



**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
Civil Suit 409 of 1996**

**1. FORT HOTELS LTD T/A COAST CAR PARK & AMUSEMENT CENTRE &**

**2. CHALLA HOLDERS LTD. T/A CHALA SAFARIS .....PLAINTIFFS**

**VERSUS**

**THE STANDARD LIMITED.....DEFENDANT**

**Coram; J. W. Mwera – Judge**

**Lijodi for Plaintiffs/applicants**

**Ndegwa for the defendant/Respondent**

**R U L I N G**

The two suits are consolidated (HCCC No. 409, 410 both of 1996) for the sake of the summonses dated 30-6-03. On each file the application is brought under Section 3A Civil Procedure Act and Order 9A Civil Procedure Rules. The two main prayers are that;

- (a) This court do set aside an ex-parte ruling dismissing the suit (s).
- (b) There be an order requiring the suits to go for hearing inter-partes.

Taking what counsel said and from the records, each of these two files bear a notice of motion dated 4-2-2002. It was brought under Order 16 rule 5 Civil Procedure Rules and Section 3A Civil Procedure Act for orders that the suit(s) be dismissed for want of prosecution because the plaintiffs had not taken steps to list them for trial since pleadings were closed in September, 1996.

On HCCC 409/96 Omwitsa – Commissioner of Assize, as he was then, being satisfied that the application to dismiss had been served, but and the plaintiff neither appearing nor filing any papers in opposition, the defendant was entitled to orders of dismissal as it had presented its application. This was on 19-3-03.

On HCCC 410/96 the same commissioner, considering a similar application to dismiss suit for want of prosecution, on 11-7-2002 had granted the orders.

Mr. Lijodi argued that both suits be reinstated by setting aside the dismissal orders on the basis that the plaintiff's lawyers who practised in Nairobi failed to fix the cases for hearing. That such was a mistake that could not be visited on the litigant who all the time relied on that said lawyer with the conduct of its cases. And that the cases had prospects of success. Arguments for/against the application (s) went on HCCC 409/96.

Mr. Ndegwa opposed the application to the effect that even as early as 23-7-2002 when the dismissal application came before Ouna -Judge for hearing, a director from the plaintiff company attended court. Their lawyers M/s Kimani Githongo & Co. of Nairobi who had been served with an application did not appear. They had not filed any papers in opposition either. That that director asked the court to be given time to negotiate to withdraw the suit(s). That that was granted and a mention fixed on 26-8-2002. The record shows that no one appeared then. On the fresh date of 28-11-02 only the defendant/applicant's counsel appeared. The court noted that that date had been served and yet the plaintiff was absent. It heard the and dismissed the suit for non-prosecution. Mr. Ndegwa urged the court to consider that the plaintiff was not being forthright by claiming that its lawyer did not convey the dates of hearing the application dated 4-2- 2002. That it knew the date and that is why its director attended court on 23-7-02. It asked for a date to mention the case so that withdrawal of suit would be recorded. It did not negotiate that with the defendant and did not even come to court again. That this was clear indication that the plaintiff had lost interest in the case (s). And that Order 16 rule 51 Civil procedure Rules does not envisage setting aside dismissal orders and reinstating a suit. But that the provisions of law give the plaintiff an opportunity to file another suit subject to limitation. The suits were not listed for hearing for six years to the time the dismissal application(s) were filed. And now a further 3 years down the line, is only when the plaintiff is waking up from its slumber when taxation followed the dismissal, that it is thinking of setting aside the orders. That all this, is unjust to the defendant.

This court is satisfied that dismissal of the suits was as per Order 16 rule 5 Civil Procedure Rules. The applications were laid under that provision of law. It was not denied that pleadings closed in September 1996 and the dismissal application was brought in February 2002. The plaintiff was served with the application through its lawyers. On the first day to hear the application to dismiss, the plaintiff's director came to court and pleaded that the it would negotiate the withdrawal of the suit(s). It was given time to do so. It did nothing. It did not appear on subsequent dates. It had not filed any papers in opposition either. The dismissal orders that followed were in order.

The defendant deserved such orders otherwise it would be unfair to let litigation hang over its head forever. The plaintiff by all the above conduct cannot complain. It has not shown reason why this court should exercise its discretion by setting aside the orders complained of. Particularly it was almost false to claim that the dismissal orders followed the inaction of the previous lawyers not to fix the matter for trial. The lawyers may have not done that. But when then plaintiff's director came to court on 23-7-2002 it knew that the suit(s) was due for dismissal if it did nothing to fix the trial dates. It cannot say that it entrusted its lawyer with all the conduct of the matter and did not know even of the application to dismiss. That was seriously misleading of Mr. Lijodi. Indeed Mr. Ndegwa drew the court's attention to the fact that laying these applications under Order 9A rule 10 Civil Procedure Rules was fatally defective. This court agrees. That provision of law only refers to setting aside a judgement plus a decree following non-appearance and default of defence. Here the defendant entered appearance and filed a defence. It is not the one seeking setting aside either. This application was thus misconceived.

Anyway all in all, the applicant has not shown good cause why this court should set aside its dismissal orders and the applications in both causes (consolidated) are dismissed with costs.

Orders delivered on 19-5-2005.

**J. W. MWERA**

**JUDGE**

**19-5-2005**