



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 254 of 2004**

**GLASS EAST AFRICA LIMITED.....1<sup>ST</sup> PLAINTIFF**

**NAJMUDIN JIWAJI GANIJEE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FIRST AMERICAN BANK OF KENYA LTD.....DEFENDANT**

**R U L I N G**

This is an application by the Defendant under Order 16, rule 5 (a) of the Civil Procedure Rules for dismissal of the Plaintiff's suit for want of prosecution. Under that rule, if, within three months after the close of pleadings the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal. The Defendant has elected the latter option, as it was entitled to do. There is a supporting affidavit sworn by FREDRICK NGATIA, learned counsel for the Defendant who also presented the application. The application is opposed by Plaintiffs upon grounds to be found in the replying affidavit sworn by the Plaintiffs' learned counsel, JOB MWANGI THIGA. Those grounds are:-

***(i) that the Plaintiffs are not guilty of unreasonable delay;***

***(ii) that they had in fact taken steps towards setting down the case for hearing;***

***(iii) that the 2<sup>nd</sup> Plaintiff has since died and hearing of the suit cannot proceed before someone else is substituted in his place and appropriate steps have already been taken towards this substitution; and***

***(iv) that the Defendant has contributed to the delay by denying the 1<sup>st</sup> Plaintiff access to his registered offices in Nairobi and thus leading to delay in compiling and filing the Plaintiffs' list of documents.***

Mr. Thangei, learned counsel, opposed the application for the Plaintiff. He advanced the further ground that the Defendant having signed a joint statement of agreed issues dated 21<sup>st</sup> December, 2004 which was filed on 6<sup>th</sup> January, 2005, that is over six months since close of pleadings, it is now estopped from moving the court under paragraph (a) of rule 5 for dismissal of the suit for want of prosecution.

I have considered the submissions of the learned counsels, including the cases cited. The estoppel pleaded by Mr. Thangei cannot exist. It cannot be said that by signing the joint agreed statement issues the Defendant abandoned its right to move the court for dismissal of the case for want of prosecution. Had the Plaintiffs set down the suit for hearing in the one year and eight months from the 6<sup>th</sup> January,

2005 (when the agreed statement of issues was filed) and 9<sup>th</sup> September, 2006 (when the present application was filed) the Defendant would not have found it necessary to move the court for dismissal of the suit. Had it refused to sign the agreed statement of issues, or file its own statement of issues, I have no doubt that the Plaintiffs would have accused it of obstructing their efforts to prepare the suit for hearing.

It is not in dispute that pleadings closed on or about 13<sup>th</sup> July, 2004. When the present application was filed on 8<sup>th</sup> September, 2006 there had thus been a delay of two years and nearly 2 months. This is inordinate delay which must be explained satisfactorily by the Plaintiffs. Have they offered a reasonable explanation for the delay? Even if it were granted the Plaintiffs that between close of pleadings on 13<sup>th</sup> July, 2004 and the filing of the agreed statement of issues on 6<sup>th</sup> January, 2005 - about six months - they were looking for documents and preparing the statement of agreed issues, there is still over one year and eight months from the date of filing the agreed statement of issues (6<sup>th</sup> January, 2005) and the filing of the present application (8<sup>th</sup> September, 2006). This delay must be acceptably explained by the Plaintiffs. What explanation has been offered? It is said that the Plaintiffs filed their list of documents on 25<sup>th</sup> November, 2005; that on 11<sup>th</sup> January, 2006 they invited the Defendant to fix a hearing date but that the court file could not be found; and that on 3<sup>rd</sup> May, 2006 the 2<sup>nd</sup> Plaintiff died. The Plaintiffs filed their list of documents one year and over four months since close of pleadings. They say that the Defendant obstructed them in their efforts to get documents. I do not think, in our adversarial system of justice, that a party is under any obligation to assist his adversary in preparation of the case against himself. That one year and four months between close of pleadings and filing of the Plaintiffs' list of documents is not adequately or properly explained. Regarding the claim that an invitation was made to the Defendant to attend the registry in order to fix a hearing date, there is no evidence that the exhibited letter was sent at all. Furthermore, beyond the claim by the Plaintiff, there is no evidence that the court file was missing at the alleged time or at all. Such evidence can easily take the form of a letter from the registry to that effect.

The 2<sup>nd</sup> Plaintiff died on 3<sup>rd</sup> May, 2006, long after the suit should have been fixed for hearing. His death has merely added to a long delay by himself while he was still living and his co-plaintiff. That long delay, as I have already found, has not been satisfactorily explained. The death of the 2<sup>nd</sup> Plaintiff therefore cannot assist the surviving plaintiff in resisting the present application.

The court will normally not dismiss a plaintiff's suit for want of prosecution where such plaintiff has shown a willingness to proceed with the suit. Such willingness is not apparent in the present suit. The court will also not dismiss a plaintiff's suit for want of prosecution unless the delay has occasioned to the defendant such prejudice as may not be compensated for by an award of costs. In paragraph 5 of the supporting affidavit it is sworn that arising from the delay in prosecution of the suit the Defendant shall have great difficulty in tracing material witnesses since such witnesses have left the Defendant's employment. This has not been controverted by the Plaintiffs. I am satisfied that the long delay in prosecution of this suit has occasioned the Defendant a serious prejudice that cannot be made good by an award of costs.

In the circumstances therefore I will allow this application. The Plaintiffs' suit is hereby dismissed with costs to the Defendant for want of prosecution. The Defendant shall also have the costs of the application. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2006.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 1<sup>ST</sup> DAY OF DECEMBER, 2006.**