



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

**Civil Suit 447 of 2004**

**HAITHAR HAJI ABDI .....1ST PLAINTIFF**

**ABDI RAHIM HAITHAR HAJI.....2ND PLAINTIFF**

**VERSUS**

**KENYA NATIONAL CAPITAL CORPORATION LTD.....DEFENDANT**

**SOUTH DOWNS DEVELOPERS LIMITED.....2ND DEFENDANT**

**R U L I N G**

What is before the court is a Notice of Motion dated 13th October 2005 made by the 2nd defendant. The application seeks an order for the dismissal of this suit for want of prosecution and is brought under OXVI Rule 5, O. L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The application is based on the grounds that, the plaintiffs has not taken any step or made any application with a view to proceeding with their suit as against the 2nd defendant for a period now exceeding one year; that it is in the interest of justice and fair play to all parties herein that the plaintiff's suit against the 2nd defendant be dismissed. The 2nd defendant's counsel, Mr Njenga submitted that the plaintiff filed its present suit on 10th August 2004 and simultaneously filed an injunction application against the defendants.

That the plaintiff also sought orders against the registrar of titles injuncting him from registering the transfer of the suit property to the 2nd defendant. That the application came up for hearing on 12th August, 26th August and 10th December 2004 and on each occasion the plaintiff sought an adjournment. That since 10th December 2004 the plaintiff has not taken any further action in this suit. 2nd defendant argued that the pendency of this suit was prejudicial to it and therefore sought orders as prayed.

2nd defendant's counsel further submitted that the present suit is unmeritorious since what the plaintiff seeks to stop, has already been concluded; that is, that the suit property was sold to the 2nd defendant and the transfer has accordingly been effected. 2nd defendant relied on two authorities; firstly Nakuru HCCC NO. 250 OF 2001 (Unreported) NATIONAL BANK OF KENYA LTD – V – D.P. MAHINDA t/a JONES & JONES ADVOCATES; and secondly HCCC NO. 708 OF 2002 (unreported) JASON OLUGA – VS – NATIONAL BANK OF KENYA LTD the ratio of both cases is that where a respondent fails to explain a delay in fixing a matter for hearing, an application for dismissal for want of prosecution will be granted.

The application was opposed on behalf of the plaintiffs by learned counsel Mr Albert Khaminwa. Plaintiff counsel submitted that the 2nd defendant's application is frivolous and vexatious for the applicant failing to make full disclosure to the court. Plaintiff stated that there is money owed to the 1st defendant and arising from those debts there were 7 cases pending before court. That two of those cases were consolidated. In one there was a pending application for review of orders of Hon Justice Waki (as he then was).

That the other suit came before Hon Justice Osiemo on 14th November 2005 but the same did not proceed because it could not be reached. Plaintiff's counsel stated that this case should not be viewed in

isolation in view of those pending suits. Plaintiffs counsel also argued hat there being a constitutional matter pending before the High court, where the plaintiff challenging sale of the suit property this application ought not to be granted.

The plaintiff counsel requested the court to exercise its discretion in favour of the plaintiff, and dismiss the 2nd defendant's application since the plaintiff has given sufficient explanation for not fixing this case for hearing. The 2nd defendant's counsel, stated in response, that the other suits that the plaintiff referred to are independent and separate to the present suit. In regard to the constitutional matter 2nd defendant stated that the stay granted, therein, related to HCCC NO. 2310 of 1993. That, that stay did not extend to these proceedings. I have considered the application before me, the replying affidavit and the arguments made by counsels.

I find indeed that on obtaining an adjournment on 10th December 2004 of the application dated 10th August 2004, for injunctive orders, the plaintiff has taken no action in either setting down the suit or application for hearing. That non-activity obviously offends OXVI Rule 5 (d) and would render this suit to be dismissed for want of prosecution, notwithstanding other suits between the parties.

Over and above that finding I was interested to know whether close of pleadings hereof have occurred. I found that the summons hereof are dated 19th August 2004. The same seem not to have been served and the validity of the same has not be extended hereof. The summons therefore expired on 18th August 2005. That being the case this suit cannot continue to subsist with expired summons. The suit again for that reason is liable to be dismissed

For the reasons shown herein above this suit is dismissed with costs as against all the defendant's the 2nd defendant is also awarded costs of the Notice of Motion dated 13th October 2005.

**Dated and delivered this 7th day of December 2005.**

**MARY KASANGO**

**JUDGE**