



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 5418 OF 1992**

**KABANSORA FLOUR MILLS ..... PLAINTIFF  
VERSUS  
JAMBO BISCUITS LTD ..... DEFENDANT  
R U L I N G**

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This is an application by the Defendant seeking orders to have the suit dismissed for want of prosecution. The application was filed pursuant to the provisions of Order XVI rule 5 of the Civil Procedure Rules

The application is supported by the affidavit of Fredrick Ashimosi Shitambasi, an advocate of the High Court of Kenya. By the said affidavit, Mr. Shitambasi sets out the brief history of the case. He has pointed out the salient facts as follows:

- (i) Suit was filed on 8/10/92
- (ii) Defendant entered appearance on 16/12/92
- (iii) The Case was last in court on 17/11/99, when it was stood over generally.
- (iv) On 28/11/01 the case was taken out of the hearing list. Since that date, the plaintiff has not taken any further action to prosecute the case.

In response to the application the Plaintiff has filed an affidavit of Benjamin Yator. By his said Replying Affidavit Benjamin Yator has made the following points:-

- (a) the application and supporting affidavit have conflicting dates, and are therefore fatally defective and should be struck out.
- (b) The Defendant had admitted part of the Plaintiff's substantial claim of Kshs 509,045/-.
- (c) The Plaintiff has been hampered in its keen desire to prosecute the case by matters beyond its control as the original documentary evidence is in the hands of the C.I.D.
- (d) The Defendant is guilty of laches in bringing this application.

At the Hearing of the application Mr. Lubullelah submitted that the failure by the Plaintiff to prosecute the case since November 2001 was reason enough for the dismissal of the case. A period of over 2 years was deemed as sufficient evidence of the Plaintiff's lack of interest in prosecuting the case. The applicant also submitted that the Plaintiff had failed to give a satisfactory explanation for its failure to take steps during that period. The said explanation proffered by the Plaintiff was to the effect that the Plaintiff's original documentary evidence was in the hands of the Criminal Investigations Department (CID). Efforts by the Plaintiff to retrieve the said documents from the CID had been unsuccessful.

The applicant submitted that if the original documents were missing, the Plaintiff could have applied to the court to utilize copies thereof as evidence in the case. The applicant therefore felt that the missing original documents should not by themselves be a good enough reason for the Plaintiff not to prosecute the case. However, the Plaintiff feels that unless they were unable to adduce evidence before the court of their efforts to procure the original documentary evidence, any attempts by them to utilize copies of such documents would most probably be rejected by the court.

I pause at this juncture to ask myself the question as to whether or not the explanation for the delay is reasonable, in the circumstances of this case. The circumstances that I refer to are basically constituted of the following factors:-

- (1) The suit was filed on 8th October 1992, and the Defence thereto was filed on 18/12/92
- (2) The summons for Directions were finalized on 14/3/95, after the parties had, (inter alia), filed a jointly-signed statement of the issues to be determined at the trial.
- (3) On 28/11/01 when the case came up for Hearing before Githinji J. (as he then was), the parties consented to it being marked stood over generally, for the reason that the Defendant had been placed in receivership.

The court has perused the 2 documents annexed to the Replying Affidavit, and noted that they are dated 10/2/00 and 23/11/01. Both letters emanate from the Plaintiff, and are addressed to their lawyers. The letter dated 10/2/00 basically informs the advocates that the Plaintiff could not trace the dishonoured cheques as they were in the custody of a police officer who was no longer in the police force. And then the letter of 23/11/01 notifies the Plaintiff's advocates that the Plaintiff was still tracing some of the missing documents. The letter also made reference to the fact that the Defendant had been placed under receivership thus necessitating the adjournment of the case, to enable the lawyers apply to join the receiver manager into the suit.

Both letters would appear to support the position put forward by the Replying Affidavit, as well as the Plaintiff's submissions, to the effect that the delay was occasioned by the missing documents. However, upon a closer scrutiny of all the circumstances, it becomes apparent that insofar as the letters – were written prior to 28/11/01, when the case was last in court for Hearing, the Plaintiff has not offered any explanation for the lack of action for the period in issue i.e. from 28/11/01 to date. Thus, whilst I am in agreement with the Plaintiff that they do not have any control over the CID who may be holding the original documents, this court has no alternative but to make a finding that the Plaintiff has not explained the actions, if any, which it took with a view to prosecuting the case for the period of over 2 years from 28/11/01.

