



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 367 OF 2001

CENTURY OIL TRADING COMPANY LIMITED PLAINTIFF

VERSUS

GERALD MWANIKI MBOGO AND ANOTHER DEFENDANT

RULING

The Notice of Motion herein, dated 16/4/04, under Order 16 rule 5 of the Civil Procedure Rules, seeks:

- 1. Dismissal of the suit herein with costs for want of prosecution.**
- 2. Cost of both this application and the entire suit to be awarded to the Defendants.**

The application is supported by the Affidavit of Njoroge Nani Mungai dated 26/4/04, and on the grounds that the Plaintiff has refused, neglected and/or failed to set down the suit for hearing and or failed to take any steps to prosecute the suit over 12 months since the last court attendance; and thus the suit is an abuse of the court process. The Defendant further avers that: continued delay in prosecuting the suit constitutes unnecessary anxiety.

Through its Replying Affidavit of 17/6/04, sworn by Martin Gacheru, a Director of the Plaintiff company, the Respondent opposes the application on the grounds that: the delay referred to by the applicant is explainable; that by agreeing to have the matter taken out of the Cause List of 10/3/03 the Defendants acquiesced in the delay, and lastly that if the suit is dismissed, it would suffer irremediable loss in the sum of its claim of Kshs.8,370,060/= whereas no prejudice would be suffered by the Defendant/applicant, and if any, it can be compensated in costs.

After due consideration of the pleadings by both parties and the authorities cited, especially the decision in **IVITA V. KYUMBU, Civil Suit No.340 of 1971**, which was heavily relied upon by both Counsels, I have arrived at the following findings and conclusions: Much of the Respondents grounds of opposition to the application for dismissal relate to activities prior to 10.3.03. That is the day the suit was, by consent, taken out of the day's Cause List; upon the application by the Plaintiff's Counsel, who had recently come on record, to facilitate familiarization with the contents of the suit.

Unfortunately, the above Consent to take out the suit from that day's Cause List, as herein above stated has been argued by the Respondent as constituting acquiescence by the Defendants, to the delay. I find that interpretation of that day's events a deliberate distortion of the truth.

Such applications are a normal practice in the Court room, and to turn round and argue that when a

Counsel indulges another, for whatever reason, that constitutes acquiescence or waiver, is at best dishonesty.

The critical time, and when the clock began to tick is from 10/3/03 pursuant to Order 16 Rule 5 of the Civil Procedure Rules.

Between 10/3/03 and 16/4/04, the Plaintiff went to sleep and did nothing towards prosecution of its suit; until this application for dismissal was filed. Counsel for the Plaintiff/Respondent, Mrs. Okioga, admitted as much in the cause of her submissions. No satisfactory explanation was advanced for the inaction over the period in excess of one year.

Counsel for the Respondent submitted that the Defendant's have a duty to have the suit listed for hearing and that it is not only the responsibility of the Plaintiff. For that she relied, over and above Order 16 rule 5 (d), on a Ruling by the Learned Judge Nyamu, in **H.C.C.C. No.724 of 2000, MICHAEL MWANGI GICHOHI V. INTRA AFRICA ASSURANCE CO. LTD.**, in the cause of which the learned Judge at p.3 said: **"I see no reason why either party should not initiate the immediate steps and thereafter set the case down for hearing."**

With the uttermost of respect, I don't subscribe to the notion that Order 16 rule 5 (d) shifts the burden of expeditious prosecution of a suit from the Plaintiff to the Defendant:

"It is the duty of the Plaintiff to get on with the case. Public policy demands that the business of the Courts should be conducted with expedition. ... This action has gone to sleep for nearly two years (over one year in the current suit).. It should now be dismissed for want of prosecution."

Lord Denning M.R. in **FITZPATRICK V. BATGER & CO. LTD** [1967] 2 All ER 657, at page 658.

The current application is also distinguishable from the facts before Nyamu, J. where he clearly was concerned about the limitation period in a personal injury – tort – case, whereas here it is an issue of contract where the limitation period, under Cap.22, Laws of Kenya is six, as opposed to three years in torts.

It is also important to underline the fact that under Order 16 rule 5 (d) the Defendant is given an option to **either set the suit down for hearing or apply for its dismissal.**

Any prudent defendant would obviously go for dismissal. After all, if the Plaintiff has demonstrated laxity in prosecuting his own suit what guarantee is there that he would respond to a hearing dated fixed by the Defendant?

Finally, Counsel for the Plaintiff/Respondent admitted that the Defendants have been prejudiced, but went on to add: **"But this is outweighed by the Plaintiff's claim herein."** This clearly has reference to the Shs.8,370,060/= in the Plaint; which Counsel submitted would be irreparable loss if the suit were dismissed.

I find the comparison between monetary loss and mental anxiety very cynical. Besides, to premise the loss of Kshs.8,370,060/= on the dismissal of the suit for want of prosecution **per se**, is tantamount to a presumption that the Plaintiff is guaranteed of success in the suit.

I do not believe that the Court can proceed on such an assumption. If the situation was that clear and dry, the parties would not have come to Court, and the Plaintiff would have proceeded with speed to finalize the obvious! The assumption is both preposterous and mythical, and I am not sold to the notion that any party in any case can be so sure of success until the final judgment of the Court.

For all the above reasons, I grant the application and dismiss the suit with costs, for want of prosecution. I also order that the Plaintiff/Respondent herein, bears the costs of this application.

DATED AND DELIVERED at Nairobi this 20th day of July, 2004.

O.K. MUTUNGI

JUDGE