

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

Civil Suit 342 of 2001

APOLLO INSURANCE COMPANY LTD.....PLAINTIFF

VERSUS

TELEWORLD INDUSTRIES LIMITED..... DEFENDANT

RULING

The application is a Notice of Motion dated 13th August, 2007 brought under Order XVI rule 5 of Civil Procedure Rules and Section 3A of Civil Procedure Act. It seeks to have the suit dismissed for want of prosecution, and for costs. Only one ground is cited as the basis for the application which is that the Plaintiff has failed and/or neglected to take steps to prosecute the suit for the last 3 years.

The Defendant's Advocate has sworn affidavit in support of the application in which he summarizes the history of this suit since it was filed on 1st March, 2001. The application is opposed. The Respondent's Advocate has sworn a replying affidavit in which he explains the delay that has occurred since the matter was last in court on 27th September, 2004.

The power to dismiss a suit for want of prosecution is discretionary and one which should not be exercised unless it is shown that the delay is prolonged and inexcusable and that the Defendant will suffer prejudice by reason of the delay. Mr. Sevany for the Applicant contends that the Plaintiff/Respondent has delayed in setting the suit down for hearing over a period of three years. Mr. Khanna for the Respondent on his part lays blame on Mr. Sevany arguing that on 27th September, 2004 **Kasango, J** stood over the case generally to enable the parties to agree on documents. Mr. Khanna submitted that while on his part he sent Mr. Sevany his documents immediately after the court order, none had been forthcoming from Mr. Sevany, or any response either way received from him despite reminders to do so.

I have considered both submissions by Counsel. For sure there has been some delay in having this matter set down for hearing. As to who is to blame, each party points an accusing finger on the other, and each in my view is right. It is no excuse that the Respondent stayed put waiting for documents for three years. That is unreasonable. If Mr. Khanna was serious he could have moved the court to order the Applicant's Advocate to provide it's list of documents or have the defence struck out, if it came to that.

As for the Applicant, I do find that in keeping quiet and failing to respond to Mr. Khanna's request for documents, Mr. Sevany acquiesced in the delay in having the suit set down for hearing. A Defendant who has acquiesced in delaying the matter is not entitled to a dismissal of the action for want of prosecution. See **IVITA VS KYUMBU [1984] KLR 441** and **ALLEN VS SIR ALFRED MCALPINE & SONS [1968]1 ALL ER 543**.

Having come to this conclusion I find that the Defendants application to dismiss the suit for want of prosecution is unmerited and the same is dismissed. I make no orders as to costs. I do however order that the Plaintiff should set down the suit for hearing on priority in any event within 30 days from date herein.

Dated at Nairobi this 16th day of November, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

Kavungu holding brief Sevany for Applicant

Mr. Khanna for Respondent

LESITT, J.

JUDGE