



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

Civil Case 61 of 2003

LONDON DISTILLERS (K) LTD.....PLAINTIFF

VERSUS

PHILIP KIPCHIRCHIR1ST DEFENDANT

SHAITANYA SEVAK2ND DEFENDANT

HAIL & COTTON DISTILLERS LTD.....3RD DEFENDANT

RULING

The application for my determination is the one amended and dated 5th March, 2007. It is under Order XVI Rule 5(a) of the Civil Procedure Rules. The application seeks that the plaintiff's suit as against the defendants be dismissed for want of prosecution. And that the costs of the suit and application be awarded to the defendants.

It is contended by the defendants that there has been inordinate delay by the plaintiff and its Advocates on record in prosecuting this case for over 3 years and 9 months since the close of pleadings. And that the plaintiff's apparent disinterest and delay in prosecuting this suit is inordinate and inexcusable, therefore the defendants should not be kept in indefinite abeyance by the plaintiff's reluctance in prosecuting its case.

The present suit was filed on 6th February, 2003 under certificate of urgency. The defendant through **Guram & Co.** Advocates entered appearance on 17th February, 2003. The defence in this matter was filed on 11th March, 2003. It is also clear that the last time this suit came up for hearing was on 10th November, 2005 for hearing of the application dated 3rd February, 2003. The plaintiff's Advocate sought and obtained an adjournment. The court condemned the plaintiff to pay court adjournment fees which to date has not been paid for reasons best known to the plaintiff.

Mr. Billing Advocate for the defendants submitted that the plaintiff or its Advocates have not taken any steps in order to bring the dispute to an end.

Order XVI Rule 5 states that;

"If, within three months after

- (1) **the close of pleadings or**
- (2) **the removal of the suit from the hearing list or**
- (3) **the adjournment of the suit generally, the plaintiff or the court of its own motion on notice to the parties, does not set the suit down for hearing, the defendant may either set the suit down for hearing or apply for its dismissal”.**

The Plaintiff has filed a replying affidavit through **Betty Laura Rashid** an Advocate of the High Court of Kenya. It is deponed that there is an application on record that has fixed for hearing on 19th June, 2007. And that the plaintiff should not be shut out without a hearing for that would be contrary to the interest of justice. The plaintiff also states that as soon as the application dated 3rd February, 2003 is disposed off, it will take a hearing date for the determination of the suit.

I have considered the application, the supporting affidavit and the affidavit in reply to the application. I agree the matter proceeded *ex parte* before me, due to the absence of the plaintiff's advocates. However, that notwithstanding, I have taken into consideration the explanation offered for the delay in the prosecution of the matter. The plaintiff says that there is an application dated 3rd February, 2003 which has been set down for hearing on 19th June, 2007. That application was set down for hearing on 23rd February, 2007, while the present application was filed in court on 12th January, 2007.

It is important to note that the application coming up for hearing on 19th June, 2007 was filed on 6th February, 2003 and it is an application for injunction. It is now 4 years and 5 months since the application for injunction was filed. However it still remains undetermined despite the fact that it was filed under certificate of urgency. Perhaps it is clear that if the plaintiff failed to prosecute its application for the last 4 years and 5 months, then it may take or require similar amount of time to prosecute its suit.

There is no explanation for the delay of 4 years, 5 months and it is incumbent upon the party in pursuit of a claim to conclude it within the shortest time possible. If the plaintiff has not taken any plausible or reasonable steps to conclude an interlocutory application, I think it would be impossible to expect it to conclude its suit within reasonable time. It is always the duty of the party in pursuit of a claim to bring the suit for trial and failure to discharge such a burden would mean disinterest in the finalization and determination of the dispute.

I think it is the onus of a party faced with an application for dismissal of its suit to show sufficient and/or credible evidence to enable the court to exercise its discretion in its favour. The plaintiff must take all the necessary steps at its disposal to achieve an expeditious disposal of its suit. The party who instigated the suit must not be accused of laxity in the prosecution of the suit. It is in the interest of justice to bring the claim of the plaintiff to a speedy conclusion. And it can only be speedily concluded if the plaintiff takes the necessary steps of bringing the claim before the eyes of the court.

In my view delay is affront to the administration of justice, delay is something to be deplored, delay is repugnant to justice, delay spoils the image of the judiciary, delay forments public outcry against the judiciary, delay creates disharmony between the consumers of justice and the courts. Delay is a disguised disinterest in the disposal of the suit. Delay creates desolate and despair in the minds of the party affected by the delay. It is a despicable attempt to enslave a party to an endless contest. That contest must come to an end if the instigator is unwilling to end it. In this case the plaintiff is like a despotic ruler hanging over the head of the defendants.

For the reasons stated and looking at the matter as a whole, it is manifestly clear that the plaintiff is disinterested in the finalization of the dispute. The reasons offered for the delay are insufficient and inadequate to measure the degree of reasonableness. It is below the expectation of this court. I have no answer for the inordinate and inexcusable delay than to end the journey which was falsely started in the year 2003.

Order: **The application is allowed and the suit of the plaintiff is dismissed with costs.**

Dated and delivered at Nairobi this 10th day of May, 2007.

M. A. WARSAME

JUDGE