

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL CASE NO. 672 OF 1989

JOSEPH NZOMO MUNYAO PLAINTIFF

- VERSUS -

1. VICTORY SECURITY SERVICES LTD.

2. KENYA BREWERIES LTD. DEFENDANTS

R U L I N G

KENYA BREWERIES LTD. was sued by the 2nd Defendant while VICTORY SECURITY SERVICES LTD. was named as the 1st Defendant in a suit filed by the plaintiff JOSEPH NZOMO MUNYAO ON 19.3.89 claiming Damages for injuries suffered as a result of an accident involving motor vehicles belonging to the Defendants. After close of pleadings the suit was set down for hearing severally but was on each occasion adjourned for various reasons. The last such adjournment was on 13.9.00 when the suit was stood over generally.

On 3.12.2002, the 2nd Defendant applied by Notice of Motion under order 16 rule 5 of the Civil Procedure Rules for the Dismissal of the suit as against it for want of prosecution. Mr. Okong'o for the 2nd Defendant submitted that the said suit has been pending for the last 13 years and it was last listed for full hearing for the 13th September 2000. He further said the delay in prosecuting the suit was likely to cause injustice on the part of the 2nd Defendant in that the suit was based on negligence attributed to the 2nd Defendant employees who have since left their employment and with the long passage of time. It may not be possible to trace them when the suit eventually is listed down for hearing.

Mr. Kalama who held brief for Mr. Mulei for the plaintiff opposed the application on the ground that the main suit could not be listed down when an application by the 1st defendant dated 24.2.97 was still pending. In the Replying Affidavit by Mr. Mulei, he says the practice of the courts has been that no hearing of the main suit is fixed unless all applications have been dealt with. I must admit I was taken by surprise by that line of submission. Order 16 rule 5 is very clear and no where does it mention pending of application. I however do agree that the rule also gives the Defendant an option to set down the suit for hearing. Since it is an option, the Defendant herein has exercised that option.

I have read the record and the pleadings and note that the plaintiff has been very casual about the matter. Adjournments have been sought and granted severally and the plaintiff did nothing for 2 years since the last adjournment, and not even after the 2nd Defendant's counsel alerted him of the intention to file the current application.

The Plaintiff cannot be allowed to bring a suit and hold the Defendants at ransom until he is ready to prosecute the same. The plaint clearly basis the plaintiff's claim on negligence attributed to the Defendant's employee. It is common knowledge that employees are not permanent fixtures owned by the employer. In the circumstances I do agree that unnecessary delay is likely to cause injustice to the 2nd Defendant. No good reasons have been advanced by the plaintiff for his failure to prosecuted the suit. The same is consequently dismissed as against the 2nd Defendant with costs.

Dated and Delivered at Mombasa this 14th day of March, 2003.

P.M. TUTI

COMMISSIONER OF ASSIZE