



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ADMIRALTY CAUSE NO. 1 OF 1998**

**AL-YASIN TRADING &**

**CONTRACTORS CO. LTD. .... PLAINTIFF**

**VERSUS**

**THE OWNERS OF THE MOTOR VESSEL**

**“MUZAFFER AZIZ” ..... DEFENDANT**

**RULING**

This is an admiralty cause filed in court in 1998. The defendant has filed a Notice of motion dated the 28.7.2000 under Order 25 r.14 Rules of supreme Court and inherent jurisdiction of the court seeking orders that this suit be dismissed with costs for want of prosecution together with costs of this application. The grounds relied upon are that

- (a) Pleadings were deemed to be closed on 21.7.1998.
- (b) Plaintiff should have taken out a summons of directions within 1 month after close of pleadings.
- (c) The plaintiff despite being urged to do so by defendant has failed or refused to set on with the action.
- (d) Plaintiff is guilty of inordinate delay.
- (e) That the delay has caused prejudice to the defendant and has rendered a fair trial impossible in that the insurers of the Demurrage, freight, and defence, have gone into liquidation.
- (f) The master of the vessel in command of the vessel at the material time has left the motor vessel upon expiry of his contract. He was to be called as a witness.
- (g) The bank guarantee by KCB which is still in force is expensive and oppressive funds not earning interest.
- (h) Court diary is already full for this year and further delay will be caused by having to obtain a date for hearing.
- (i) That the plaintiff has failed to react to letters dated 3.7.2000 and 21.7.2000 pointing to the delay

complained of but the plaintiff's advocate has failed to respond giving the impression that they have no interest in the suit.

The applicant has filed a lengthy affidavit in support.

In reply the plaintiff admits that there was some delay in the prosecution of the action. There was lack of instructions when the plaintiff could not be traced by their advocates. This situation was communicated to defendant's advocate by letter dated 13.9.2000. The plaintiff gave instructions in August and subsequently in September 2000 a list of documents was filed by the plaintiff showing they still had interest to proceed with the action. That no prejudice has been occasion to the defendant by the delay complained of which has been fully explained. If there has been inordinate delay the applicant has warned the same or acquiesced in the same. List of documents was filed on 17.5.2000 only 2 months before making this application, this amounted to taking action in the suit after raising complaints. The application was filed 2 months after this step was taken and it is obvious the reason was that the defendants' insurers had been put into liquidation and there was fear as to how the counsels legal fees would be met. See fax sent to Kinyua Kamundi by his clients on 27.7.2000 where he was advised that this suit be struck off as the delay has caused prejudice to ship owners and the their insurers. Note that no prejudice has been shown except that of the payment of fees of the advocate by the insurers. Note also that the ship owners are not in liquidation but the insurers. There is allegation that the master of the ship was to be a witness and he has left and this will prejudice defendants fair trial. It is submitted that this being a commercial matter evidence is likely to be in documents and statements already taken or to be taken and that this is not a compelling factor. It is disclosed that the security was given at the beginning and the interest granted for a period of 2 years only. Therefore no prejudice is suffered by the defendant in this respect.

After considering the arguments of both sides I find that the delay is accepted by the plaintiff is explained and the plaintiff has offered to pay costs in relation thereto in co-operation and has apologized for the delay. I do also find that the plaintiff is quite interested in pursuing the action. An application for dismissal of an action is drastic step and orders should only be made in clear and obvious cases. I am not satisfied that the reasons forwarded for showing prejudice are sufficient to warrant dismissal order. However it is not for the court to encourage delay of cases as this is obstructive and interferes with the smooth running of the court. I therefore dismiss the application and order that the plaintiff do pay costs to the defendant to be argued upon by the parties or taxed. I direct the parties to complete discovery within 14 days and thereafter hearing dates to be fixed for 1 day. Suit shall be fixed in court diary for hearing within the next 60 days finally which the suit shall stand dismissed.

**Dated this 5th day of July 2002.**

**J.**  
**COMMISSIONER OF ASSIZE**

**KHAMINWA**

5.7.2002

Present: Mr. Kinyua for applicant

Mr. Inamdar for plaintiff

Mr. Inamdar: -

I want a copy of Ruling.

Mr. Kinyua: -

I require a copy of the Ruling.

Court: -

The same be supplied upon payment of costs.

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**