

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

MILIMANI COMMERCIAL COURTS

Civil Suit 120 of 2002

MERIDIAN PROPERTIES LIMITED..... PLAINTIFF

VERSUS

ASPI VARIAVA1ST DEFENDANT

CHANCERY RESTAURANT LIMITED.....2ND DEFENDANT

SHAMSHUDIN KARIM KURJI 3RD DEFENDANT

RULING

The Defendant has moved the court by Notice of Motion dated 19th January, 2006. The same is brought under Order XVI Rule 5(d). The Defendant seeks that this court would be pleased to dismiss the Plaintiff's suit for want of prosecution. It is clear from the Affidavit in support that this matter was last in court on the 26th of July 2005 when the court delivered a Ruling on the application of the 2nd Defendant seeking to strike out the amended plaint filed by the Plaintiff five months out of the statutory time. The plaint was not struck out and it was held by the court to have been filed within time. It is stated in the affidavit that despite that ruling the plaintiff did not take any steps to set this suit for hearing and indeed has not done so to date. The Defendant described that delay as inordinate and inexcusable. The Defendant further stated that the Plaintiff in this suit has demonstrated an unwillingness to prosecute this case. The Defendant therefore is of the view that in the interest of justice this suit should be dismissed.

During argument the Defendant relied on filed grounds of opposition but on the court examining those grounds, it is clear that some of the grounds introduced facts which can only be done in an affidavit. The first ground the Plaintiff states, that there has not been inordinate and inexcusable delay. Having stated so, the Plaintiff does not elaborate what it has done since this case was last in court. The second ground is that the Plaintiff has stated that it has constantly demonstrated willingness to prosecute this case. Again that ground needed to be elaborated and perhaps by an affidavit to show the steps that the Plaintiff has taken to prosecute this suit. From the bar, Plaintiff counsel stated that one of the steps the Plaintiff has taken is to file the issues in this case. This was responded to by counsel for the Defendant who stated that those issues were filed a few days before the arguments of this application. The third ground of the Plaintiff was that it was not in the interest of justice to have the suit dismissed and that the plaintiff would suffer loss if the suit would indeed be dismissed. This ground was also in need of elaboration to show what loss the Plaintiff would suffer. The fourth ground stated that the application by the Defendant was an abuse of the court process. This ground also needed to be explained what manner of abuse was perpetrated by Defendant in bringing this application. The sixth ground stated that the application was incompetent and this I understood to be because the Defendant's application had been brought under Order XVI Rule 5(a) rather than Rule 5(b). The Defendant at the hearing of the application successfully applied to amend the afore stated Rule.

The court in considering the application finds that the plaintiff has failed to take reasonable steps to prosecute this action which as the title will show is a 2002 case but on closer examination of the pleadings shows that this case was initially filed in 1997. That being the case, I accept the submissions made by the Defendant that the continued subsistence of this case may be prejudicial to the Defendant. The Plaintiff

failed to show to this court that it has taken steps to prosecute this case and in failing to file a replying affidavit which perhaps could have assisted the court to understand the facts that the Plaintiff relied on, the plaintiff chose to rely on grounds of opposition. That being the case, I am of the view that the defendants application is merited and that orders ought to be granted in its favour.

The orders of the court are as follows:

- 1. That the Plaintiff's case is dismissed as against the Defendants for want of prosecution with costs being awarded to the Defendants.**
- 2. The Defendant is also awarded costs of the Notice of Motion dated 19th January, 2006.**

MARY KASANGO

JUDGE

Dated and Delivered at Nairobi 19th October 2006.

MARY KASANGO

JUDGE