

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

CIVIL SUIT 625 OF 2002

SKOOL ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.DEFENDANT

R U L I N G

The defendant has moved the court by Notice of Motion, brought under; OXVI Rule 5, of the Civil Procedure Rules.

The motion seeks the dismissal of the plaintiff's suit for want of prosecution.

The motion is grounded on the ground that the plaintiff has failed to prosecute the suit since 27th June 2002, without any reasonable or just cause.

The defendant's supporting affidavit state that this matter had been fixed for hearing several times and that the matter was lastly adjourned on 17th June 2002 when the plaintiff applied to act through its general manager. That the ruling of that application was delivered on 27th June 2002 and no action thereafter had been taken.

The plaintiff in opposition stated, through its general manager, that this matter had severally been adjourned at the instance of defendant. The plaintiff enumerated those adjournments and stated that the matter could not proceed for hearing on 5th June 2002 because the defendant had not filed its replying affidavit. On 17th June 2002 when the matter was fixed for hearing the defendant objected to the plaintiff being represented by its general manager and the ruling on that objection was delivered on 27th June 2002. On 27th June, the day of ruling, the defendant applied to substitute its replying affidavit. That to date the defendant has not served the plaintiff with such substituted affidavit. The plaintiff's representative finally said, that the plaintiff has always been ready to proceed but the delay had been caused by the defendant.

I have perused the proceedings hereof. It seems that on 22nd May 2002 the plaintiff appeared on a certificate of urgency and an injunction was granted ex parte. The matter was thereafter listed on 5th June 2002 when the parties consented to adjourn the matter to 17th June 2002. The plaintiff was granted leave to file a supplementary affidavit and the defendant was granted leave to file a replying affidavit.

On 17th June 2002 an objection was raised by the defendant to the plaintiff being represented by its general manager. The ruling to that objection was delivered on 27th June 2002. On that day the defendant was granted leave to substitute its replying affidavit. It does not seem as though the defendant did substitute that affidavit, but suffice it to say, that no further action was taken on this matter by either party until the present application. That is the chronology of the proceedings in this matter. The injunction granted to the plaintiff on 22nd May 2002 although granted through an ex parte hearing, was permanent in its terms and it is not surprising that the plaintiff is not keen to proceed with this matter. OXVI Rule 5 provides that within three months from when a matter is adjourned general as is the case here, if the matter is not fixed for hearing it may be dismissed. In our case the period is more than three months, in fact it is 3 years to date with no attempt by the plaintiff to proceed with its case. I find that indeed there has been inordinate and in excusable delay on the part of the plaintiff, and I cannot find any fault on the part of the defendant. It is the plaintiff who brought this action, and the defendant was quite entitled to let

“sleeping dogs lie.” Since I find there is no excuse shown by the plaintiff why there was in activity for such a long period I find that the defendant’s application must succeed.

The order of the court is: -

1) That the plaintiff’s suit is dismissed for want of prosecution with costs to the defendant.

2) The plaintiff shall also pay the defendant’s costs of the application dated 24th November 2004.

Dated and delivered this 14th day of July 2005.

MARY KASANGO

JUDGE