



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

Civil Case 96 of 2004

HALIMA ABDINOOR HASSAN JELLE SHEIKH AHMED & ABDIKHEIR SHEIKH AHMED

(Suing as the Administrator of the Estate of

ABDULLAHI SHEIKH AHMED (DECEASED).....

.....PLAINTIFFS

VERSUS

CORPORATE INSURANCE CO. LTD.....

.....DEFENDANT

R U L I N G

The defendant has brought this application with a view to having the suit herein dismissed for want of prosecution.

The records show that the plaintiff was filed in court on 17th February 2004, and that the claim relates to an incident which occurred on 20th September 1999. After the defendant was served with the plaintiff and summons, it entered appearance on 27th May 2004. Thereafter, a defence was filed on 10th June 2004. But, on 16th June 2004 the defendant filed an amended defence.

The plaintiffs then filed a Reply to Amended Defence on 5th July 2004. Thereafter, the case went to sleep.

It was not until 13th July 2005 that the plaintiffs changed their advocates, so that the firm of Cheloti & Etole Advocates came on record, in place of the firm of Ahmednasir, Abdikadir & Co. Advocates. However, notwithstanding the change of advocates, there does not appear to have been any awakening in the proceedings.

On 22nd July 2005, the defendant brought an application for the dismissal of the suit, for want of prosecution. It is the defendant's contention that the plaintiffs have not given any sufficient explanation for their delay in prosecuting the suit. Indeed, as far the defendant was concerned, the change of advocates is not a sufficient explanation for the inactivity from 5th July 2004, upto 22nd July 2005 when the application for dismissal was filed.

The defendant also submits that even after this application was filed, the plaintiffs' new lawyers had also not taken any step in the proceedings. Therefore, the sum total of the period during which the

plaintiffs had not taken action was about 22 months, as at the date when the application was being prosecuted.

Another issue that was taken up by the defendant was the fact that the claim itself was for U.S. Dollars 1.2 million. Therefore, the claim is substantial. In the light of the magnitude of the claim, the defendant feels that the delay by the plaintiffs', in prosecuting the suit was prejudicial to the defendant.

However, the defendant goes on to emphasize that in an application for dismissal for want of prosecution, it was not for the defendant to demonstrate how it would be prejudiced; but for the plaintiff to explain the delay in prosecuting the case.

In response to the application, the plaintiff's counsel did say that they had only come on record on 13th July 2005. Therefore, she was unable to explain the reasons why the advocates who were previously on record had not taken steps to prosecute the suit more expeditiously.

In my view, the failure by Mrs Keya, advocate for the plaintiffs' providing an explanation for the state of inactivity between 5th July 2004 and 13th July 2005, is not helpful either to the plaintiffs or to the court. I believe that when faced with an application such as the one before me, it is the responsibility of the plaintiff and the advocate on record to tender an appropriate explanation for any delays in the prosecution of the case. If the plaintiff fails to provide a reasonable explanation for the delay, he risks having his suit dismissed. I have used the phrase; **"he risks having his suit dismissed"** advisedly, because delay by itself may not be an end in itself, in such applications. But I will revert to that later.

For now, the explanation tendered by the plaintiffs is that the parties herein did engage in negotiations between 22nd July 2005 and 29th September 2005. When the said negotiations failed, the plaintiffs forwarded to the defendant, a draft statement of the issues which, in the plaintiffs' view, ought to be determined by the trial court.

To my mind , although the two actions mentioned by the plaintiffs do not constitute steps in the proceedings, they are indicative of the fact that since July 2005, the plaintiffs were awake. And, for as long as the parties were involved in negotiations, it would have been imprudent for the plaintiffs to simultaneously take steps to prosecute the suit. Therefore, I hold the view that the explanation tendered by the plaintiffs herein is reasonable, for the period between July 2005 and May 2006.

But even though there was no explanation for the inaction between July 2004 and July 2005, I hold the considered view that the delay was not so inordinate or excessive as to result in a situation wherein there can no longer be a fair trial.

In the case of **KENYA NATIONAL CORPORATION LIMITED V VIDHYA SAGAR VOHORA & ANOTHER, HCCC No. 2967/97**. the HON KASANGO J. quoted with approval the following words from **NJUKI GACHUGU V GITHI [1977] KLR 108:-**

"..... the plaintiff's delay had been excessive, flagrant and inordinate; and as it had seriously prejudiced a fair trial of the action, it would be unfair and unjust to call upon the defendants to meet the plaintiff's claim which would accordingly, be struck out."

I wholly agree, that if a delay was such as described in the passage above, the suit ought to be struck out. It was for that reason that I had earlier said that it was not enough to simply look at the delay as an end in itself.

In **IVTA V KYUMBU [1984] KLR 441 at 449**, the HON. CHESONI J. (as he then was) explained the position eloquently when he expressed himself thus:-

"So the test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents,

and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff, before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

In this case the delay has not been so inordinate as to deprive the parties the ability to have a fair trial. Therefore, I decline to dismiss or strike out the suit herein.

However, the plaintiffs are directed to take all necessary action to complete the pre-trial procedures such as discovery of documents and the drafting of issues, within the next THIRTY (30) DAYS. The plaintiffs are to invite the defendant to fix trial dates within the next 45 days.

Meanwhile, the costs of the application shall be in the cause.

Although the defendant has been unsuccessful, it is through the application that the plaintiffs are being compelled to move swiftly, as they should have done in the first place.

It is so ordered.

Dated and Delivered at Nairobi this 6th day of July 2006.

FRED A. OCHIENG

JUDGE