

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

Civil Case 5694 of 1992

EXPRESS MERCHANDISE LIMITEDPLAINTIFF

V E R S U S

1. MUKHI & SONS LIMITED

2. COMMERCIAL TRANSPORTERS LTDDEFENDANTS

R U L I N G

The Defendants herein have sought (respectively by notices of motion dated 29th November and 6th August 2007) dismissal of the Plaintiffs' suit for want of prosecution. Both applications are brought under **Order 16, rule 5(d)** of the **Civil Procedure Rules** (the Rules). Under that provision, if, within three months after the adjournment of the suit generally, the plaintiff, or the court on 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 application has been opposed by the Plaintiff who has filed grounds of opposition dated 7th May, 2008 but has not filed any replying affidavit.

I have considered the submissions of the learned counsels appearing. No authorities were cited. I have also perused the record of the court. This is a very old suit which was filed in **1992**. The cause of action is pleaded to have arisen between **23rd September, 1986 and 31st March, 1987**. The first time it was fixed for hearing was for **1st and 2nd October, 1997**. Hearing did not proceed as the 1st Defendant had not been served. It was subsequently fixed for hearing for **25th and 26th May, 1998**. Hearing did not proceed on that date either; the suit was stood over generally.

The only other time the suit was fixed for hearing was for **13th May, 2003**. The Plaintiff was not ready and sought adjournment. In adjourning the case the court (Ransley, J) ordered as follows:-

“COURT: The Plaintiff to pay court adjournment fees and the Defendants' costs of today of KShs. 2,000/00 within 14 days, failing which the suit will be struck out. Otherwise, fresh date to be fixed. No further adjournment to be granted.”

The 2nd Defendant's director has deponed in the affidavit supporting the application dated 6th August, 2007 that the Plaintiff did not comply with the said order. This of course has not been traversed as there is no replying affidavit. The suit was therefore liable to be struck out, though no application was made by the Defendants for such an order.

More importantly, since 13th May, 2003 the Plaintiff has not set down the suit for hearing. This delay of nearly four (4) years is inordinate. It has not been explained at all as there is no replying affidavit. The Plaintiff could not even be jolted into action by the present applications!

The Defendants have deponed, in effect, that because of the long delay a fair trial of the action will no longer be possible, especially because their witnesses in the matter have left employment. Considering when the cause of action arose (**about 22 years ago**) and when the suit was filed (**16 years ago**), I agree that it will no longer be possible to have a fair trial of the action. It is totally unacceptable that this suit should continue to hang over the Defendants' heads. It is clear that the Plaintiff has lost interest in the suit and may never prosecute the same.

I will therefore allow both applications. The Plaintiff's suit is hereby dismissed for want of prosecution with costs to the Defendants. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF JULY, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 18th DAY OF JULY, 2008