



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 157 of 1994**

**MOHAMED SHEIKH ABDULRAHIM AL-MADDY**

**Alias MOHAMED SHEIKH AL-MADDY .....  
.....PLAINTIFF**

**VERSUS**

**1. SHEIKH TAIB BAJABER**

**2. BREK SAID TAMIMI .....  
.....DEFENDANTS**

**RULING**

Sheikh Ali Taib Bajaber and Brek Said Tamimi, the defendant herein, took out a motion pursuant to the provisions of Order XVI rule 5 and 6 of the Civil Procedure rules in which they prayed for this suit to be dismissed for want of prosecution. The motion is dated 20<sup>th</sup> September 2004 and is supported by the affidavit of Francis Kyambia. When served, Mohamed Sheikh Abdrahim Al-Maddy alias Mohamed Sheikh Al-Maddy, the plaintiff herein resisted the motion by filing the replying affidavit he swore on 22<sup>nd</sup> July 2005.

When the motion came up for interpartes hearing, this court granted leave to the defendant to prosecute the application exparte when the plaintiff and his counsel failed to turn up despite having been served with a hearing notice.

It is the submission of the defendants that the plaintiff has since 14<sup>th</sup> December 2000, when suit was stood over generally failed to set down the suit for hearing. By then, 3½ years had lapsed. It is the averment of the applicant that the suit should be dismissed because its existence has caused and continues to cause prejudice and injustice to the defendants. Though the plaintiff and his counsel were absent in court during the interpartes hearing of the motion, the law enjoins me to consider the replying affidavit the plaintiff filed to opposed the motion. The plaintiff refuted the averment that this suit was last in court on 14<sup>th</sup> December 2000 and averred that it was last in court on 11<sup>th</sup> December 2001 when the firm of Khaminwa and Khaminwa was formally placed on record as appearing for the plaintiff. It is said that the aforesaid firm of advocates has tried on many occasions to secure a hearing date but in vain, It is also alleged that the delay in prosecuting the suit was that the parties were involved in negotiation for an out of court settlement of this suit and another suit before the Chief Magistrate's court. In short, the plaintiff is of the view that the delay is not deliberate.

I have considered the competing arguments presented to this court. Under Order XVI rule 5(d) of the Civil Procedure rules, if the suit is not fixed for hearing by the plaintiff or by the court within 3 months from the date when the suit was adjourned generally or removed from the cause list, the defendant is entitled to apply for it to be dismissed for want of prosecution. The court's power to dismiss for want of prosecution in such circumstances is expounded in passage contained in **Halsbury's Laws of England 4<sup>th</sup> Edition Vol.37 para 448 as follows:**

**“The power to dismiss an action for want of prosecution, without giving the plaintiff the opportunity to remedy his default, will not be exercise unless the court is satisfied.**

**(i) that the default has been intentional and contumelous or**

**(ii) that there has been prolonged or in-ordinate and in excusable delay on the part of the plaintiff or his lawyers and that such delay will give rise to substantial risk that it is not possible to have a fair trial on the issues in the action ...”**

The plaintiff has explained that he has attempted to fix the matter for hearing but that no dates were available from the registry. I have perused the record and it is clear that what was listed for hearing on 14<sup>th</sup> December 2000, was the Chamber Summons dated 14<sup>th</sup> April 1994. On that date, the parties did not turn up for the hearing hence the application was marked as stood over generally. On 11<sup>th</sup> December 2001, the firm of Khaminwa & Khaminwa came on record in place of Kimani Charagu & Co. for the plaintiff. It is clear from the record that the plaintiff has not listed the suit for hearing since its institution on 10<sup>th</sup> March 1994.

I find the explanation given to justify the delay to be untenable and inexcusable. Even assuming that the suit came up for hearing or for an application on 11<sup>th</sup> December 2001, still there is no explanation as to why the suit was not fixed for hearing between 11<sup>th</sup> December 2001 and 15<sup>th</sup> October 2004. When the motion was filed there is evidence that, the defendant informed this court on 13<sup>th</sup> July 2005 that there was no offer to settle the matter by the plaintiff. In the end I am convinced that this is one of those cases which this court must dismiss because the delay to prosecute the suit is unjustified and

in-excusable. I allow the motion as prayed. In sum, the suit is dismissed for want of prosecution with costs to the defendants.

Dated and delivered at Mombasa this 28<sup>th</sup> day of August 2008.

**J. K. SERGON**

**J U D G E**

In open court in the presence of Mr. Munyithya h/b for the firm of Taib & Taib for the Applicant