Had the matter rested there, I would have granted the application without further consideration. However, the Plaintiff has put forward further submissions which must be given due consideration. The first of these submissions is that the Defendant did not take steps to fix the case for Hearing. The Plaintiff also submitted that the Defendant is guilty of laches, and thus does not deserve to be granted the orders sought as the application was not filed with due diligence. The plaintiff further submitted that the orders sought are discretionary, and that therefore the court ought to exercise its discretion in favour of the Plaintiff. The reasons advanced for this submission are that the dismissal of the suit would be a draconian measure which should only be taken in the most rare of cases.

It was submitted by the Plaintiff, that it was in the interests of justice to let the case proceed to trial. Finally, the Plaintiff submitted that the Application and the supporting affidavit had inconsistent dates, and should both be struck out with costs.

I will strive to address the issues raised, in turn, in the manner following.

(i) The provisions of Order XVI rule 5 (d) provide the Defendant will have the option of either setting the suit down for hearing or alternatively, applying for its dismissal. By choosing to apply for the dismissal of the suit the Defendant was well within its rights as expressly stipulated by the rules.

(ii) I must confess that I did not understand the reasons why the Plaintiff was accusing the Defendant of laches.

If the Defendant had filed an application to dismiss the suit soon after 28/11/01, the court would most probably have dismissed such an application. Whereas the rules allow the lodging of application for dismissal to be brought after more than 3 months following the adjournment of the suit generally, I believe that a prudent Defendant would actually wait for a considerably longer period before lodging such an application, if the application were to have a reasonable chance of being granted by the court. In effect, the delay complained about does actually weigh in the Defendant's favour.

(iii) This court recognizes the fact it has a discretion to decide whether or not to grant the application. In arriving at its final decision of this matter, the court will exercise its said discretion appropriately. In the exercise of the said discretionary power, the court will take cognizance of the fact that the dismissal of a suit summarily is a draconian step. And whilst in the process of exercising its discretionary power, the court will be mindful of the need to arrive at the most just result for the parties.

(iv) The application before the court is dated 28/11/03 whereas the affidavit supporting it was sworn on 24/11/03. The Plaintiff submits that since the affidavit purports to support an application which bears a date that is 4 days after the affidavit was sworn, the said affidavit would effectively be supporting a non-existent application. As far as the Plaintiff is concerned, the 2 documents are both fatally defective, and ought to be struck out.

The rules governing affidavits are to be found in Order XVIII of the Civil Procedure Rules. Order XVIII rule 9 provides as follows:

“Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned”.

The current wording of that rule was introduced by legal Notice No. 119/1975. Prior to that date, the position of our law was the same as in England. In the case of *Wahinya Vs Wahinya* [1976] KLR 96 Chesoni, J. (as he then was) dealt with a case in which an affidavit had been sworn before suit was filed. The court ruled as follows:

“The law contemplates commencement of a suit first before an affidavit can be sworn. In my opinion an affidavit which is sworn before action is valueless and cannot be acted on even if it is filed after issue of the summons. The court may, however, in its own discretion, make an order on it upon an undertaking by the applicant to reswear and refile the affidavit, but such discretion will be exercised only where refusal to make the order prayed for would cause irreparable damage, hardship and injustice to the applicant”.

Following the amendment to the rules, an affidavit may be accepted and acted upon even if sworn after the suit has been filed. In this case, the affidavit was definitely filed after suit was filed. The only issue raised is that it was sworn 4 days before the date of the application. Could it therefore be fatally defective

as urged by the Plaintiff. And would the Application be similarly defective?

This court holds the view that the affidavit which was sworn before the date of the application is not defective. I cannot see any ground upon which it can be said to be defective, merely because its date preceeds the date of the application. Indeed when I take note of the provisions of Order XVIII rule 9, which states that an affidavit sworn before a suit is filed will not be rejected just because it pre-dated the institution of the suit, I believe that the attempt to strike out an affidavit whose date is prior to the application is no more than a feeble attempt at attacking the said affidavit. But if I should be wrong on that score, and If indeed the affidavit were to be deemed defective, I still would hold that that would not render defective the application itself. The application was instituted under the correct provisions of the law.

The said application has also set out, within its body, the grounds upon which it was brought. The most significant ground is that the Plaintiff has failed to prosecute the suit for a period of more than 2 years. The failure to prosecute the suit for that duration is not denied. Indeed the said delay could not be denied, because the same is borne out by the court records

And as I have stated earlier in this Ruling, the Plaintiff has not explained the delay. It should by now be sufficiently clear that the applicant has persuaded me to grant orders dismissing the suit for want of prosecution.

Accordingly, I grant prayer 1 of the Chamber summons dated 28/11/03. Costs of he application and of the suit are granted to the Defendant.

Dated at Nairobi this 19th day of February 2004.

**FRED A. OCHIENG**

**Ag. JUDGE**