

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

Civil Case 14 2004

MADAN GOPAL SHARMA..... PLAINTIFF

VERSUS

RAJENDRA CHAGANLAL PATTNI.....DEFENDANT

RULING

The Notice of Motion herein dated 25/9/06, seeks dismissal of the suit herein for want of prosecution.

Supported by Philip Nyachoti's Affidavit, the application is on the grounds that the matter was last in court on 20/6/06 for the Plaintiff's application dated 21/9/04 and the Defendant's application dated 13/10/04 when it was stood over generally and the court ordered that fresh dates be fixed at the Registry.

On 20/6/06 Preliminary Objections were to be heard, but the matter did not proceed. Since then, avers the applicant, no action has been taken by the Plaintiff to prosecute the suit. When the Plaintiff sought to fix a hearing date on 31/10/06 for 3/11/06, this dismissal application had been filed – on 25/9/06, and no date was picked.

In opposition, the Respondent has given a chronology of events to explain the delay. Thus, the suit was filed on 12/1/04; on 21/9/04 the Respondent sought further particulars, on the defence, vide an application which was fixed for hearing in July, 2005, but did not proceed because applicant's counsel was reported sick. Another date was taken for 31/10/05, but again applicant's counsel was absent – at Milimani Commercial Courts. The application – seeking better particulars- did not take off even on 20/6/06, and without such particulars, discovery could not be completed, and hearing of the suit cannot take off.

To date, the particulars have not been provided to the Plaintiff, and instead of supplying the particulars the Defendants resorted to dismissal of the suit, while the application for better particulars is still before this court – Mugo, J.

My perusal of the pleadings and consideration of the submissions by both learned counsels – Mr. Ligunya and Mr. Khan, leads me to the following findings and conclusions.

While counsel for applicant/defendant admits that the application for better particulars on defence is still pending, and that discovery is thus not complete, he contends that such an explanation is not sufficient. I find that submission strange because, without the requested particulars, discovery cannot be completed, and without discovery, the suit is not ripe for hearing. That, in my view, is sufficient explanation by the Respondent/Plaintiff, of the delay in prosecuting the suit.

As this court has repeatedly held, delay is a factual matter, and no two cases are identical. Here, the delay in prosecuting the suit is all because of the Defendant/Applicant's failure to supply the better particulars on the defence sought by the Plaintiff.

Accordingly, I find and hold that there is no inordinate delay, and if there is, the blame cannot be placed at the door steps of the Plaintiff. If anything the delay is caused by the Defendant/Applicant's conduct.

On the basis of the above, I dismiss the application herein, with costs to the Respondent and against the applicant.

DATED and delivered in Nairobi, this 21st Day of February, 2007.

O.K. MUTUNGI

JUDGE