



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 1129 of 2001**

**TRUST BANK LIMITED..... PLAINTIFF**

**VERSUS**

**ZAVERCHAND RAMJI SHAH.....1<sup>ST</sup> DEFENDANT**

**MAHENDRA RAMJI SHAH.....2<sup>ND</sup> DEFENDANT**

**PARIN KARAMSHI SHAH .....3<sup>RD</sup> DEFENDANT**

**PRINCELY HOUSE LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

By their Motion on Notice filed on 26.3.2007 the defendants seek an order that the order made on 22.11.2006 by Mary Kasango J be reviewed and in the alternative the entire suit be dismissed for want of prosecution. The application is expressed to be brought under the provisions of Order XLIV Rule 1 Order XV1 Rule 6 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act. There three grounds on the face of the application expressed as follows:-

- (i) That there is an apparent error or mistake on the face of the record.**
- (ii) That there is sufficient cause.**
- (iii) No action has been taken by the plaintiff since 2001 towards the prosecution of this suit.**

The application is supported by an affidavit sworn by the 1<sup>st</sup> defendant who states that he is authorized to swear the same by the co-defendants. In the affidavit it is deponed that the defendants instructed their advocates to raise a preliminary objection to the plaintiff’s suit on the basis of grounds set out in their notice dated 17.2.2005. It is also deponed that the plaintiff resisted the said objection on the basis of certain documents served upon their advocates. It is then deponed that their objection was overruled in error hence their prayer for review. In the penultimate paragraph of the said affidavit, it is deponed that since 2001 the plaintiff has taken no action in the suit hence the prayer for dismissal for want of prosecution.

The application is opposed and there is a replying affidavit sworn by Vincent Chokaa counsel for the plaintiff. In the affidavit, the advocate takes issue with the supporting affidavit for having been drawn by a firm of advocates not on record. Mr. Chokaa further swears that there is no error or mistake apparent in Mary Kasango J’s ruling which requires review. With respect to the prayer for dismissal for want of prosecution, counsel depones that this case had come up for hearing on 2.11.2006 when the defendants

took up the said preliminary objection. In the premises, only 4 months delay is involved. In any event, so the plaintiff contends the defendants advocates were on 29.1.2007 invited to fix the case for hearing and the case is indeed fixed for hearing on 13.12.2007. In the premises according to the plaintiff, the suit cannot be dismissed for want of prosecution.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. Order XLIV Rule 1(1) of the Civil Procedure Rules reads as follows:-

**“1. (1) Any person considering himself aggrieved –**

**(a) by a decree or order from which no appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed,**

**and who from the discovery of new and important matter or evidence which, after the exercise of due diligence by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

The applicants contend that there is an error or mistake apparent on the face of the record. The mistake or error is alleged to be in the following remarks of the Learned Judge:

**“The question that the court would ask itself is whether this case falls within Schedule A or B mentioned in its order. This court finds that it cannot rule out the possibility that this case could be amongst the above schedules. Accordingly, the court is unable to uphold the defendants’ preliminary objection with regard to Section 228.”**

The defendants argue that the Learned Judge overlooked – Schedules A and B attached to the defendants’ list of documents. How can that be when the Learned Judge expressly addressed the issue in the remarks alleged to contain the mistake or error? It cannot be overemphasized that the Learned Judge was dealing with a Preliminary Objection and no doubt had in her mind the guidelines given by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Ltd – vs – West End Distributors Ltd [1969] EA 966**. It is illustrative that besides stating that she was unable to uphold the preliminary objection with regard to Section 228 she added that it was important to also note that the court did grant the firm of Chokaa & Company advocates the right to represent the plaintiff in various matters.

In my view, the defendants have not satisfied me that there is a mistake or error apparent on the face of the ruling of Mary Kasango J. I have detected no other sufficient reason to warrant review of the said order.

On the defendant’s application for dismissal of this suit under Order XVI of the Civil Procedure Rules I have found as follows. On 24.11.2004, the advocates for the plaintiff were given a hearing date of this case. That was on 25.4.2005. The case was listed before me and counsel for the plaintiff indicated that the case was ready for hearing. Counsel for the defendants on his part indicated that he had filed a Preliminary Objection and was ready to argue the same. On my part, I noted that the case was not ready for hearing as issues had not been framed. I directed that the same be framed within 30 days and thereafter a hearing date be given for arguments on the defendant’s preliminary objection. The preliminary objection was canvassed before Mary Kasango J on 2.11.2006 culminating in the ruling now sought to be reviewed. That ruling was delivered on 22.11.2006. The record shows that on 5.12.2006 on the plaintiff’s Advocate’s application the case was fixed for hearing on 29.1.2007. Come that date counsel for the defendants applied for adjournment on the ground that his client was out of the country and intimated that the parties wished to explore out of court settlement. The defendants were in fact

condemned in the costs of adjournment. The record shows that on 6.2.2007 the case was by consent fixed for hearing on 13.12.2007.

In these circumstances, I fail to see how the order of dismissal sought by the defendants can advance the course of justice when the plaintiff has clearly demonstrated a desire to move on with its case in my view without undue delay. For those reasons, I will refuse the application. It is dismissed with costs.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2007.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:-**

Njagi holding brief for Mugambi Imanyara for the applicant.

**F. AZANGALALA**

**JUDGE**

**27/9/07**