

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

Civil Case 828 of 1995

GUARDIAN CHEMISTS LTD.....PLAINTIFF

VERSUS

MOWLEM CONSTRUCTION CO. LTD.....DEFENDANT

RULING

Before me is an application by the Defendant under Order XVI Rule 5 of the Civil Procedure Rules seeking an order that the suit against him be dismissed with costs for want of prosecution as well as the costs of this application. The application is based on the ground that there has been inordinate delay. In support of the application Allan George Kamau has sworn an affidavit giving grounds for the application.

Rule 5 of Order XVI provides as follows:-

“If within 3 months after (a) the close of pleadings; or (b).. (c) the removal of the suit from the hearing list; or (d) the adjournment of the suit generally, the Plaintiff does not set down the suit for hearing, the Defendant may either set down the suit for hearing or apply for its dismissal.”

Mr. Maina for the Defendant, submits that it is a proper case which the Plaintiff’s action should be dismissed under Rule 5. The Plaintiff’s Cause of Action is based on an alleged motor accident which took place on or about the 13th September 1994 at about 6.45 a.m. whereby the Plaintiff’s motor vehicle registration NO.KAA 374L violently collided with the Defendant’s motor vehicle registration NO.KGV 832 along Chiromo Museum Road as a result of which the Plaintiff’s said motor vehicle was extensively damaged and he incurred Shs.606,943/= costs of repair. The Plaintiff filed this suit on 15th March 1995 and the Defendant on being served with the summons filed defence on 3rd April 1995.

The Plaintiff took no steps to set the suit down for hearing until 23rd February 1998 when it was last set for full hearing but it was taken out of the cause list on the court’s own motion. Thereafter the Plaintiff never took any steps to set the suit down for hearing until 4th March 2002 when the Defendant brought a Notice of Motion to have the Plaintiff’s suit dismissed for want of prosecution but the application was not allowed and the Plaintiff was given a chance to fix the suit down for hearing but the Plaintiff took no steps as directed by the court.

This Notice of Motion was filed on 22nd February 2007 but the Plaintiff though served did not file any papers in opposition to the application.

The Defendant alleges inordinate delay on the part of the Plaintiff in bringing his suit to a speedy conclusion.

The question of delays in bringing civil actions to speedy conclusions was exhaustively considered by the Court of Appeal in **England in Allen Vs. Sir Alfred MC Alpine & Sons** where it was held that when the delay is prolonged and inexcusable, and is such as to do grave injustice to the one side or the other or both, the court may in its discretion dismiss the action straight away. On the other hand, this power should not be exercised unless the court is satisfied:

(1) that the default has been intentional and contumelious eg conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or is such as is likely to cause or to have caused serious prejudice to the Defendants either between themselves and the Plaintiff or between each other or between them and a Third Party.

In the instant suit the Cause of Action arose on 13th September 1994. The Plaintiff has never taken steps to set the suit down for hearing. At one point the Defendant had applied for the suit to be dismissed for want of prosecution but the application was refused and the Plaintiff was given a chance to take steps but to date since 4th March 2002 he has not taken any steps to set the suit down for hearing. He was served with this application but did not file any papers in opposition. The delay of 14 years is excessive and the Plaintiff has been guilty of inordinate and inexcusable delay.

In the case of **Fitzpatrick Vs. Batger & Co. Ltd [1967] 2 ALL ER 566** Lord Denning said at page 658:

“..... it is the duty of the Plaintiff’s adviser to get on with the case. Public Policy demands that the business of the courts should be conducted with expedition.”

There being no explanation for delay there is no way the court can exercise its discretion otherwise.

Accordingly I allow the application and dismiss the suit for want of prosecution. I award the Defendant costs of the suit and of this application.

Dated and delivered at Nairobi this 19th day of July 2007.

J.L.A. OSIEMO

JUDGE