



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO**

Civil Case 23 of 2008

SHAJANAND HARDWARE (K) LTDPLAINTIFF

VERSUS

KIRON WORKS (RONO) DEFENDANT

RULING

ON APPLICATION TO DISMISS SUIT FOR LACK OF PROSECUTION

I: Background

1. The subject of the main suit herein is that of contract for goods sold and delivered. The original Plaintiffs/respondent sued the defendant/applicant at the High Court of Kenya at Kisumu. The place of being sued was questioned which the plaintiffs conceded and parties had the matter transferred to the High Court of Kenya at Kericho for hearing.
2. The suit had been filed on 7th November, 2007 and transferred on 27th May, 2008. By 29th May, 2008 the defendant/applicant was notified of the availability of the file. For five months thereafter nothing occurred. No action had been taken by the plaintiffs/respondent.
3. By an application dated 13th November, 2008 the defendant/applicant prayed for this Court to dismiss the suit for lack of prosecution.

II: Application Notice of Motion 13th November, 2008

4. The defendant/applicant stated that the plaintiff/respondent was no longer interested in this matter and therefore the suit be dismissed for lack of prosecution.
5. In reply the advocate for the plaintiff/respondent stated that at the time of filing suit, documents relied on were misplaced and or missing in two of their offices namely Kisumu and Kericho. It therefore meant looking for them but this was compounded by the absence of staff who had since left its employment. Now they are ready and have complied with the prequisite of discoveries.

III: Opinion.

6. A suit should have never been filed without first verifying your facts and documents. It was indeed presumptions for the plaintiff/respondent to file suit before their documentation to prove their allegations

had been set.

7. In this situation the plaintiff/respondent state that they are now ready to proceed with the trial.

8. What should have actually occurred is that after the close of pleadings a notice under order 10 r 11a CPR is to be issued by the parties that they would rely on. The respondent/plaintiff who claims to rely on such documents required to first do so.

9. In fact I am unable to see any reply to the defence on this file.

10. The rules have further changed whereby, apart from supervising themselves on pretrial issues, the rules of August, 2008 require that the matter be mentioned once before a Hon. Judge, before hearing dates are taken.

11. Whereas I do agree that the Plaintiff/respondent has been lax in this matter, the application for dismissal should be made after the mention before the court on taking a hearing date.

12. I decline to make orders of dismissal but I will award costs to the defendant/applicant throw away Kshs. 5,000/=.

DATED this 17th day of December, 2008 at Kericho

M.A. ANG'AWA

JUDGE

Advocate

J.M. Maanuke instructed by M/S Bruce Odeny & Co. advocates

for the Plaintiff/respondent

M.L. Ombachi instructed by Ombachi & Co. advocates

for the defendant/applicant.