



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Suit 12 of 2004

PRAXEDES KHAYECHIA.....PLAINTIFF

V E R S U S

1. KENYA COMMERCIAL BANK

2. ATTORNEY GENERAL.....DEFENDANT

R U L I N G

The 1st Defendant, Kenya Commercial Bank Ltd., made an application on 9.10.2006 (dated 18/9/2006) seeking an order that the suit herein be dismissed for want of prosecution. The application was premised on *Order XVI Rules 5 of the Civil Procedure Rules and section 3A* of the Civil Procedure Act. In the two grounds stated by the 1st Defendant, the latter contended firstly that there had been inordinate delay on the part of the Plaintiff in prosecuting the suit which delay was prejudicial to the 1st Defendant's interests and secondly that the Plaintiff had shown lack of interest in the suit. The affidavit in support of the application was sworn on 18.9.2006 by one Gladys Biamah, a Senior Legal Officer of the 1st Defendant who averred that she was well versed with the matters in the suit and was competent and duly authorized to make the affidavit. The said affidavit showed, inter alia, that the suit last came up for hearing on 21.10.2004 when it was stood over generally and that since that time, no steps had been taken to prosecute it.

When the application came up for hearing on 12-3-2007, Miss Wanjeri, learned Counsel for the Plaintiff conceded service of the application on the Plaintiff. She submitted that the Plaintiff had failed to furnish her firm with instructions and that the firm lost contact with the Plaintiff in 2004. She sought adjournment so as to formally apply to withdraw. That application was declined on the ground that the Miss Wanjeri's firm had had ample time from the date of service on 9.10.2006 to withdraw if the advocates were getting no instructions from their client. Consequently, the application proceeded to hearing unopposed pursuant to Order L Rule 16 (3) as the Plaintiff had filed neither grounds of opposition nor a replying affidavit.

Mr. Masinde, learned Counsel for the 1st Defendant who argued the application, urged the court to grant the application as the Plaintiff had lost interest in the litigation and had taken no steps to prosecute it since 21st October, 2004 when the hearing was adjourned generally.

Order XVI Rule 5 of the Civil Procedure Rules states:-

“ 5. *If within 3 months after-*

(a)

(b)

(c)

(d) *the adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.”*

In the case of IVITA v. KYUMBU [1984] KLR 44 (by Chesoni, J., (as he then was), this court set the test to be applied in dismissal for want of prosecution thus:-

“The test applied by the courts in an application for the 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 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 available time. It is a matter in the discretion of the court.”

In the instant case, the delay was prolonged and the Plaintiff offered no excuse for it. The Plaintiff seemed to have lost interest in the case, and failed even to offer instructions to its advocates. This is a proper case for dismissal of the suit for want of prosecution. I find merit in the application and I allow it. The suit is hereby dismissed for want of prosecution. The Plaintiff shall pay the costs of the suit to the Defendants and the 1st Defendant shall be entitled in addition to the costs of the application.

Dated at Kakamega this 24th day of May, 2007

G. B. M. KARIUKI

J U D G E