



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 2967 OF 1997

**KENYA NATIONAL
CORPORATION LIMITED.....PLAINTIFF**

VERSUS

VIDHYA SAGAR VOHORA.....1ST DEFENDANT

T.N. VOHORA2ND DEFENDANT

RULING

The defendants are the movants of the Chamber Summons application dated 17th May 2004 seeking the following orders: -

- (1) That the suit against the 1st defendant be dismissed for lack of prosecution;
- (2) That the suit against the 2nd defendant has abated.

The application is brought under Order XVI Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

In support of the second prayer counsel for the defendants stated that the second defendant had passed away and her death certificate is annexed to the supporting affidavit marked as "VGI".

Looking at the death certificate I note that the deceased is named as SHAKUNTLA KUMAR VOHORA. The second defendant on the other hand is T.N. VOHARA.

The defence counsel argued that the Plaintiff failed to sue the second defendant in her maiden name, namely SHAKUNTLA KUMAR VOHORA and instead used her married name, which was T.N. VOHORA. To support that argument counsel drew the court's attention to correspondence written to the defendant by the plaintiff offering financial facility.

I find that I am unable to accept the defence submissions that T.N. Vohora is one and the same person as SHAKUNTLA KUMAR VOHORA.

I am of the view that the Plaintiff at the time when it offered the financial facility to the defendant it would have satisfied itself to the correct identity of T.N. Vohora, and this would be so when one considers that the Plaintiff was offering over Kshs 9 million. I therefore find it difficult to accept that SHAKUNTLA KUMAR VOHARA, now deceased, is the same as T.N. VOHARA. In this respect, the defence fails in regard to prayer No. 2.

In respect of prayer No. 1, the defence submitted that the Plaintiff adjourned generally this suit on 21st November 2001, and since that date the Plaintiff until the filing of the present application had taken no action to set the suit down for hearing. The Plaintiff's argument was that after being informed about the death of the second defendant they embarked on investigation to ascertain whether it was worth while to continue with the litigation.

The investigation report attached to the replying affidavit is dated 7th October 2002.

The Plaintiff's counsel was unable to explain what action it took on receipt of that report. Indeed, it seems that no action was taken on behalf of the plaintiff. Can one then assume that the Plaintiff concluded that this Litigation is not worth pursuing; the plaintiff, to my mind, were woken from their slumber by the defence application for dismissal.

The Plaintiff's counsel argued that the defence had not shown what prejudice they would suffer and if at all they suffered they could adequately be compensated with costs.

Order 16 Rule 5 does not set as a pre-requisite to an order for dismissal that a party do show the prejudice they suffer. I am of the view that a delay of 18 months before any action is taken does put the defendant at substantial risk that they possibly might not have a fair trial of issues in the action. Looking at defence exhibit "VSV I" the facility the subject of this action was granted in 1992, that is 12 years ago and with such passage of time prejudice against a fair trial is obvious.

The defendant relied on the cases:

NJUKI GACHUGU - V - GITHI 1977 LKR 108

ALLEN - V - SIR MCALPINE & SONS LTD 1968 2QBD 229

ROWE - V - TREGASKIE 1968 3 ALL ER 447 which have persuaded me.

In the case of **NJUKI** I wish to quote its holding as follows: -

".....the plaintiff's delay had been excessive, flagrant and inordinate; and as it had seriously prejudiced a fair trial of the action, it would be unfair and unjust to call upon the defendants to meet the plaintiff's claim which would, accordingly, be struck out".

The defendants succeed in their prayer for the dismissal of the suit against both defendants' for want of prosecution. The suit is accordingly struck out with costs to the defendants. Going through the file I noted that the summons herein provided the time for appearance to be 10 days.

Order 4 rule 3 (4) of the Civil Procedure Rules provides "the time for appearance shall not be less than 10 days". The summon herein having provided that the defendant should file an appearance within 10 days quite obviously contradicted the afore said rule. The court of appeal in the case of **CENEAST AIRLINES LTD - KENYA SHELL LTD (2000) 2 EA** page 362 stated in regard to such breach as follows: -

"This is a clear breach of Order 4 Rule 3 (4) and makes the summons invalid and of no effect."

Accordingly the summons in this case are invalid and on that basis alone this case would be dismissed.

The orders of this court are as follows: -

- (1) That this suit is dismissed for want of prosecution with costs to the defendant.

(2) The costs of the application dated 17th May 2004 are awarded to the defendants.

Dated and delivered this 11th day of October 2004.

MARY KASANGO

AG JUDGE