



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 3038 of 1996I

RAJESH RUGHANI.....PLAINTIFF

VERSUS

FIFTY INVESTMENTS LIMITED.....1ST RESPONDENT

KEMBI & MUHIA ADVOCATES..... 2ND RESPONDENT

RULING

On 7/4/05, the Defendants/Applicants moved to this court under Order 16 rule 5(a) and (d) and Order 50 Rule 1 of the Civil procedure Rules, seeking dismissal of the Plaintiff's suit for want of prosecution.

It is common ground that the summons were served in September, 1998; appearance and defence entered on 22/9/1998; appearance and defence entered on 22/9/1998 and 8/10/1998 respectively. Effectively, therefore the pleadings closed on or about 24/10/1998. But sine then the Plaintiff went to sleep; an averment supported by the Plaintiff's failure to respond to the agreed issues sent to him by the Defendants in January 2002, till the filing of this application for dismissal of the suit on 7/4/05 when the Respondent woke up and filed a list of documents on 30/5/05 together with signed list of issues.

The counsel on record up to 30/5/05, Mr. Hira, does not explain the delay in prosecuting the suit. However, Mr. Orege, Counsel for the Respondent in the current application. Found that an excuse, to submit that failure by an advocate to take action should not be visited on innocent Plaintiff.

This submission is, after admitting that there was a delay in prosecuting the suit. That was not all. The learned counsel submitted that the Defendant/Applicants had not averred that they have suffered any prejudice because of the delay.

I have patiently considered the submission that failure by a litigant's counsel should not be visited on such party, rather the court should exercise its discretion, and order the suit to be fixed for hearing as soon as practical, rather than dismiss the same.

The above line of thinking no longer holds water and in my view, it is the duty, and the fight of any litigant, to put pressure on his counsel to have the suit prosecuted earliest possible. If the counsel cant rise to the task, the Plaintiff has the power, and the right, to dismiss such an advocate and get the services of another, presumably, more competent, to deal with the case. It must always be remembered that it is the

Plaintiff's suit, no the advocates, which risks dismissal for want of prosecution.

Put differently, it is acceptable for a Plaintiff to hide behind his counsel's inactions, for such a defence is tantamount to an admission on the collusion with his advocate, not to prosecute the suit as required by the law. Such a Plaintiff should not expect lenience from the court when he has failed to push his counsel to comply with the obtaining provisions.

Where there are good reasons for the delay in prosecution the case, I have no doubt the court exercises its discretion to avoid the draconian effects of dismissing the suit. This is clearly spelt out in this court's rulings, including that in IVITA VS. KYUMBU, Civil Suit No. 340 of 1971. But as twas stated in the same case, at Page 449; **"where the defendant satisfied the court that there has been prolonged delay, and the Plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable, and in such case, the suit may be dismissed."**

In the present case, the delay is unquestionably unexplained other than that the counsel on record took no action. I have already expressed myself on that lame excuse.

Turning to the submission that the Defendant/Applicants have not averred that they will suffer or have suffered any prejudice as a result of the delay, I find such a submission unfortunate and callous. In the past, applicants for dismissal of suits like the current one have had to monotonously repeat that witnesses memories fade and at times such valuable evidence may get lost through death of such witnesses.

I think time has come for us to take into account the anxiety and the mental torture of a defendant who has, year in year out to live with the thought of a suit that hangs over his head simply because the Plaintiff is not desirous with or serious of the finality of such litigation.

For all the above reasons, this application succeeds and I grant the following orders:

- 1. Dismiss the suit herein, for want of prosecution, in terms of the provisions of Order 16 rule 5 of the Civil procedure Rules.**
- 2. Order the Plaintiff/Respondent to pay to the Defendant/Applicant the costs of both this application and the suit herein.**

DATED and delivered in Nairobi, this 3rd Day of October, 2005

O.K. MUTUNGI

JUDGE