

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 286 of 1998

M.A. BAYUSUF & SONS LTD. PLAINTIFF

- Versus -

SCHENKER & CO. (E.A.) LTD. DEFENDANT

Coram: Before Hon. Justice Mwera

Mwagona for Applicant/Defendant

Nyongesa for Respondent/Plaintiff

Court clerk - Kazungu

RULING

The defendant filed a notice of motion dated 6/5/2005 under Order 16 rule 5 Civil Procedure Rules and Section 3A Civil Procedure Act for orders that this suit be dismissed for want of prosecution. The main ground put forth was that when the case came up in the callover on 27/6/2002, it was taken out and stood over generally. That for slightly over 3 years - the plaintiff has done absolutely nothing to fix the suit for hearing the inattention and inactivity that has not been explained. That by defaulting on this primary duty which always rests on the shoulders of a plaintiff, whereby the defendant has had the suit hanging over its head, it is just and proper that it be dismissed. That was Mr. Mwagona's main plank of argument.

Mr. Wanyonyi's rejoinder that the defendant should as well have set down the suit for trial because it has a counter-claim on record or that there was some outstanding application or procedure to be cleared by the defendant did not seem to hold much water, so this court thought. Not even that the defendant had not filed and served its list of documents. Mr. Wanyonyi also seemed to blame the registry procedure in listing matters, in that there are limited slots to utilize and so the plaintiff's lawyer's inability to take hearing dates should not be passed on to the detriment of the party (plaintiff). But he did not in any way show any attempts at fixing the hearing dates eg by inviting the defendant for that, or demonstrate why the plaintiff's lawyers' firm chose to process other cases it handles passing over this case.

Having considered all above, this court concluded that it was this application which prompted the plaintiff on 20/6/2005 to jump from its slumber and invite the defendant to come and take trial dates. All facts put together, the plaintiff appears either to have forgotten about this case or lost interest in it. Such cases deserve to be dismissed so that not only do the defendants feel relieved but the court registries can also cleanse their records and shelves.

However, the plaintiff is given 30 days to fix the hearing of this suit and this is only because the greater interest is served when disputes are ultimately decided on their merits. But before doing so, the plaintiff is directed to pay costs of this application assessed at Sh. 7,500/= in the next 15 days. In default this suit will stand dismissed.

Orders accordingly.

Delivered on 21st October 2005.

J.W. MWERA

JUDGE