



REPUBLIC OF KENYA

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

Civil Case 359 of 2000

IVESCO ASSURANCE CO. LTD.....PLAINTIFF

VERSUS

MAYMUNA KASSIM.....1ST DEFENDANT

ISMAIL MAALIM ALI T/A BLACK SEE PETROLEUM CO.....2ND DEFENDANT

R U L I N G

This is an application by the defendants brought under Order XVI R 5 of the Civil Procedure rules seeking orders that the plaintiff's suit be dismissed for want of prosecution. It also seeks costs of this application as well as costs for the entire suit.

The application is based on the grounds that there has been inordinate delay in setting this suit down for hearing.

The application is also supported by an affidavit sworn by the applicant in which he avers that the suit was filed on 22nd February 2000 and defence was filed on 17th April 2000. The pleadings closed in May 2000 and the matter was last in court on 30th January 2002 when it was taken out by consent and stood over generally. Since then the plaintiff has failed, ignored and or refused to take any steps to have the matter set down for hearing.

Mr. Mbugua counsel for the defendants submitted that this is a fit case for dismissal for want of prosecution. The plaintiff was served with this application but did not file any papers in opposition to the same nor did he attend these proceedings.

A consideration of the principles to be applied in deciding whether or not a suit ought to be dismissed for want of prosecution were stated in the case of *Allen v. Sir Alfred McAlpine and Sons* 1968 All ER 307. It must be shown that:

- (a) the delay is inordinate
- (b) the inordinate delay is inexcusable or
- (c) the defendant is likely to be prejudiced.

Delay is a matter of fact to be decided on the circumstances of each case. Where the reason for delay is offered, the court should be lenient and allow the plaintiff an opportunity to have his case decided on

merit.

In the instant case the Plaintiff was served with the application but did not file any papers in opposition nor has he offered any reason for the delay.

That being the case, I have no option but to exercise my discretion in favour of the defendant and dismiss Plaintiff's suit for want of prosecution and it is so ordered.

The defendants will also have costs of this application as well as the entire suit.

Dated and delivered at Nairobi this 28th day of November 2007.

J. L. A. OSIEMO

JUDGE