REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 401 OF 2002

MILLY GRAIN MILLERS LTD…….....……PLAINTIFF

VERSUS

EL SAFA KENYA LTD…….....…DEFENDANT

RULING

By its Chamber Summons dated 15th December 2005 the defendant seeks under Order 6 Rule 13(d) the striking out of this suit for being an abuse of the process of court. In the alternative it seeks under Order 16 Rules 5(d) and 16 the dismissal of this suit for want of prosecution. In support of the application Bilal Chaundry, the General Manager of the defendant swore an affidavit and deposed that this suit is mainly based on the allegation that the defendant passed of its goods as those of the plaintiff, that prior to the filing of this suit the defendant had applied for the registration of Trade Mark in dispute to which the plaintiff objected, that after considering the defendant's application and the plaintiff's objection the Registrar of Trade Marks registered the Trade Mark in favour of the defendant, that the plaintiffs claim in this suit is therefore spent and overtaken by events and that the pendency of this suit flies in the face of the process of court and should be struck out. That in the alternative this suit should be dismissed for want of prosecution as the plaintiff has not taken any action since 18th September 2004 when the case was last adjourned to have it heard.

Mr. Adhoch holding brief for Mr. Madhani for the defendant argued the applications along the facts deposed to in the supporting affidavit as summarized above.

In response Mohamed Rashid, a director of the plaintiff company swore along replying affidavit in which he deponed that if anything it is the defendant's present application which is an abuse of the process of court, that the registration of the Trade Mark "SAFI" in favour of the defendant does not make this suit an abuse of the process of court as the claim is not on infringement of a trade mark but on passing off the defendant's goods as those of the plaintiff, that at any rate that registration was illegally and irregularly obtained and that the plaintiff is challenging it. Regarding delay he deponed that the same was partly attributed to the defendant by its application for amendment, the attempts the parties made to settle the matter and the inavailability of dates. Mr. Okongo counsel for the plaintiff also argued the matter along those facts.

As already stated the main prayer in this application is to strike out the suit under Order 6 Rule 13(d) for being an abuse of the process of court. Order 6 of the Civil Procedure Rules deals with pleadings generally. The power under Rule 15(d) is therefore confined to cases where the abuse of the process of court is manifest from the pleadings. For instance it is an abuse of the process of the court and contrary to justice and public policy for a party to relegate the same issue which, as may appear from the pleadings, has already been tried and decided against him. Frivolous and vexation proceedings may also amount to an abuse of the process of court especially where the proceedings are absolutely groundless. In such cases the court has power to strike out such proceeding and prevent the time of the public and the court from being wasted.

The court has, however, never to lose sight of the fact that the power to strike out pleadings under Order 6 Rule 13 generally is to be sparingly exercised. Pleadings are to be struck out in the clearest of the cases

where it is clear to the court that they have no change of succeeding even with an amendment – **D. T. Dobie & Company (Kenya) Ltd – Vs – Muchina (1982) KLR 1**. In this case it is not manifest from the pleadings that the plaintiffs claim is an abuse of the process of the court. The defendant before making this application should have amended its defence and shown how the registration of the Trade Mark "Safi" makes the plaintiff's claim an abuse of the process of court. I agree with Mr. Okongo that the plaintiff's claim in this suit is based on the allegation that the defendant passed of its goods as those of the plaintiff and not on infringement of a trademark.

It has also not been shown that the registration of the Trade Mark in favour of the defendant makes the plaintiff's claim totally untenable. In the circumstances the defendant's main prayer in the application comes a cropper.

The alternative pray is for the dismissal of the suit for want of prosecution. This is based on the all time saying, which will never wear out however often said, that justice delayed is justice denied.

The overriding consideration in a pray to strike out a suit for want of prosecution is whether or not justice can still be done despite the delay. Where for instance the defendant satisfied the court that as a result of the delay he has lost some important documents he intended to rely on or his witnesses have died or going out of the jurisdiction of the court and their attendance cannot be secured easily and cheaply the suit will be struck out. It will also be struck out where it is demonstrated to the satisfaction of the court that the delay is inordinate and inexcusable. In the words of Lord Deming in **Allen – Vs – Sir Afred McAlphine & Sons Ltd [1968] 1 ALL ER 543:**

"The principle on which we go is clear: When the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away."

In this case it has not been demonstrated to the satisfaction of the court that justice cannot still be done despite the delay. It has also not been shown that the delay is inexcusable. The plaintiff has in the replying affidavit shown that most of the delay has been due to factors beyond its control.

For these reasons I dismiss this application with no order as to costs.

DATED and delivered this 7th April 2006.

D. K. MARAGA

JUDGE