

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

Civil Case 869 of 1997

ERUSTUS M. MUCHIRIPLAINTIFF

V E R S U S

TELEWORLD INDUSTRIES LTD1ST DEFENDANT

PARVEZ I. HOODA2ND DEFENDANT

ANWARALI MERALI3RD DEFENDANT

R U L I N G

This is an application (by notice of motion dated 16th December, 2005), for dismissal of the Plaintiff's suit for want of prosecution. It is brought under Order 16, rule 5(d) of the Civil Procedure Rules (the Rules). Under that rule, if within three months after 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. The Defendants have elected to apply for dismissal of the suit, as it is their right to so to do. The application is supported by the affidavit of the Defendants' advocate, RAJINDER BILLING. It gives a history of the suit.

The Plaintiff has opposed the application. The replying affidavit sworn by him on 10th March, 2006 and filed on the same date sets out the following grounds of appeal:-

1. That the Plaintiff has not been sleeping and the suit has previously been set down for hearing but could not proceed.
2. That in May 2005 the Plaintiff was transferred to Mombasa, and this occasioned some delay.
3. That the delay has not been deliberate or inordinate.
4. That the Plaintiff has a strong case against the Defendants and should be given an opportunity to prosecute it.
5. That the Defendants are determined to have the Plaintiff's suit dismissed on technicalities.

I have given due consideration to the submissions of the learned counsels appearing. No authorities were cited. I have also perused the court record. It is to be noted that the Defendants had brought a similar application before by chamber summons dated 6th June 2001. On 31st July 2001 the court (Kasanga Mulwa, J) refused the application upon finding that the Plaintiff had taken some active steps to ensure that the case is prosecuted. That application ought to have alerted the Plaintiff to the fact that the Defendants would not tolerate any undue delay in prosecuting the suit.

It is common ground that on 7th March, 2005 the suit was adjourned generally. It had come up for hearing but could not be heard as it was agreed that the Plaintiff's application by chamber summons dated

2nd March 2005 for leave to amend the plaint ought to be disposed of first. That application was filed, it will be noted, only a few days before the substantive suit was due to be heard.

The application has not been heard or otherwise disposed of so far. It was fixed for hearing on 15th June, 2006, 7th November, 2006 and 22nd February, 2007 but was not heard. On 15th June, 2006 no reasons appear on the record for adjourning the application. On 7th November, 2006 adjournment was by consent of the counsels. On 22nd February, 2007 the matter was adjourned because it was said that the Defendants' advocates had withdrawn from the record and a new firm of advocates appointed.

And then on 19th March, 2007 a deputy registrar of the court ordered that the present application for dismissal of the suit be heard before the one for leave to amend the plaint. This order is not recorded as a consent order, though both parties were represented before the deputy registrar. Notwithstanding this order, however, the consent of the parties of 7th March 2005 to the effect that the application for amendment of the plaint be heard first before the suit can be heard still stands. And the suit therefore cannot be heard until the said application is heard or otherwise disposed of. By the same reasoning, the suit cannot be dismissed for want of prosecution until the application for amendment of the plaint is disposed of.

In the circumstances, I must refuse this application. It is hereby dismissed. Parties will take a date for hearing of the chamber summons dated 2nd March 2005 without delay. They will bear their own costs of this present application. Orders accordingly.

DATED AT NAIROBI THIS 17TH DAY OF MAY 2007.

H. P. G. WAWERU

JUDGE