



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.85 OF 1996**

1.DHIRAN KOTAK

2.AZIZ TAYABALI.....PLAINTIFFS

= V E R S U S =

SHABAHA INVESTMENTS LTD. & 6 OTHERS.....DEFENDANTS

R U L I N G

This suit was set down for hearing with the consent of all the parties on 16.1.01. Three days were given and confirmed at the Monthly Call-over in May as 12th, 13th and 14th of June, 2001.

After confirmation of the dates however, the Plaintiffs' Advocates on record at the time M/s Salim Dhanji & Co., took out a Chamber application under Certificate of Urgency seeking to withdraw from acting for the Plaintiffs. They explained their difficulties in a lengthy Affidavit which was considered when the application was heard inter-partes and granted before Hayanga, J., on 6.6.01. All counsel for the Defendants were present and stated that they had no objections to raise.

The Plaintiffs then instructed new Advocates M/s Kinyua Kamundi who came on record on 8.6.01. Come the hearing date 4 days later and Mr. Kinyua was not ready for the hearing. He sought an adjournment on the ground that the case file had not been retrieved from the Plaintiffs' erstwhile Advocates and it was difficult therefore to proceed.

That application was strenuously opposed by both counsel for the Defendants M/s Lumatete and Satish Gautama. They saw nothing but a deliberate attempt on the part of the Plaintiffs to subvert the cause of justice through delay. In their view there was sufficient time for the Plaintiffs to appoint and instruct new counsel having been fore-warned that an application would be filed by their other Advocates to withdraw.

I have perused the record and I must agree with M/s Lumatete and Gautama that the Plaintiffs' conduct betrays ulterior motives. Their erstwhile Advocates disclose the frustrations they faced due to lack of communication and instructions from the Plaintiffs. A conscientious Plaintiff would be concerned about the expeditious disposal of his case. Not these Plaintiffs. The main hearing has already been adjourned once at their behest. Some of the parties and their Advocates travel from Nairobi for the hearing. Some three days of the court calendar were tied up to facilitate completion of the case. That one of the Plaintiffs is a frequent traveller out of the country is not an excuse. His travels are not part of the equation of the court's or the Defendants' calendar. As correctly pointed out by Defendants' counsel they were not present in court. A court of equity would be slow to come to the aid of a party who conducts himself in such manner.

Having said that it is still the function of the Court to exercise its discretion in granting or refusing an adjournment. There is an Advocate now on record who says he has instructions to proceed but is held

back by a file which has not been released by other Advocates who have been allowed by the court to withdraw. A party has the Constitutional right to appoint counsel of his choice. He would nevertheless bear such costs and consequences in the exercise of that Constitutional right as it is not absolute.

In the result I am inclined to grant the adjournment sought on the following terms:-

- 1) The adjournment shall be last one sought at the behest of the Plaintiff.
- 2) The Plaintiffs shall pay Court Adjournment Fees in the sum of Kshs.6,000/- for the three days reserved for hearing.
- 3) The Plaintiffs shall pay to the two Advocates on record for the Defendants 1 – 6, getting-up and Adjournment costs assessed at Kshs.20,000/- each. (Kshs.40,000/-).
- 4) The Plaintiffs shall in any event pay witness expenses to the Defendants which shall be taxed if not agreed.
- 5) The payments in 2 & 3 above shall be made within 14 days.
- 6) The case shall be set down for hearing for a period of 3 consecutive days within the next 90 days.
- 7) In default of compliance with any of the above orders the Plaintiffs or any of them shall have no further audience in the suit which shall stand dismissed with costs.

I so order.

Dated this ...13th..... day of.....June.....2001.

P.N. WAKI

J U D G E