



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3271 of 1982

**KENYA TOURIST DEVELOPMENT CORPORATION
.....PLAINTIFF**

VERSUS

**TSAVO MOTEL
LIMITED.....DEFENDANT**

RULING

This is an application by the defendants under Order XVI Rule 5 of the Civil Procedure Rules seeking for orders that this suit be dismissed with costs for want of prosecution and that the defendant should have the costs of this application.

This application is opposed by the plaintiffs.

Order XVI Rule 5 provides as follows:

“If within three months after (a) the close of pleadings; or(c) the removal of the suit from the hearing list; or

(d) the adjournment of the suit generally, the plaintiff does not set down the suit for hearing, the defendant may either set down the suit for hearing or apply for its dismissal.”

Mr. Sagani for the defendants submits that it is a proper case in which the plaintiff’s action should be dismissed under Rule 5. The plaintiff had sued the defendants to recover Shs.1,705,873/=.

The suit was filed against the defendant on 7th October 1982. The defence was filed on 24th November 1982 when the pleadings were closed. The plaintiffs have taken no steps to set down the suit for hearing since 7th October 2000 which is more than 5 years since the last adjournment of this matter.

Mr. Muli for the plaintiff submitted that the defendant’s application is frivolous, misconceived and an abuse of the process of the court. His argument is based on the ground that the suit was reinstated after dismissal for want of prosecution on courts own motion. The file could not be traced and on 28th June 2000 the court ordered that the file be reconstructed which was done on 29th March 2001. With due respect to counsel I do not see anything frivolous or vexatious in the defendant’s application. Even assuming that it is true that the plaintiff’s suit was dismissed by the court on its own motion as the plaintiff states and later on 28th June 2000 the court made an order that the suit be reinstated.

The time from the year 2000 to the time when the defendant filed this application for dismissal of the suit for want of dismissal which is over 5 years entitled the defendant to file this application for dismissal as the plaintiff took no steps to set the suit down for hearing.

In **ROWE VS. TREGASKES [1968] 3 ALL ER 447**, in an appeal from dismissal of a suit for want of prosecution, Lord Denning M R observed at page 448 what is to be done? We have said on many occasions that we consider all delay, not only the delay after writ, but also the delay in the first two or three years is often the most prejudicial of all. At any rate, if a plaintiff does delay until the period of limitation, he should keep to the time table thereafter. Bearing this in mind, it seems to me that the delay here was inordinate. It was inexcusable, and there is serious prejudice to the defendant. The judge directed himself properly in accordance to the recent cases. He dismissed the case for want of prosecution, and I do not think that we should interfere with his discretion.

This suit was filed in 1982. It was dismissed for want of prosecution by the court on its own motion but was on 28th June 2000 reinstated by the order of the court. Since then it is now over 5 years and the plaintiff has taken no steps to set it down for hearing, in my view it would be unfair and unjust to call upon the defendants to meet the plaintiff's claim against.

This is a fit and proper case which should not be allowed to continue any further.

Accordingly, I allow the defendant's application and dismiss the suit with costs to the defendants together with costs of this application to be borne by the plaintiff.

Dated and delivered at Nairobi this 12th day of October 2006.

J.L.A OSIEMO

JUDGE