



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1107 OF 1990

KENBOX INDUSTRIES LTD.....PLAINTIFF

VERSUS

RAMESH SHAH.....DEFENDANT

RULING

This is the defendant's application under Order XVI Rule 5 and Section 3A Civil Procedure Act that the suit be dismissed for want of prosecution.

The application based solely on the ground that plaintiff has not since 27.5.2002 when suit was last adjourned set suit down for hearing. The application was listed for hearing on 3.2.2003 but it has been adjourned on several occasions. The hearing of the application was completed yesterday – that is 22.5.2003.

The application was served on plaintiff advocates on 28.11.2002 on the same day plaintiff advocates wrote to defendant's advocates to attend registry on 5.12.2003 for fixing a hearing date of the suit and on 5.12.2002 plaintiff advocates fixed the suit for hearing for next Monday and Tuesday that is on 26.5.2003 and on 27.5.2003. Today is on a Friday. There is a weekend and then the suit is scheduled to be heard on 26.5.2003.

The application on dismissal of the suit was filed 6 months after the date of last adjournment of the suit on 27.5.2002. By order XVI

Rule 5© and 5(d) Civil Procedure Rules defendant was entitled to apply for dismissal of the suit if plaintiff had not set suit down for hearing within 3 months after the last adjournment. But whether or not the court will dismiss a suit for want of prosecution will depend on the discretion of the court. The discretion of the court is exercised judicially.

Plaintiff claims over Shs.27 million plus general damages from the defendant. The defendant on the other hand counterclaims over Shs45 million from the plaintiff. The history of the suit up to 15.5.92 is set out in my ruling dated 15.5.92. The history of the suit after that date is reflected by the record. According to the Order of Shah, J (now J.A) given on 28.3.94, this suit and HCCC NO. 2793/93 are to be heard in sequence one after the other by the same Judge. That means that the hearing dates of the two suits was to be fixed at the same time.

This is undoubtedly an old suit filed on 2.3.90 and which relates to an agreement dated 30.6.89. Although there was delay of six months in fixing suit for hearing the suit has now a hearing date in three

days time.

Dismissing the suit will not finally determine the dispute believe the parties as defendant will have to prosecute the counterclaim and as court will also have to deal with the other suit – HCCC No. 2793/93 it would be unjust to dismiss the suit for want of prosecution and thereafter allow defendant to prosecute the counterclaim. It is not contended by defendant that the delay in the prosecution of the suit is such that a fair trial cannot be held at this stage.

Considering all the circumstances of this case it is my view that injustice will be done in plaintiff's suit is dismissed for want of prosecution. It is just in the circumstances that all matters in controversy between the parties should be heard and determined on merit. Costs will be sufficient compensation to the defendant.

Consequently I dismiss the defendants application dated 27.11.2003 is dismissed with costs to the defendant in any event

. E.M GITHINJI

JUDGE

23.5.2003

Mr. Odera present

Mr. Nagpal present