

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 5775 of 1991

JOE ISAAC NDERITU PLAINTIFF

VERSUS

KENYA INDUSTRIAL ESTATES..... DEFENDANT

RULING

Before me is a notice of Motion brought by the defendant under O.XI R. 5(d) of the Civil Procedure Rules seeking dismissal of suit for want of prosecution. The issues in this application can be best approached by a recital of the proceedings in the matter up to date.

On the 29-10-91 the respondent instituted this suit against the applicant in which he sought orders to restrain the applicants from leasing or selling the machines the subject matter of this suit which were purchased through the assistance of the applicants.

On 29-10-91 upon ex parte summons filed by the respondents under Order XXXIX Rule 1 and 2 the Judge in chambers issued a temporary injunction restraining the applicants its servants and agents until the hearing of the application interpartes. The applicant/defendant upon being served with summons and the ex parte order of injunction entered appearance on 14-2-92 and filed a defence on 27-2-92. On 11-2-94 the applicant applied for the discharge of the ex parte injunction which was subsequently granted on 14-6-94. The case came up for hearing on 8-10-96 and was part heard before Ringera J. On 19-2-97 the suit came up for hearing before Ole Keiwua J and was stood over generally with an order that it starts de novo. On 3-8-2000 the applicant filed an application for dismissal of the suit for want of prosecution but was dismissed and the respondent was granted 90 days within which to set down the suit for hearing.

On 5-11-2003 the respondent took a hearing date but the application was adjourned at the request of the applicants because the date was taken ex parte without inviting them to come and take a date.

On 17-10-05 the applicant filed this notice of motion for dismissal of the suit for want of prosecution under Order XVI R. 5(d) of the Civil Procedure Rules. The application is based on the ground that the plaintiffs have not taken any steps to set down the suit for hearing since it was last in court on 5-11-03.

The application is opposed by the respondent who has filed a replying affidavit in which he avers that he has taken sufficient steps to see that this suit is heard and finally determined. He submitted that the applicant had made a similar application to have the suit dismissed for want of prosecution which application was dismissed by the court and he was given 90 days to fix the suit down for hearing which he did but the hearing did not take place because the applicants applied for adjournment.

He further avers that after that adjournment he became sick with eye problems which contributed to the present circumstances. Order XVI Rule 5 (d) provides as follows:

“If within three months after (a) the close of the pleadings; or (b) ----- from the hearing list or (d) the adjournment of the suit generally, the plaintiff does not set down the suit for hearing, or apply for its dismissal.”

It is the duty of a plaintiff to bring this suit to early trial. But from the recital of the proceedings it cannot be said that this suit was dormant. It was kept like all the time dismissal for want of prosecution

under Order XVI Rule 5 (d) of the Civil Procedure Rules. The act to dismiss a suit for want of prosecution is draconian and should only be resorted to undeserving cases only.

As was stated in Halsbuys Laws of England 4th Ed. Vol 37 par.448.

“The power to dismiss an action for want of prosecution without giving the plaintiff the opportunity to remedy his fault will not be exercised unless the court is satisfied that the default has been intentional and contumelious or that there has been prolonged or inordinate delay on the part of the plaintiff or his lawyer and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendant either as between themselves and the plaintiff or between each other or between them and third parties.

As I have said earlier from the recital of the proceedings in this suit the plaintiff has kept the suit alive and as such I have not been convinced by the applicants that I should exercise my discretion in its favour.

For the above reason the defendants notice of motion of 17th October, 2005 is dismissed. I order that the costs of this application be costs in the suit. Plaintiff to take steps within 14 days of receiving copy of this Ruling.

Dated at Nairobi this 7th day of December, 2006.

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J.L.A. OSIEMO

JUDGE