



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 57 of 2003

DOSHI IRONMONGERS LIMITED

2. ASHOK LABSHANKER DOSHI PLAINTIFFS

- Versus -

1. HACO INDUSTRIES KENYA LIMITED

2. SOCIETE BIC DEFENDANTS

Coram: Before Hon. Justice L. Njagi

Mr. Okong'o for plaintiffs/respondents

Mr. Ndegwa for defendants/applicants

Court clerk – Kinyua

R U L I N G

By a notice of motion dated 9TH June, 2006, and expressed to be brought under order VI rules 5 and 6 of the Civil Procedure Rules, the defendants/applicants have moved the court for orders that the plaintiffs' suit be dismissed for want of prosecution, and that the costs of this application and of the suit be awarded to the plaintiff (sic).

The application is premised on four grounds, wit, that the plaintiffs have not set down the suit for hearing since the suit was filed; that a period of three months has elapsed since the close of the pleadings and the plaintiffs have not set down the suit for hearing;

that the plaintiffs have been indolent in prosecuting the suit; and that the continued abeyance of the suit is causing prejudice to the defendants. In support of the application is the affidavit of David Mwaura Maina, Advocate, sworn on 13th June, 2006.

The application is opposed. In his replying affidavit sworn on 20th June, 2006, Mr. Ashok Labshanker Doshi, the 2nd plaintiff herein, avers that the plaintiffs are anxious to prosecute the suit; that they have taken all formal steps to enable them to fix a hearing date, and that their desire to take an early date has been hampered by lack of hearing dates at the Mombasa Civil Registry. He accordingly prays that the application be dismissed with costs.

During the hearing of the application, Mr. Ndegwa appeared for the applicants while Mr. Okong'o appeared for the respondents. The thrust of Mr. Ndegwa's argument was that the pleadings closed 3¹/₂ years ago and a hearing date has not been taken. Such a delay is prolonged, inexcusable, and so prejudicial that no justice can be done to the defendants. He prayed that the suit be dismissed with costs.

Opposing the application, Mr. Okong'o for the plaintiffs/respondents relied on the replying affidavit and submitted that order VI rules 5 and 6 of the Civil Procedure Rules under which the application is expressed to be brought have no relevance to dismissal of suits, and that the same should have been brought under order XVI of the Rules. Secondly, there is no material produced before the court to show that the delay is prolonged and inordinate; but even if it was prolonged and inordinate, the plaintiffs have offered a good reason why they have been unable to get an early hearing date. He finally submitted that in the event that the court finds that there is inordinate delay, it should also find that justice can still be done in the matter. He accordingly urged the court to dismiss the application with costs.

In reply, Mr. Ndegwa referred to order L rule 12 and submitted that no objection is allowed to an application if the rule quoted is incorrect. He further submitted that the authority cited was not binding as it was a High Court decision, and that the delay was prolonged and inexcusable, and that with the death of Mboya, a member of the firm of advocates for the defendants, justice could not be done in the matter. He once again asked the court to dismiss the suit with costs.

Upon considering the application and the submissions of counsel, I find that there are two main issues to be determined. These are whether the application is properly before the court and, if so, whether the suit herein ought to be dismissed for want of prosecution. With regard to the first issue, it is instructive that this application is expressed to be brought under order VI rules 5 and 6 of the Civil Procedure Rules. Order VI deals with pleadings generally, and rules 5 and 6 deal with the time when any matter may be pleaded, and departure from one's pleading, respectively. The Order and rules upon which the application is predicated do not, therefore, invoke the jurisdiction of the court, and where the court's jurisdiction is not properly invoked, then the court is not properly seized of the matter before it.

Mr. Ndegwa for the applicants sought to rely on order L rule 12 and submitted that an objection should not be raised if the proper rule is not quoted. With respect, order L rule 12 does not support the sentiments expressed by Mr. Ndegwa. The rule states –

“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

A failure to comply with this rule means a failure or omission to state the order, rule or other statutory provision under or by virtue of which an application is made. It does not extend to a situation in which an applicant states the wrong order, rule, or other statutory provision as has happened in this instance. Therefore order L rule 12 does not come to Mr. Ndegwa's rescue. For invoking the wrong order and rules, the application before the court does not properly invoke the court's jurisdiction and it is improperly before the court and incompetent. I therefore uphold Mr. Okong'o's preliminary objection.

If the court's jurisdiction had been properly invoked, the next issue would be to consider whether the suit ought to be dismissed for want of prosecution. The test to be applied in applications for dismissal of suits for want of prosecution was clearly laid down by Lord Denning MR in ALLEN v. SIR ALFRED McALPINE & SONS LTD. [1968] 1 ALL ER 543 at page 547 in which he said –

“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 in its discretion may dismiss the action straight away ...”

The suit which is sought to be dismissed for want of prosecution was filed on 25th March, 2003. The defendants entered appearance on 23rd April, 2003, and filed their defence on 7th May, 2003. By a letter

dated 18th January, 2005, the plaintiffs' advocates invited the defendants' advocates to send the latter's representative to the Civil Registry on 27th January, 2005 with a view to listing the case for hearing. No date seems to have been taken on that date, and no other steps seem to have been taken to fix a date. It is on this basis that the application is premised.

By a Notice dated 3rd November, 2005 and issued by the Deputy Registrar to all advocates and litigants, the Deputy Registrar said –

“Take notice that I shall start giving full hearing dates for the first quarter of year 2006 on 22nd November 2005.

As we have two judges, the total available dates for the first quarter is 72. Each law firm will be allocated one (1) case.

You are therefore requested to present the case number to the Executive Officer High Court Civil Registry on or before Friday 11th November 2005 to give the Registry ample time to retrieve the files.”

This notice is clear evidence that getting early hearing dates at the Mombasa Civil Registry is not all that smooth. This is bound to contribute to delays in the hearing of matters and the plaintiffs have adequately exonerated themselves from total blame.

Even though there is delay in the fixing of a hearing date in the matter, in view of the practice at the Civil Registry, I think that the delay is excusable. And if it was not excusable, I think further that it is not yet too late to do justice in this matter. The applicant has not demonstrated how the death of Mr. Mboya alone will hinder the administration of justice in the matter. The overriding consideration is always whether or not justice can be done despite the delay. At this stage, even though there is some delay, I think that justice can still be done.

Having found that the application is incompetent and being of the persuasion that justice can still be done, in exercise of this court's discretion, the application is hereby dismissed with costs. The main suit should be set down for hearing at the earliest available time. It is so ordered.

Dated and delivered at Mombasa this 18th day of September, 2006.

L. NJAGI

JUDGE