



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

Civil Suit 439 of 2006 (OS)

MACHROSE LIMITED.....PLAINTIFF

VERSUS

BANK OF BARODA LIMITED.....1ST DEFENDANT

TRISTAR PLANTATIONS LIMITED.....2ND DEFENDANT

RULING

The 1st Defendant has moved the court by a Motion dated 9th September, 2008 brought under Order XVI rule 5 (d) of the Civil Procedure Rules seeking to have the Plaintiff's suit dismissed for want of prosecution.

The ground for the application is that the Plaintiff has not taken any steps to prosecute this case since the 27th November, 2006 when the injunction application dated 4th August, 2006 was withdrawn with costs in the cause.

The application is further supported by the affidavit sworn by George Gitonga Murugara, Advocate for the 1st Respondent/Applicant, dated 9th September, 2008. The contents of the affidavit are considered. The affidavit sets out a brief background of the case. Mr. Gitonga avers that the suit was brought by way of Originating Summons on 4th August, 2006 simultaneously with an application for injunction. That the application was eventually withdrawn by both parties through a letter to the Deputy Registrar of this court dated 27th November, 2006. It is further averred that no further action or step has been taken since then to have the suit heard.

The 2nd Respondent's Advocate has supported this application by an affidavit sworn by Samuel Gakuru Advocate dated 23rd September, 2008.

The Plaintiff's director JULIUS MWANGI has filed a replying affidavit dated 21st October, 2008. I have considered the contents of this affidavit. The gist of the Plaintiff's affidavit is that the Plaintiff's previous advocate, Kigano & Associates was inactive, failed to give the Plaintiff guidance and kept the Plaintiff in the dark as to the development of the case. The Plaintiff avers that he has since changed the Advocate and is desirous of prosecuting his case and that he ought not to be made to suffer due to mistakes of his Advocate.

The principles a court has to apply in such an application of this nature were settled in the case of **IVITA V. KYUMBU [1984] KLR 441** where **Chesoni, J.** as he then was held:

“3. The test applied by the Courts in an application for 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 time. It is a matter in the discretion of the Court.”

The Applicant in this case has complained of delay in setting the suit down for hearing. From the record, this suit was last in court on 30th January, 2007 when Hon. Waweru, J. gave directions as to hearing. That is a delay of 1½ years. That delay is not inordinate in all the circumstances of the case. The onus is on the Respondent to give any excusable explanation for this delay. The explanation given lays blame on the Respondent’s previous Advocate for the lack of inertia in prosecuting the case. I think that given the length of the delay in issue and the Applicant’s act to change Advocate, the explanation given by the Applicant is acceptable and delay excusable.

I have considered that the Applicant has not claimed that it has or will suffer any prejudice due to the delay for which an award of costs cannot adequately compensate. The Applicant has not shown any real prejudice it has suffered or that justice will still not be done despite the delay.

The court has a wide discretion under Order XVI rule 5 of the Civil Procedure Rules to allow or decline an application to dismiss the suit. I am of the view that no prejudice will be suffered by the Applicants which an award of damages cannot compensate. I am also satisfied that despite the delay, justice can still be done in this case. I will therefore decline the application to dismiss the suit but make the following orders.

- 1. The Applicant’s application dated 9th September, 2008 be and is hereby dismissed.**
- 2. The Respondent shall pay thrown away costs to the Applicant assessed at kshs.20,000/- within 30 days from date herein from date of service with this order.**
- 3. The Respondent shall set this suit for hearing within 60 days from the date herein.**
- 4. In default of (2) and (3) above this suit shall automatically stand dismissed with costs.**

Dated at Nairobi this 28th day of November, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in open court:-

Mrs. Munyaka holding brief Ms. Babu for the Applicant

N/A for George Gitonga Murugara for 1st Respondent

N/A for Mr. Samuel Gakuru for 2nd Respondent

LESIIT, J.

JUDGE