



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 1075 of 2002**

**ISIAH IKHONI AKHAULE ..... PLAINTIFF**

**VERSUS**

**ARADON & COMPANY ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL INDUSTRIAL CREDIT BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

This is an application by notice of motion dated 18<sup>th</sup> January 2006 by the 2<sup>nd</sup> Defendant for an order that the Plaintiff's suit as against it be dismissed for want of prosecution. It is brought under Order XV1, rule 5 (a) of the Civil Procedure Rules. Under that rule, if within three months after the close of pleadings the plaintiff, or the court on its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal. The 2<sup>nd</sup> Defendant has elected the latter option, as it was entitled to do. There is a supporting affidavit sworn by its learned counsel.

The Plaintiff has opposed the application upon the grounds set out in the replying affidavit sworn by him on 10<sup>th</sup> February 2006 and filed in court on 1<sup>st</sup> March 2006. Those grounds can be summarized as follows:

- (i) *The Plaintiff's main witness, who happens to be his ex-wife and who lives in Japan, is either unwilling or reluctant to attend court to testify.*
- (ii) *That the Plaintiff is in financial difficulty and thus unable to cater for his witness's travel from Japan and accommodation in Kenya as demanded by her.*
- (iii) *That there was no delay prior to April 2005 in setting down the suit for hearing.*
- (iv) *That the Plaintiff is keen and eager to prosecute the suit.*
- (v) *That if the suit is dismissed at this stage the Plaintiff will suffer irreparably.*

I have considered the submissions of the learned counsels appearing. It is common ground that pleadings closed on or about 16<sup>th</sup> October 2002 because defence was served on 2<sup>nd</sup> October 2002, and there was no reply to the defence filed. Order VI rule 11 refers. A perusal of the court record shows that there was an application for interlocutory injunction by chamber summons dated 18<sup>th</sup> September 2002 filed together with the plaint. I agree with learned counsel for the Plaintiff that it was necessary for that application to be heard and disposed of first before the suit could be set down for hearing. The application was heard between 16<sup>th</sup> October 2003 and 28<sup>th</sup> April 2004 before Mutungi, J. Ruling was eventually delivered on 15<sup>th</sup> April 2005. It is expected that the court record was with the Judge between 28<sup>th</sup> April 2004 and 15<sup>th</sup> April 2005. The Plaintiff could thus not, during that period, have been able to fix the case for hearing even if he had been so minded.

The Plaintiff concedes that there has been delay since April 2005 in setting down the case for hearing. He has given basically two reasons for failure to set down the case for hearing. One, that his main witness is either unwilling or reluctant to attend court from Japan and two, that in any event he is financially unable to make the necessary arrangements for that witness to travel to and stay in Kenya to testify. As correctly pointed out by the learned counsel for the 2<sup>nd</sup> Defendant, the court, , and for that matter the 2<sup>nd</sup> Defendant, cannot be expected to wait indefinitely in these circumstances for the Plaintiff's financial situation or persuasive abilities to improve. But having said that, the court will not lightly dismiss a plaintiff's suit for want of prosecution where the suit can be heard without further delay, or where the defendant will suffer no hardship, and where there has been no flagrant and culpable inactivity on the part of the plaintiff. See the case of VICTORY CONSTRUCTION COMPANY VS A. N. DUGGAL (1962) E.A. 697. The court has a discretion in the matter.

In the present case I consider that the suit can be heard without further delay if the Plaintiff is so minded. If this were to happen the 2<sup>nd</sup> Defendant will not have suffered hardship. I also consider that there has not been any flagrant or culpable inactivity on the part of the Plaintiff. I hold that the ends of justice in this case will be better served by giving the Plaintiff one more chance to prosecute

his case. I will therefore refuse the 2<sup>nd</sup> Defendant's application and order that it be and is hereby dismissed. In doing so I will order that the Plaintiff do take a positive step within twenty-one (21) days from delivery of this ruling to set down the suit for hearing, and also do pay the 2<sup>nd</sup> Defendant's costs of this application, hereby assessed at Kshs.15,000/00 within the same period of time. In default the 2<sup>nd</sup> Defendant may apply for a review of the order herein dismissing its application with a view to substituting therefor an order allowing the application and dismissing the Plaintiff's suit with costs. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF JUNE, 2006

H.P.G. WAWERU

JUDGE

DELIVERED THIS 23<sup>RD</sup> DAY OF JUNE, 2006.