



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL DIVISION**

**CIVIL SUIT 467 OF 1999**

**SOFIA ALI JAHADHMY ..... PLAINTIFF**

**VERSUS**

**ABUDI MOHAMMED ALI ..... 1ST DEFENDANT**

**MUNICIPAL COUNCIL OF MOMBASA ..... 2ND DEFENDANT**

**RULING**

The 1st defendant's Notice of Motion of 29th July 2002, brought under O16r.5 (d) Civil Procedure Rules and Section 3A Civil Procedure Act, sought one main prayer: (1) That the plaintiff's suit herein be dismissed for want of prosecution.

There was a supporting affidavit sworn by the applicant's lawyer Ms Ali and she presented the reasons why the orders sought should be granted accordingly. The court heard that the suit was filed on 12th October 1999. A defence followed on 3rd December 1999 and 14 days thereafter pleadings closed. The suit had however been filed along with an injunction application to which ex parte orders were given. That the defendant filed papers opposing this application but up to date, four and half years down the line, it has not been fixed for hearing.

That on the only date the suit was fixed for hearing before Hayanga J, on 31st August 2002, it could not proceed because the plaintiff's lawyer was not in town. No other hearing dates were taken and on 10th March 2003 the plaintiff died. The application to substitute the plaintiff and also amend the plaint was filed and orders granted 17th March 2004. But that the plaintiff did not file and serve an amended plaint ever since to date. That in accordance with O6A r6 Civil Procedure Rules, since the amendment orders were not effected in 14 days from 17th March 2004, they lapsed and thus the whole thing has remained in that uncertain state.

That the 1st defendant continues to suffer with the injunction order in place. That that order barred him from repairing his flat next to the plaintiff's one on the same building. That the cracks that were to be repaired have grown wider over the period as the repair costs have escalated. That from the above, it can be seen that the plaintiff has lost interest in the cause and so the suit should be dismissed as prayed. Or because the deceased plaintiff has not been substituted since 10th March 2002 the suit here has abated. Mr. Lijodi's feeble opposition to the above application was that the plaintiff, whom they substituted has not given his / her lawyers relevant documents to complete discovery and inspection and so set hearing dates. So Mr. Lijodi pleaded for time to file documents and apply for time to be enlarged to enable him to file an amended plaint, followed by trial dates.

Under O16 r. 5 (d) if within 3 months after adjourning the suit generally neither the plaintiff nor the court itself set it down for hearing, the defendant may set the suit down for hearing or apply to have it dismissed. From 31st August 2002 when the suit was adjourned generally by Hayanga J, because the plaintiff's counsel was not in town on the trial date, three months expired on 31st November 2002. It is not shown that the plaintiff had set down the suit for hearing. The court had not done so either. The 1st defendant should have opted to set it down for trial or seek its dismissal. He did not do so and the plaintiff died. There were moves to substitute him and accordingly to amend, file and serve a plaint on that account.

That has never taken place, yet the injunction orders continue to hurt the 1st defendant who must also endure a suit hanging over his head which the plaintiff is not keen to move forward. Indeed the plaintiff is not giving his lawyer the relevant documents to facilitate discovery and inspection so that hearing dates can follow. With all the above this court is satisfied that the plaintiff has lost interest in prosecuting this case and it is dismissed as prayed. The 1st defendant gets costs of the suit and this application. Ruling accordingly.

Delivered on 28th July 2005.

**J.W. MWERA**

**JUDGE**