



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

Civil Suit 698 of 1994

JOHN MISOGA LWANGU & OTHERS PLAINTIFFS

V E R S U S

1. FORT PROPERTIES IMITED

2. MISTRY V. NARAN MULJI & COMPANY

3. HOUSING FINANCE CO. OF KENYA

4. SAVINGS & LOAN KENYA LTD.

5. MUNICIPAL COUNCIL OF MOMBASA. DEFENDANTS

RULING

Order 10 Rule 11A (1) obliges all parties to a suit to make discovery within one month after the pleadings are closed. The pleadings in this 1994 case were closed in January 1995.

When this case came up for hearing before me on 12th November 2003 it could not be heard as the parties had not made discovery. I directed that parties do make discovery before the next hearing date. Though some of the plaintiffs filed their list of documents on 2nd July 2005 the case could not be heard on the 7th September 2005 because the other parties had not made discovery. So that even if this suit were fixed for hearing again for that same reason it cannot heard.

In spite of three orders, the first one made by the Deputy Registrar on 31st July 1998, the second one by myself on 12th November 2003 and the last one by the Hon. Justice Mwera on 7th September 2005 the defendants have to date not made discovery. That notwithstanding they have separately applied under Order 16 Rule 5(d) (1) to have this suit dismissed for want of prosecution. In my view all those applications are an abuse of the process of court. If I wanted I would have resorted to Order 10 Rule 20 and struck out their defences. But I do not want to do that because the plaintiffs themselves have been indolent. I do not accept Mr. Asige's argument that I should confine myself to the period stated in the applications, which is since 12th November 2003. If I had found merit in the application I would have looked at the whole history of the case to see whether or not the plaintiff have been diligent in prosecuting his case.

Before a defendant is heard on an application for dismissal of a suit for want of prosecution he must show that he has put his house in order and that there is nothing from his end that can hinder the hearing of the case. As I have said even if this case were fixed for hearing today it could not still have been heard as the

defendants have not made discovery. The defendants' applications are hereby dismissed with no order as to costs. The plaintiffs having themselves been indolent they do not deserve the costs of the applications.

DATED and delivered this 25th day of May 2007.

D.K. MARAGA

JUDGE

25.5.2007

Before Maraga Judge

Mwakireti for plaintiff

Pandya for 1st and 2nd defendant

Swaleh for Archer & Wilcock.

Court clerk – Mitoto

Court – Ruling delivered in open court.

D.K. MARAGA

JUDGE

Mr. Swaleh - I apply for leave to appeal.

D. MARAGA

JUDGE

Court – Leave to appeal granted.

D. K. MARAGA

JUDGE