



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 113 OF 1998

SHIGOG INVESTMENTS LIMITED
PLAINTIFF/APPLICANT

VERSUS

1. NATIONAL BANK OF KENYA LIMITED 1ST DEFENDANT
2. KENYA REVENUE AUTHORITY 2nd DEFENDANT
3. COMMISSIONER OF CUSTOMS & EXECISE..... 3RD DEFENDANT
4. ATTORNEY GENERAL 4TH DEFENDANT

RULING

The first defendant in this suit seeks orders to dismiss this suit against it for want of prosecution on the part of this applicant. The application is supported by affidavit sworn by counsel Ms. Gudka who states that the pleadings between plaintiff and the applicant closed on 4.5.1998 and since then the plaintiff has taken no further steps against this defendant. The application is brought under Order XVI rule 5(a).

The plaintiff in reply states that it is not true that there is want of prosecution in this suit. It is said that the suit has been prosecuted and has terminated in favour of plaintiff against all defendants.

That a ruling by Hon. Commissioner Tutui determined the matter and a decree was drawn (exhibit SMS2). The plaintiff proceeds to allege that the advocates A B Patel & Patel should not be acting for first defendant as they acted for the plaintiff on this particular transaction and was paid shs. 2 million as fees and it is not right for them to act against them in this case. Further they say the first defendant was sued in his capacity as trustee only as he was keeping a deposit of money in this case during 1997-1998. I have perused the record. The plaint accuses the applicant of intending to “irregularly and/or wrongfully to release a sum of shs. 30,582,109/- thereby jeopardizing the interest of the plaintiff and hence endangering its ownership of the charged property” and “despite notice to first defendanthave refused and neglected to refrain from the act”.The prayers of plaint is an injunction restraining the applicant from releasing the money. The applicant filed statement of defence denying these allegations. I see the plaintiff taxed party & party only against 2nd and 3rd defendant. Looking at the Notice of Motion dated 24.10.2000 it was made against 2nd and 3rd defendants only on their admissions and the decree drawn from the ruling of the court is against he 2nd and 3rd defendants only.

I find therefore that the allegations made in the plaint against the applicant and denied by the applicants have never been determined although an interim injunction was issued.The suit between plaintiff and this

defendant is therefore outstanding and has not been prosecuted within the prescribed time.

In the circumstances the application is allowed and orders are granted as prayed with costs.

Dated this 14th day of June, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Read in presence of Ms. Gudka and Mrs. Obura

Mrs. Obura – I apply for a certified copy of the ruling and the proceedings of this application.

Court – Order granted copies to be supplied upon payment of coping charges.

J. KHAMINWA

COMMISSIONER OF ASSIZE