintiff.

3. From the record, this suit has never taken off to full hearing. By its application dated 30/05/2006, the 1st defendant sought orders that the plaintiff's suit be dismissed for want of prosecution and that costs of both the suit and the application be awarded to the 1st defendant. The applicant says that since 18/10/2005, the plaintiff has not taken any step in the matter and therefore that the plaintiff has no interest in prosecuting the suit.

4. The application is also supported by the affidavit of **George Mugoya Mbeya**, advocate for the 1st

defendant who says that the plaintiff has refused and/or failed to set the matter down for hearing since the 18/10/2005. During the hearing of the application, Mr. Mbeya also said that the respondent having been given more than one chance to file responses to the application it has not done so. Mr. Mbeya submitted that the plaintiff's failure to file responses to the application is a clear indication that it is not interested in prosecuting the case.

5. The 2nd defendant also filed its application on 7/11/2006 also seeking to have the plaintiff's suit dismissed for want of prosecution. The application was presented on similar grounds and supported by the sworn affidavit of **Elly Oluoch** a Senior Commercial Officer employed by the 2nd defendant. He said that the 2nd defendant filed its amended defence on 13/07/1999 and that the matter was last in court on 18/10/2005. That since then the plaintiff had taken no steps to list the matter for hearing. It is to be noted that there is also no response from the plaintiff to the 2nd defendant's application.

6. On 1/02/2007, the plaintiff filed an application seeking leave of the court to file its Replying Affidavit out of time pursuant to the order made by Hon. Mutungi J on 6/12/2006. That application was allowed by an order of the court dated 21/03/2007, but again there is nothing on record to show that the plaintiff filed the said Replying Affidavit.

7. At the hearing of the 1st defendant's application both the plaintiff and the 2nd defendant were absent though duly served. The issue that arises from determination is whether the 1st defendant/applicant has made out a case for an order of dismissal of this suit for want of prosecution.

8. After carefully considering the application, the submissions made to me and the law, I am satisfied that this is a proper suit for dismissal for want of prosecution. Mr. Mbeya cited to the court, the case of **Sheikh -vs- Gupta & Others [1969] EA 140**. The Judge in that case, when faced with circumstances similar to the ones prevailing in this case, relied on the English case of **Fitzpatrick -vs- Batger & Co. Ltd. [1967] 2 All ER 627**. Both Deenning, M.R and Salmon, LJ found and held that a party who goes to sleep for a long time should bear the consequences of his sleep. SALMON LJ said the following at p. -----

"I entirely agree grossly inordinate delay of the kind which has occurred in this case is quite inexcusable and ought not to be tolerated. It is of the greatest importance and in the interest of justice that these actions should be brought to trial with reasonable expedition---. It is said in this case that the action is not to be dismissed, because the defendants might have taken out a summons much earlier than they did. They no doubt, however, were relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to suppose that a dog which had remained unconscious for such long periods as this one, if left alone, might well die a natural death at no expense to themselves..... I am not surprised that they did not apply earlier, and I do not think that the plaintiff's advisers should be allowed to derive any advantage from that fact. The plaintiff is not being deprived of compensation because he has an unanswerable claim for negligence I am quite satisfied that, in the circumstances of this case, where there has been such grossly inordinate delay without any real excuse I have no doubt but that the proper order is to dismiss the action for want of prosecution."

9. In the instant case, it is now 10 years since the suit was filed. It is 2½ years since the matter was last substantively in court and the plaintiff has not given any reasonable excuse as to why it has not taken any steps towards having the suit heard and determined. Further, the plaintiff has not even filed a Replying Affidavit to the 1st defendant's application despite having been given two chances to do so.

10. In the result I allow the 1st defendant's application and order that the plaintiff's suit, filed in court on 30/04/1998 be and is hereby dismissed with costs to the 1st defendant/applicant.

It is so ordered.

Dated and delivered at Nairobi this 16th day of June 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-