



**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO. 4122 OF 1991**

CONCORD INSURANCE COMPANY LTD.....PLAINTIFF

-VERSUS

H. YOUNG & COMPANY LTD.....DEFENDANT

RULING

This is an application dated the 29/9/2000 under Order XVI Rule 5(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for Orders that this suit be dismissed for want of prosecution.

The application is made on the ground that the Plaintiff failed to take any steps to prosecute the suit for a period of over 12 months. A supporting affidavit was annexed which gives the sequence of events upto the time the matter was taken out of the hearing list. For 11th and 12th 1998 after which no further action has been taken by the plaintiff to set down the suit for hearing.

A replying affidavit was filed on the 16th February, 2001. The Plaintiff/Respondent opposes the application on the grounds; that the applicant has not made discovery as mandatorily provided by the provisions of Order X Rule IIA of the civil Procedure Rules. That the applicant was on 11th August, 1997 served with a request for further and better particulars but the applicant has failed to supply the same despite the Respondent’s reminder dated 25th August, 1998.

The Respondents further contends that the application is misconceived as the provision under which it is made refers only to suit which have actually been invited for hearing but are taken out on the day of the hearing which is not the case herein.

The applicants also contend that the applicants were entitled to set down the suit for hearing but they have not done so.

The courts jurisdiction to dismiss a suit for want of prosecution is discretionary. Order 16 Rule 5 of the Civil Procedure Rules under which this application is brought provides as follows:

“5 If, within three months after-

(a) the close of pleadings; or,

(b)

(c) the removal of the suit from the hearing list; or

(d) the adjournment of the suit generally the plaintiff, or the court of its own motion on notice to the parties, does not set the suit down for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.

The applicant therefore was entitled to the choice to either set the suit down for hearing or to apply for dismissal. He chose to make this application.

Such an application can be made 3 months after the close of pleadings; removal of the suit from the hearing list or adjournment of the suit general. This matter was taken out of the hearing list for 11th and 12th November, 1998.

I find that the Respondent has not taken any step to prosecute the suit since the matter was taken out of the hearing list. I also find that he has failed to supply the further and better particulars requested by the Respondent on the 11th August 1997. I do not think the applicant is bringing this application in good faith. My view is that both parties are guilty of inaction although from the supporting affidavits the Respondent it seems the Respondent has not been eager to prosecute this suit.

I do not think this is proper for dismissal. I refuse the application.

The costs be in the course.

Delivered and dated this 6th day of March, 2001.

KASANGA MULWA

JUDGE