



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO. 611 OF 1999**

**UAP PROVINCIAL INSURANCE CO. LTD.....PLAINTIFF**

**VERSUS**

**DOVER INSURANCE AGENCY LTD.....DEFENDANT**

**RULING**

The application before court is brought by the defendant under Order 16 rule 1 5 (d) and Order 50 rule 1 of the Civil Procedure Rules, and Section 3 A of the Civil Procedure Act.

The defendant seeks an Order for the dismissal of the suit for want of prosecution.

The Defendant's application is grounded on the following grounds:

- (a) The Plaintiff/Respondent has not shown any interest in prosecuting this suit as no steps have been taken to set it down for hearing since 26th February 2002.
- (b) Efforts have been made to have the Plaintiff prosecution its suit but he same have gone unheeded;
- (c) The pendency of this suit is highly prejudicial to the defendant/applicant and interests of justice are not at all served by its pendency.

In submission counsel for the defendant stated that this case was last fixed for hearing on 26th February 2002 when it was stood over generally and since that date up to the date the present application was filed it had been 18 months and the Plaintiff had in the intervening period not fixed this matter for hearing nor taken any steps thereof.

The defendant's counsel exhibited in the affidavit in support of the application two letters that were allegedly sent to the Plaintiff's counsel requesting that the case be fixed for hearing. Counsel for the plaintiff argued that those letters were never received by his firm and indeed when one looks at the address used it does not correspond to the Plaintiffs counsels address seen in other exhibits.

It was deponed on behalf of the defendant that the defendant in an insurance broker and apparently because of this pending suit the defendant was experiencing difficulties with the Commissioner of Insurance. A letter addressed to the Commissioner of Insurance was annexed to defence counsel's affidavit. It was argued by the defendant counsel that the pendency of this suit was prejudicial to the defendant as it was evident from the letter of the Commissioner of Insurance.

The defence counsel argued that since the Plaintiff had failed to show reason why it had not taken any step in this matter the same should be dismissed.

The Plaintiff's counsel began his argument by saying that the third party issue had caused the delay in setting down this suit for hearing. He failed to elaborate what issue in regard to the third party caused the delay.

Order 1 rule 18 provides that once a third party enters an appearance the party giving the notice may apply for directions. It is important to note that the word used there is that 'may' apply.

The discretion, which is, there by the use of that word may, means that it was not an impediment against the plaintiff taking action in the suit. Even if it was; the issue of third party notice is really between the defendant and third party, again I am not satisfied that the third party prevented this suit being heard.

The plaintiff's counsel was heard to argue that the defendant, rather than filing the present application, had an option of fixing the case for hearing. I accept that there is in Order 16 rule 5 that option but the defendant is not bound to given emphasis on one option against the other. The defendant was entitled, as he has done here, to apply for dismissal for want of prosecution rather than setting the suit down for hearing.

The Plaintiff's counsel argued that the Plaintiff's claim is large and the Plaintiff should therefore be given the right to be heard rather than the draconian act of dismissal. The plaintiff fails to explain if indeed the claim is substantial why there was no haste on their part in prosecuting the claim.

The Plaintiff through its replying affidavit deponed that a date was not fixed because of the loss or the unavailability of the court file. The Plaintiff miserably fails to prove such loss or unavailability other than relying on a letter of invitation marked as exhibit 'AM2'. This letter has alterations made on the date of invitation which make it suspect and additionally it is dated 1st November 2003 which is 21 months after the last adjournment of this case.

The Plaintiff's affidavit in reply state that the other delay in setting the suit down for hearing was in view of the unavailability of documents in the Plaintiff file but those documents were finally traced in March 2003. Strangely enough by letter dated 30th October 2003 marked 'AM1' plaintiff's counsel writes to the plaintiff in the following terms.

**“We refer to the above matter and our letter of 24th March 2002, requesting for claim supporting documents herein. Urgently let us have the same to enable us proceed further”.**

There is a contradiction here. The affidavit depones that the Plaintiff's counsel realized that some necessary documents were unavailable and accordingly wrote to the plaintiff on 30th October 2003 requesting for the same.

Paragraph 6 of the replying affidavit then states, “That it is only in March 2003 that the said documents were found.”

This contradiction and the plaintiff's conduct of this case make it very clear that this is a case deserving dismissal. The plaintiff relied on the following cases;

**KENYA COMMERCIAL BANK LTD – V – KIDRAPH NGETHE THAIRO HCCC NO 3134 OF**

**1991 MICHAEL MWANGI GICHOHI – V – INTRA AFRICA ASSURANCE CO LTD HCCC NO 724 OF 2000**

**KENYA TEA PACKERS LTD – V – CHARLES KABURU ERASUTS & OTHERS HCCC (MILIMANI) 498 OF 2002.**

I have to state that I was not persuaded by either these cases. I am of the view that this is a case that has to be decided on its own facts.

The defendant counsel deponed that this case is causing trouble for the defendant with the Commissioner of Insurance and this fact was not controverted by the Plaintiff. For this reason and the fact that the Plaintiff for 18 months took no step and even after the filing this application has failed to attempt to fix a date clearly shows that the application of the defendant is deserving.

The orders of the court is as follows: -

**(1) That this suit is dismissed with costs to the defendant.**

**(2) That the costs of the application dated 27th August 2003 are awarded to the defendant.**

**Dated and delivered at Nairobi this 19th day of October 2004.**

**MARY KASANGO**

**JUDGE**