

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

Civil Case 1427 of 2000

SAFINA LIMITEDPLAINTIFF

VERSUS

JAMNADAS (K) LTD.....DEFENDANT

RULING

The Defendant has moved this court by Notice of Motion dated 14th September, 2006. The same is brought under Order XVI Rule 5(a) and 6 of the Civil Procedure Rules. The Defendant seeks for the dismissal of the Plaintiff's suit for want of prosecution and that costs of the suit be awarded to the Defendant. The Defendant's affidavit in support is sworn by the advocate who has the conduct of the case on behalf of the Defendant. He stated that the Plaintiff was filed in this case on 9th August, 2000. The Defendant filed its Defence on 8th May, 2003. Since the said filing of the Defence the Plaintiff has not set down the suit for hearing. That accordingly the Plaintiff is not interested in the suit and the same should be dismissed for want of prosecution. That application was opposed by the Plaintiff and replying affidavit was sworn by the advocate who has the conduct of this case on behalf of the Plaintiff. The advocate for the Plaintiff stated that the application is brought in bad faith because the parties have been discussing the issues in this matter and have almost resolved the issues save that the Defendant has not released the Plaintiff's documents. That the Plaintiff has paid the sum of Kshs.17,664/= which was found due after taking accounts but that despite that payment the Defendant had been reluctantly released relevant transfer of the motor vehicle in question. That the Plaintiff will suffer prejudice if this suit is dismissed. The Plaintiff is desirous of prosecuting the suit. Plaintiff's counsel in further oral submissions stated that the Plaintiff was desirous of amending the Plaintiff to seek a prayer for specific performance that is the release of the aforesaid documents. She stated that it was important for the background of this matter to be looked at since the matter had substantially been settled save for the issue of the Defendant's counsel's costs and as a consequence of that matter not been resolved the Defendant had refused to release the transfer documents to the Plaintiff. She stated that it was in bad faith for the Defendant who has been involved in negotiations of this matter to have brought the present application without first having written to the Plaintiff to indicate that they no longer wish to continue with negotiations.

The Defendant has moved under Order XVI Rule 5 of the Civil Procedure Rules. That rule provides that if within three months after the close of the pleadings or removal of the suit from hearing or the adjournment of the suit generally, the Plaintiff or the court on its own motion if it does not set down the suit for hearing the Defendant may either set the suit down for hearing or apply for its dismissal. It is clear that pleadings in this case closed in May 2003. From the date that the Defendant filed the Defence hereof no action has been taken on this matter. The Plaintiff opposes the present application on the basis that there are negotiations going on between the parties. As evidence of those negotiations the Plaintiff annexed two letters. The date of the last letter is 5th July, 2005 which letter was written by the Defendant's counsel to the Plaintiff's counsel seeking the payment of their costs in this matter. Despite what seemed to be disagreement on costs which the plaintiff was aware of from July, 2005 the Plaintiff did not take any action to proceed with this matter. Much more than that the period before July, 2005 from the date of close of pleadings is not explained by the Plaintiff why there has been no activity in this matter. It is obvious that when parties file court action it is expected that they would follow the prosecution of such action with diligence. It was the Plaintiff's responsibility to have ensured that this

case was prosecuted without delay. This indeed was the finding in the case of **Mukisa Biscuit Co. v West End Distributors**, [1969] E.A. 696, as follows:-

“The second matter relates to the undoubted delay in the hearing by the High Court of this case. It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty by saying that the defendant consented to the position”.

Any delay in such prosecution can sometimes lead to prejudice to the Defendant. The Plaintiff has itself to blame for having gone to sleep in this matter. I am of the view that this is a fit and proper case for an order for dismissal for want of prosecution. I can do no better than quote the words of the Honourable Justice Emukule in the case of **Peter Mwedie Muinami v Barclays Bank (K) Limited HCCC No.1046 of 1999** as follows:-

“If there is any injustice it is self induced and inflicted”.

The Plaintiff’s suit is therefore, dismissed for want of prosecution and the costs of the suit and costs of the Notice of Motion dated 14th September, 2006 are awarded to the Defendant.

MARY KASANGO

JUDGE

Dated and delivered this 15th December, 2006.

MARY KASANGO

JUDGE