

REPUBLIC OF KENYA
THE HIGH COURT OF KENYA AT MOMBASA

Civil Case 261 of 1999

**TRUST BANK LIMITED (UNDER STATUTORY MANAGEMENT
OF CENTRAL BANK OF KENYA) PLAINTIFF**

- Versus -

1. MANSI VEGEXT LIMITED

2. MANSUKH MARU

3. VIRCHAND MALDE

4. VIPUL AMICHAND SHAHDEFENDANTS

Coram: Before Hon. Justice L. Njagi

Mr. Shikely for the Defendant

Court clerk – Kinyua

R U L I N G

This application is made by a notice of motion dated 14th March, 2006, and brought under Order XVI rule 5 and Order L rule 1 of the Civil Procedure Rules. It seeks from the court two orders – that the plaintiff’s suit be dismissed for want of prosecution; and that the costs of the suit and this application be awarded to the defendant.

The application is supported by the annexed affidavit of KANAIYALAL MOHANLAL PANDYA, and more specifically is based on the grounds that this is a very old suit and the plaintiff has caused a lot of delays in proceeding with the matter; the cause of action arose six years ago; and the plaintiff has not made any effort to fix it for hearing. These grounds are reiterated and amplified in Mr. Pandya’s supporting affidavit.

By a replying affidavit sworn on 19th June, 2006, by Ruth Ngare, the plaintiff company’s liquidation agent, the plaintiff opposes the application on the ground that the first defendant is no longer trading and the rest of the defendants have emigrated to places unknown. Consequently the plaintiff has not been in a position to prosecute this suit.

During the hearing of the application, Mr. Shikely appeared for the applicant and there was no attendance by or for the respondent. After noting that the hearing date was taken by consent of the parties on 16th May, 2006, the court opted to proceed ex parte. After summarising the short history of the matter, Mr. Shikely referred to the replying affidavit in which it is deponed that the plaintiff has not been in a position to prosecute the suit because the defendants have emigrated to places unknown. He then submitted that that was not a good reason and asked the court to grant the orders as prayed.

After considering the pleadings and the submissions of Mr. Shikely, I find that it is now more than seven years since this suit was filed. Since then, no attempt or effort has ever been made to set down the suit for hearing. The reasons advanced for the plaintiff for this state of affairs is that the first defendant is no longer trading. As there is no indication as to whether the defendant will resume trading and, if so,

when it is likely to do so, we might be waiting in vain for that resurrection to take place. The second reason advanced for the delay is that the rest of the defendants emigrated to places unknown. This is surprising because the defendants are represented by counsel who has not emigrated.

The plaintiff's suit is already in breach of Order XVI rule 5 of the Civil Procedure Rules. With every day that passes, the situation gets worse. As there is no indication of any prospects for the defendant reopening shop, or the emigrants coming back any time soon, there is no objection for retaining the suit in the records. The prospects of doing justice in this matter are very slim.

In these circumstances, the orders sought by the defendants in the application by notice of motion dated 14th March, 2006 are hereby granted as prayed. It is so ordered.

Dated and delivered at Mombasa this 27th day of October, 2006.

L. NJAGI

JUDGE