

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 267 of 1996

KENATCO TRANSPORT COMPANY LIMITEDPLAINTIFF

VERSUS

PETER M. KIMANIDEFENDANT

R U L I N G

The defendant herein, Peter M. Kimani, took out a motion dated 18th January 2007 pursuant to order XVI rule 5 of the Civil Procedure rules. In that motion the defendant prayed for the suit to be dismissed for want of prosecution with leave to allow the defendant to proceed for hearing of the counter-claim in a formal proof. The motion is supported by the affidavit of Peter M. Kimani sworn on 15th January 2007. When served with the motion, Kenatco Transport Co. Ltd (in receivership), the plaintiff herein, filed the replying affidavit of Patrick M. Kamau to resist the same.

It is the submission of Mr. NYachoti, learned advocate for the defendant that the plaintiff took no steps since 9.11.2005 when the suit was adjourned generally, to have the suit fixed for hearing. It is argued that the plaintiff has no proper reason to explain the delay. It is pointed out that interlocutory judgment for the counter-claim was entered in favour of the defendant on 19th September 2003 and that the matter is awaiting for formal proof.

On its part the plaintiff has urged this court to spare the suit because the delay to have the suit ready for hearing was initially occasioned by the defendant who kept on changing advocates and by also filing many applications to amend his pleadings. The plaintiff

also blamed its previous advocate, Nzamba Kitonga for the delay in that when he closed his Mombasa branch offices the matter had to be taken over by Mr. M.K. Mulei & Co. Advocates. The firm of Nzamba Kitonga & Co. Advocates is also blamed for the delay to prosecute the matter because it is said that during the transition the files i.e. 265, 266 and 267 of 1996 were inadvertently taken to the firm's offices in Nairobi and put in a store under the assumption that they had been finalized and that the motion, the subject matter of this ruling prompted the aforesaid firm to discover that the matters had not been concluded hence arrangements had to be made to forward the files to the firm of M.K. Mulei & Co. For the above reasons this court was urged not to dismiss the suit because the mistakes complained of were that of the advocate.

I have taken into account the issues argued and raised in the application and the facts deponed in the affidavits filed for and against the motion. Under Order XVI rule 5 of the Civil Procedure rules, the court is given a wide discretion to dismiss an action for want of prosecution. In this motion, it is alleged that the plaintiff has not taken away steps to have the suit prosecuted since 9.11.2005 when the suit was adjourned generally. Of course the plaintiff has attempted to give reasons to justify the delay. It is not in dispute that the hearing of this suit was adjourned generally on 9th November 2005. The reasons given by the plaintiff to explain the delay are not supported by what is apparent from the record. In my humble view I find those reasons to be stories concocted to save this suit from jaws of the law. It is curious to note that the defendant applied to have his defence amended by a Chamber Summons dated 2nd May 2003. By the 24th day of June 2003, the defendant had already obtained leave and had filed the amended defence and the counter-claim. There is

therefore no basis that on the allegation that the defendant caused the delay. The defendant's complaint begins from 9th November 2005. The confusion which was created between the firm of Nzamba Kitonga and Co. Advocates and that of M.K. Mulei & Co. Advocates is a matter of the plaintiff and its advocates. In fact it manifests sheer negligence and incompetence on the part of the advocates concerned. That is not the kind of mistake the law envisaged to be used as an excuse. Such mistakes must be visited upon the litigant who in any case has the option of pursuing their advocate for the available remedies against their legal advisers if well advised. It is obvious from the record that the plaintiff took no steps to have the suit listed for hearing from the date it was stood over generally. By the time of filing the motion about thirteen (13) months had lapsed from the date when the hearing of the suit was adjourned generally. The law allows this court to dismiss a suit which has not been re-listed for hearing after three months have lapsed from the date when it is adjourned generally. In this case 13 months had lapsed by the time the motion was being filed. I find the delay to be inordinate and inexcusable. It would appear the plaintiff has lost the interest to pursue this suit. It was only woken up from its sweet slumber by the motion for dismissal for want of prosecution.

For the above reasons I dismiss the suit for want of prosecution with costs to the defendant. The defendant is granted leave to proceed with the hearing of the counter-claim as a formal proof in view of the interlocutory judgment already in place.

Dated and delivered at Mombasa this 5th day of June 2008.

J.K. SERGON

J U D G E

In open court in the absence of the parties though served.