REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 272 of 1996

AL AMIN AGENCY…….....……
PLAINTIFF

VERSUS

1. **SHARRIF OMAR**

2. **CREDIT FINANCE CORPORATION LTD….....**
….DEFENDANTS

RULING

This is an application by the first defendant under Order 16 Rule 5 of the Civil Procedure Rules for the dismissal of this suit for want of prosecution. It is mainly based on two grounds. The first ground is that since 14th October 2004 when the case last came up for hearing, a period of about two years now, the plaintiff has not taken any step to have it heard. The second ground is that the plaintiff has failed to comply with the order for discovery made on the 14th October 2004 when the case was last adjourned.

I regard the dismissal of a suit for want of prosecution, like the striking out of pleadings, to be a draconian action which should only be taken in exceptional cases. This is because such an action deprives the plaintiff of his cause of action against the defendant and in some cases, like where the issue of limitation arises, leaves him with no remedy at all. Such an action should therefore be taken on laid down principles. What are these principles?

As was stated in the case of **Ivita – Vs – Kyumbu [1984] KLR 441** one of the tests to be applied in applications such as this is whether there has been prolonged or inordinate and inexcusable delay in having the case heard and if there has been such delay whether justice can nonetheless be done. Thus, even though there is prolonged or inordinate delay if the court is satisfied with the plaintiff's excuse for delay and justice can still be done to the parties the suit will not be dismissed and will instead be ordered to be set down for hearing as soon as possible.

The suit will also not be dismissed if it is shown that the defendant waived or acquiesced in the delay. Mere inaction, however, on the part of the defendant cannot amount to waiver or acquiescence. There

must be some positive action on the part of the defendant which intimates that he agrees that the case should proceed thus inducing the plaintiff to do further work and incur further expense in the prosecution of the case. Should there, however, be further serious delays on the part of the plaintiff after the defendant's acquiescence in or waiver of the earlier delay, the whole history of the case my be taken into account in deciding whether or not the case should be dismissed. See **Allen – Vs – Sir Alfred McAlphine & Son [1968] 1 ALL ER 543.**

There is no fast and hard rule as to what amounts to delay. In some cases a few months will amount to inordinate delay. In others it will be a period of years. Intentional and contumelious delay, even though short, will be inexcusable. Each case depends on its own facts.

The other factor to be considered in such applications is whether there has been disobedience of a peremptory order of the court. If there has been it is regarded as intentional and contumelious and the suit will be dismissed.

The facts of this case are briefly these: Sometimes in 1994 the plaintiff purchased motor vehicle registration number KAB 626M from the first defendant through a hire purchase agreement with the second defendant. In March 1994, in spite of having paid the full purchase price, the plaintiff so alleges, the first defendant masquerading as an agent of the plaintiff and or in collusion with the second defendant collected the log book for the vehicle and a transfer form duly executed by the second defendant in his favour and transferred the vehicle to himself. It is further alleged that in the course of doing that the first defendant also forcibly took the vehicle from the plaintiff and has since refused to return it to him. The plaintiff therefore claims against both the defendants general damages for detinue, special damages in the sum of Sh. 1,115,000/=, costs and interest.

Arguing the application on behalf of the first defendant, Mrs. Moorlaj submitted that on 14th October 2004 when this case last came up for hearing, it could not go on as the parties had not made discovery. Since then in spite of the court order of that date directing that discovery be made within 60 days the plaintiff has not filed his list of documents or taken any step to have the case heard. She said that the plaintiff's Advocates' attempt to fix the case for hearing after this application had been filed and served should be ignored. Mr. Pandya for the second defendant concurred with that and added that the object of Order 16 Rule 5 of having cases expeditiously disposed of will be defeated if cases like this are left to drag on indefinitely.

For her part Miss Obura for the plaintiff opposed the application and stated that failure to comply with the order for discovery was due to inadvertence on the part of her office which should not be visited upon the plaintiff. She urged me, in the interest of justice, to dismiss the application and let the case be heard and decided on merit.

In this case the issue of waiver or acquiescence was not raised and does not therefore arise for consideration. The issues raised were delay and disobedience of a court order.

It is of the greatest importance in the interest of justice that cases should be brought to trial within reasonable time. When they are delayed there is a risk of denying justice not just to the defendants but even to the plaintiffs as well. How does this arise?

Where the case is one in which at the trial disputed facts will have to be proved by oral testimony and there is prolonged delay, there is a risk that witnesses may die or disappear. The recollection of those that remain of events that happened several years back may have grown dim and in such case there will be a substantial risk that a fair trial of the issues is no longer possible. When this stage is reached public interest demands that the suit should not be allowed to proceed. This is obviously the object of Order 16 Rule 5.

As I have said dismissing a suit for want of prosecution is a draconian step which should only be taken in exceptional cases. The burden of proof of the exceptional case is on the defendant. He has to show not only that there has been inordinate or prolonged delay but also that because of that delay it is no longer

possible to have a fair trial. The defendant has to prove that he is likely to be seriously prejudiced by the delay.

Counsel for the first defendant submitted that in view of the delay the witnesses' memory may have grown dim. On his part Mr. Pandya for the second defendant submitted that his client being a corporate body its witnesses may have been transferred or left employment. That may be so. In my view, however, these are suppositions which do not amount to required proof that both the defendants or either of them will be prejudiced. To amount to the required proof in such case there must be evidence that the witnesses have since died, disappeared or those who are still available cannot recall or recall in detail what transpired. I was not told that counsel have attempted unsuccessfully to trace witnesses or have interviewed those remaining and found out that their recollection has grown dim. That is what one would expect in a case like this. I therefore hold that the defendants have not proved to the satisfaction of the court that due to the delay it is no longer possible for them to obtain a fair trial in this matter.

That, however, is not the end of the matter. On the 14th October 2004 this case could not be heard as the parties had not filed their respective lists of documents. It was by consent ordered that they should do that within 60 days. The defendants filed theirs but the plaintiff did not. He has not even upto now filed his list. He has not applied for enlargement of time to enable him comply with that order. This is clear disobedience of a court order. Bearing in mind that this was a consent order it cannot be altered or its disobedience cannot be excused on a mere allegation of inadvertence. In the circumstances the interest of justice demand that this case, now over ten years old, should be dismissed and I accordingly dismiss it with costs including those of this application to the defendants.

DATED and delivered this 15th day of September 2006.

D. K. MARAGA

JUDGE