



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

Civil Suit 5675 of 1993

ARI CREDIT & FINANCE LIMITED.....PLAINTIFF

VERSUS

TRANS-NATIONAL BANK LIMITED.....DEFENDANT

R U L I N G

This is an application by amended notice of motion dated 4th May, 2005 brought by the Defendant for dismissal of the Plaintiff's suit for want of prosecution. It is brought under Order 16, Rule 5 (d) of the Civil Procedure Rules. Under that Rule, if within three months after the adjournment of the suit generally the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set a suit down for hearing or apply for its dismissal. The Defendant herein has chosen the latter option, as it was entitled to do.

The court record discloses that the case last came up for hearing before Ombija, J. on 12th November, 2002. It was stood over generally as it was not ready for hearing on account of discovery not having been done and issues not having been framed by the parties. It is the Defendant's case in this application that since that time the Plaintiff has not taken any step to fix the case for hearing, a period of nearly two years and four months up to the time the application at hand was filed on 8th March, 2005. The Plaintiff is therefore no longer interested in pursuing the case and the same ought to be dismissed. The supporting affidavit sworn by the Defendant's learned counsel is along those lines.

The replying affidavit sworn in opposition to the application is similarly by the Plaintiff's learned counsel. In it are deponed the following facts:-

- (i) that the Plaintiff, as a step towards preparing its case for trial, filed its list of documents and statement of issues;***
- (ii) that there are correspondences between the counsels showing the Plaintiff's various actions towards preparing the case for trial;***
- (iii) that on three occasions the Plaintiff's advocates have invited the Defendant's advocates to take a hearing date, but that the court file could not be traced;***
- (iv) that the Plaintiff's advocates have had occasion to address the Deputy Registrar of the court on the issue of the missing court file;***
- (v) that this case was transferred from the Civil Division to this division without the Plaintiff's***

knowledge, and it took its advocates some time to learn of the transfer; and

(vi) that the Plaintiff's claim involves a huge sum of money together with interest, and that therefore it should be permitted to prosecute the same.

In the course of submissions it transpired that since the filing of this application the Plaintiff has set down the suit for hearing on the 19th December, 2005, and that the Defendant has been duly served with hearing notice.

I have considered the submissions of the learned counsels. I have also read the various cases cited by them which show how various judges of this court have exercised their discretion in applications such as the present one. The court should be slow to dismiss a case for want of prosecution where the suit can be heard without further delay, or where the defendant will suffer no hardship, and where there has been no flagrant and culpable inactivity on the part of the plaintiff. See the case of **VICTORY CONSTRUCTION COMPANY VS A. N. DUGGAL (1962) E.A. 697**. In the present case I am satisfied that the Plaintiff has not been guilty of flagrant and culpable in activity. I am also satisfied that the Defendant will not suffer any hardship as the suit is already fixed for hearing on 19th December, 2005.

In the circumstances I will refuse the application. But the Defendant will have the costs of the application as the same has not been without good grounding. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 9TH DAY OF DECEMBER, 2005.