

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 886 of 2003

HOTSUM TRANSPORT SERVICES LIMITED AND 44 OTHERS.....PLAINTIFF

VERSUS

KENYA BREWERIES LIMITED.....DEFENDANT

R U L I N G

The Notice of Motion herein, dated 23/8/05, and filed on 30/9/05, seeks dismissal of the suit herein for want of prosecution. It is brought under Order 16 Rule 5 (c) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap, 21, Laws of Kenya, and is supported by an Affidavit by Alex Ngatia Thangei, and is on the grounds that: the suit was last set for hearing on 13th & 14th July 2004, but the matter did not proceed as it was not listed. Since then the Plaintiff/Respondent has taken no steps to prosecute the case, and the Plaintiff has lost interest in the case. On 19/6/06, the Defendant/Applicant sought to have the case heard, but it was not listed for unexplained reasons. Further, there was no response from the Respondent despite due service on 16/11/05. Hence the application unopposed. The Pleadings in the case closed in October, 2003, but no effort, by the Respondent to frame the issues or have any list of the documents filed.

In defence, Mr. Gitobu Imanyara, Learned Counsel for the Plaintiff/Respondent submitted that he had no notice, but had just seen the motion served and stamped in his office, which had been served and that the matter had been listed for hearing on 19/6/06, but matter had been taken out of the course list. He further said that the date had been taken by consent, but the hearing date was taken after application for dismissal had been made. He prayed that the court should not dismiss the suit when the fault lay with neither of the parties.

Upon perusal of the pleadings and consideration of the Learned Counsel for both sides, this court finds and concludes as under.

In the absence of any Replying Affidavit or grounds of opposition, the application for dismissal is clearly unopposed. The submissions by Mr. Imanyara, all touching on matters of fact are statements from the bar which have no place in interlocutory applications such as the one before me.

Learned Counsel for the Respondent made two submissions, which, upon perusal in the court file, turned out to be far from the truth. The first one was that the hearing date of the case was taken by consent after the application for dismissal had been made and filed. That submission was totally out of order, because; being on a factual matter; it could only be made through a Replying Affidavit, which had not been the case, and secondly it was not clear, and the learned counsel was equally unhelpful on this because no hearing date of the suit should or could have been taken while this application was pending. Finally the Learned Counsel submitted that the hearing fixed for 14/12/05 was for the suit, and since the hearing never proceeded that day as the court was not sitting that was evidence that the Respondent had not lost interest in the case.

Upon perusal of the court file, the above submission turned out to be factually incorrect. The hearing date was for this dismissal application, and not of the suit itself.

All in all, and for the reasons given above, there is no reason, good or otherwise, advanced to justify

the delay in the prosecution of the suit herein nor why this suit should continue decorating the judicial files.

Accordingly, the application is granted as prayed; suit dismissed with costs to the Defendant/Applicant and against the Plaintiff/Respondent, for want of prosecution.

It is further ordered that the Plaintiff/Respondent pays the costs of this application on top of the costs of the suit herein.

DATED and delivered in Nairobi this 9th Day of November, 2006.

O.K. MUTUNGI

JUDGE