



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 5910 of 1993

INVESTORS COMMERCIAL HOLDING.....PLAINTIFF

VERSUS

TANA & ATHI RIVER DEVELOPMENT..... RESPONDENT

R U L I N G

This application, by way of a Notice of Motion, under Order 16 rule 5(a) of the Civil Procedure Rules, seeks dismissal, with costs, of the suit herein, for want of prosecution.

The application, dated 15/3/04, is supported by an Affidavit of H.M. Mudeizi of even date, and is on the grounds that: for more than 3 months since the close of the pleadings, the plaintiff has taken no steps to set down the hearing; that the Plaintiff is no longer interested in the case, and the continued existence of this suit only serves to oppress the Defendant.

The suit was filed on 14/12/1993 and the defence filed on 1/7/1994. On 4/12/1996, the Plaintiff filed an application seeking injunctive orders against the Defendant which application was dismissed on 7/3/1997.

Since then, Plaintiffs have done nothing to prosecute the matter. This is over 9 years ago.

On 28/10/1996, the Plaintiff had filed another application, under Certificate of Urgency, which application has never been heard.

In defence, the Plaintiff, in his Replying Affidavit dated 10/6/05, avers that after their application was dismissed, he filed a Notice of Appeal in 2003, (no member of the appeal given), then on 20/5/1999, Plaintiff invited the Defendant to fix a hearing date of this suit. This was confusing. But that was not all. On 14th and 15th December, 2003, the Plaintiff claimed to have fixed the suit for hearing, purportedly because the Defendant/Applicants counsel had no instructions from their clients! This is terrible confusion in that while the Notice of Appeal was still on, the Plaintiff purported, and claimed to have fixed the suit for hearing of the suit on the above two dates.

A quick perusal shows that the suit was not fixed on those two dates, or at all, for hearing. Nor is there any evidence that the counsel for the Defendant was not ready to proceed, as claimed in the Plaintiff's Replying Affidavit.

My perusal of the pleadings and the submissions by counsel for the two sides clearly shows an unexplained delay in prosecuting the suit herein, and a deliberate confusion by the Plaintiff/Respondent in an effort to explain off the said delay. For instance, it is the Plaintiff's case that initially there were two suits; namely 5910 of 1993 by the Plaintiff against the Defendant; then 5725 of 1993, by the Defendant

against the Plaintiff. Then counsel for the Plaintiff submitted that the two suits were consolidated! When that consolidation took place the counsel had no idea. But that notwithstanding, the learned counsel submitted that the Defendant's suit i.e. 5725 of 1993, was stayed! That left only No. 5910 of 1993, the suit before me today.

Be that as it may, my understanding of consolidation, at least in law, does not mean that one suit is stayed! The two or more suits are heard together because the parties are the same and the issues raised are similar. I thought the submission by the learned counsel was not only novel, but unheard of in the law!

The only time that the counsel's submissions could make any sense is where there are two or more cases, raising similar issues, and one of those cases, by consent of the parties, is used as a test case. That is not the case here.

Another reason for the dismissal of the suit herein, is that the evidence on record does not tally with the law. If the Plaintiff's application for injunctive orders against the Defendant was dismissed, and the Plaintiff appealed or filed a Notice of Appeal, to aver that he went ahead and fixed a hearing of the same suit for 14th and 15th December, 2003, while the appeal was still pending is strange! That is legally not possible, and in any event, the record from the cause lists for those two dates shows that this suit was not anywhere fixed for hearing during any of the two dates.

All in all therefore, I find that since 7/3/1997, when the Plaintiff's application for injunctive orders was dismissed, there has been no step taken towards the prosecution of the suit herein.

Accordingly, and for the above reasons, the application herein was granted on 13/6/05; the suit dismissed, with costs for both this application and the suit.

DATED and delivered in Nairobi this 21st Day of June, 2005.

O.K. MUTUNGI

JUDGE