



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

CIVIL SUIT 1957 OF 1999

NATIONAL INDUSTRIAL CREDIT BANK LTD.....PLAINTIFF

VERSUS

JAMES SIAMBE IMBAYA

DOLOROSA ACHOLA IMBAYA

T/A DOROTON INVESTMENTS LIMITED.....DEFENDANT

R U L I N G

The Applicant, the Defendant in the case has by Notice of Motion dated 22nd May, 2008 brought under **Order XVI rule 5 (d)** of the **Civil Procedure Rules** sought to have the Plaintiff's suit dismissed for want of prosecution. The grounds for the application are that the suit was last heard on 30th July 2007 and that since then the Plaintiff has failed to set down the suit for hearing and has lost interest in prosecuting the suit.

The 1st Defendant has sworn an affidavit in support of the application. The affidavit gives a background of the case. In the affidavit, the 1st Defendant avers that the Plaintiff has caused the hearing of the case to be adjourned on three occasions. It is further averred that the Defendants will be prejudiced if suit is not dismissed as the witnesses' memories will fade and vital defence documents be lost.

The application is opposed. The replying affidavit in the matter has been sworn by the Advocate for the Plaintiff in this case. The Advocate gives a chronology of events and the various attempts made to have the case heard. The Advocate also deposes that he caused only one adjournment due to unavailability which was on 30th July 2007.

I have considered the application and the submissions of counsel, Mr. Wandago for the Applicants and Mr. Kibui for the Respondents.

The Applicants are asking this court to exercise its discretion in their favour and have this suit dismissed for lack of prosecution. The case of **IVITA vs. KYUMBU [1984] KLR 441** cited by the Applicants sets down the test to be applied in an application for dismissal of a suit for want of prosecution. Chesoni J, as he then was, held as follows:

“A defendant who has waived or acquiesced in delay is not entitled to a dismissal of the action for want of prosecution but mere inaction on the part of such defendant does not amount to a waiver or acquiescence.

The test applied by the courts is an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court."

Is the delay involved in this case prolonged and inexcusable? It is not disputed that the case was last in court on 30th July 2007, which was 10 months by the time the instant application was filed. For this court, I do not think that 10 months is a prolonged period of time as to lead to a finding that it is inordinate. However I do note that this case is very old, having been filed nine years ago. I also know as a fact that this court was giving priority hearing dates for old cases filed before 2000.

As to whether the delay is excusable, the reasons given for failing to fix the case for hearing is that by early in the year when the Plaintiff's Advocate sought for hearing dates he was informed that there were no dates available. That is a lame excuse as no explanation is offered for the failure to fix the case for hearing at the end of 2007 when the court diary was open.

The Plaintiff has also given another excuse why the court declined to give dates for the case. That reason was the fact that the parties had not done discovery and none had filed their list of documents.

I perused the file and confirmed that on 28th January 2004, the case was adjourned by Mutungi, J., for failure of the parties to complete discovery. Mr. Kibui submitted that the Plaintiff has since filed there list of documents but that the Defendants are yet to do so.

The Defendant/Applicant has urged that the Plaintiff has delayed to set down the suit for hearing and that it will suffer prejudice due to loss of witnesses' memory and documents. It is clear that the Defendant has acquiesced in the delay by failing to file its list of documents as ordered by the court in January, 2004. The prejudice the Defendants are claiming they will suffer due to the delay is not tenable as the case rests on documentary evidence which are unlikely to get lost as no evidence was adduced to establish this. The Defendants are clearly not entitled to a dismissal of the case on grounds they have themselves contributed to. Being a discretionary power the court must act judicially and consider all the circumstances of the case.

I have carefully considered this matter and taken into consideration all the circumstances of the case. I am fully satisfied that the delay involved in this case is not inordinate or prolonged. The excuse given by the Plaintiff for the delay was not convincing. However as the delay is not prolonged, the excuse given is of little consequence. I also find that the Defendants, who are the Applicants, have acquiesced in the delay and are therefore disentitled to a dismissal of the suit on the grounds given.

The Notice of Motion application dated 22nd May 2008 is dismissed with costs in the cause. The Plaintiff is ordered to set this case down for hearing within 90 days from the date of this ruling with leave to the Defendants to apply.

Dated at Nairobi, this 11th day of July, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

No appearance for Mr. Wandago for Applicants

Mr. Morara for Mr. Kibui for the Respondent

LESIT, J.

JUDGE