



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA 3

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 215 of 2003

CMC AVIATION LTD.....PLAINTIFF

VERSUS

YUNUS MUNSHI T/A BUSINESS AVIATION.....1ST DEFENDANT

BUSINESS AVIATION2ND DEFENDANT

RULING

The application is a Notice of Motion dated 23rd March, 2007. It has been brought by the Defendant under Order XVI rule 5A and Order L rule 1 of Civil Procedure Rules. It seeks to have the suit dismissed for want of prosecution and for costs of the application and of the entire suit.

There are five grounds in support of the application:

- 1. THAT the plaint herein was filed on 22nd April, 2003 and an appearance thereto and defence were filed on 28th June, 2006.**
- 2. THAT no pleadings were filed after the defence and consequently pleadings were closed.**
- 3. THAT more than 3 months have passed ever since the close of pleadings.**
- 4. THAT the Plaintiff has lost interest in this suit.**
- 5. It is in the interest of justice to have this matter dismissed.**

There is an affidavit sworn by **YUNIS MUNSHI**, the Defendant and a Director of Business Aviation SPRL Kinshasa, sworn on behalf of the Defendant himself and the Company named in the affidavit.

That affidavit denies that the deponent trades in the name of **BUSINESS AVIATION**. It also depones that earlier orders of the Court which a warrant for his arrest and the arrest of an aircraft owned by **BUSINESS AVIATION SPRL KINSHASHA** was issued, was lifted after he applied for the setting aside of the order. The deponent states that since the order was set aside on 30th May, 2003 no further action has been taken by the Respondent except filing an appeal challenging the Court's ruling.

The application was opposed. The Respondent has filed a replying affidavit sworn by **ADI M. DASTUR**, the General Manager of the Plaintiff Company. In the affidavit, it is deponed that the

Defendants have, since the suit was filed for a debt of US\$56,647, paid in part US\$10000. The deponent annexes various correspondences and admissions by the Defendants. The deponent depones further that the suit arises out of professional services rendered by the Plaintiff to the Defendant's Aircraft 9Q-CAY. Mr. Adi depones that the said aircraft was arrested and detained in Moi International Airport, following a successful application by the Plaintiff. He depones further that the Court later lifted the arrest and released the aircraft and that consequently the Plaintiff filed an appeal which is still pending.

For the purposes of this application, Mr. Kingatta for the Applicant's submitted that the pleadings in the case closed last year and that no action to set the suit down for hearing has been made.

Mr. Gitao on the other hand submitted that it could not be argued that the pleading had closed due to the unresolved issue of the proper party to sue. Mr. Gitao submitted that in light of the averment by **YUNUS MUNSHI**, that he was stranger to the claim in the plaint, and that he did not operate any business by name of **BUSINESS AVIATION**, the pleadings cannot be regarded to be closed.

The issue of the Defendants being or not being the proper party is not for this court to decide. In regard to the present application, the powers of the court to dismiss a suit for want of prosecution are discretionary. The principles to be considered are very clearly set out in the celebrated case of **IVITA VS KYUMBU [1984] KLR 441**. The Applicant must show that the delay in setting the suit down for hearing is prolonged, inordinate and inexcusable. In that regard, Mr. Kangata argued that the matter was last in Court on 2nd October, 2006. That was eight months before the current application was filed. Is that period inordinate and inexcusable?

Mr. Gitao has submitted that the Plaintiff has experienced problems pursuing the Defendants, which Mr. Kangata alluded to in his own submissions. Since both parties admit that the Plaintiff has had difficulty serving the Defendants. I find that the Plaintiff has an explanation for the delay which, in the unique circumstances of this case, is excusable.

The Defendant/Applicant to an application of this nature must prove that justice cannot be done as a result of the delay. The Applicant should show what prejudice the delay is likely to cause them. Quite apart from demonstrating that the Respondent's attempts at serving the Defendant(s) were slow and far in between, the Applicant has not alleged that it suffers or continues to suffer any prejudice due to the Plaintiff's failure to take steps to set the suit down for hearing. In the circumstances, no prejudice is alluded to and none is evident from the pleadings and annexures before me. I find that the application is without merit and is dismissed with no order as to costs.

The Plaintiff should take steps to set the suit down for hearing within 30 days from today's date.

Dated at Nairobi this 9th day of November, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

N/A for Applicant

Mr. Kimende for Mr. Gitao for Plaintiff.

LESIIT, J.

JUDGE