

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

Civil Case 251 of 1991

SUNFLAG TEXTILES & KNITWEAR MILLS LTD.....1ST PLAINTIFF

HARRISON MUTURI KINUTHIA.....2ND PLAINTIFF

VERSUS

JOHNSTONE ETALE LIJUTSA.....DEFENDANT

RULING

By this Notice of Motion dated 8th July 2005 and expressed to be brought under Order XVI Rule 5 and Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act the Defendant seeks orders that the Plaintiff's suit be dismissed for want of prosecution. The application is based on the grounds that the Plaintiff has not taken any steps to set the suit down for hearing for over 4 years; that pendency of this matter has greatly prejudiced the Defendant; and that litigation must come to an end. The application is also supported by an affidavit sworn by Munge Murage on 8th July 2005 in which he avers that the suit was filed on 21st January 1991 and the Defendant filed his defence on 22nd March 1991; that the suit was last fixed for hearing on 28th November 2002 when it did not proceed as the same was not confirmed for hearing at the call over, and that it is now over 4 years since the suit was filed in court and the Plaintiff has not taken any steps to set it down for hearing.

The application is opposed by the Plaintiff on the grounds that the delay was due to attempts by the parties to settle the suit out of court. There were proposals made and there was a likelihood of settlement out of court.

Mr. Mungai counsel for the Plaintiff submitted that the parties appeared before Ojwang J and counsel for the Defendant asked to be given time to consult his client about the settlement proposals but did not get back to him in respect of those settlement proposals. He further submitted that discovery was not made because they expected settlement.

Mr. Gikangi counsel for the Defendant conceded that proposals for settlement were made but this was done after this application for dismissal of the suit for want of prosecution had been filed. This suit was filed in court about 17 years ago and obviously this is an inordinate delay.

But the power to dismiss an action for want of prosecution without giving the Plaintiff the opportunity to remedy his fault will not be exercised unless the court is satisfied that there has been inordinate and inexcusable delay on the part of the Plaintiff.

In the instant suit the delay is excusable on the ground that there were proposals for settlement out of court and which is conceded by counsel for the Defendant.

Accordingly, I decline to dismiss the Plaintiff's suit for want of prosecution and order that the parties do take an early date in the registry for a mention before a Judge to record their settlement proposals.

Costs of this application will be costs in the suit.

Dated and delivered at Nairobi this 18th day of July 2007.

J.L.A. OSIEMO

JUDGE