



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 47 OF 2009**

**AKABA INVESTMENTS LTD .....PLAINTIFF**

**V E R S U S**

**KENYA REVENUE AUTHORITY .....DEFENDANT**

**RULING**

**1. AKABA INVESTMENTS LTD**, the Plaintiff filed this case on 11<sup>th</sup> November 2009 against **KENYA REVENUE AUTHORITY**, the Defendant. Plaintiff alleges Defendant unlawfully withdrew reduced tariff rates for sugar imported from Common Market for Eastern and Southern Africa (**COMESA**) which allegedly led prohibitive tariffs. That although in other similar cases before Court of Appeal it was determined that Defendant should release the sugar consignments to the respective importers, the Defendant failed to release Plaintiff's consignment. Plaintiff has therefore prayed for special and exemplary damages.

2. The Plaintiff's claim was defended by Defendant by defence filed on 25<sup>th</sup> November 2009. The Plaintiff's claim is denied in that defence.

3. From the date that defence was filed no party took any step towards preparation of this case for trial. It is that inactivity which led the Defendant to file Notice of Motion dated 22<sup>nd</sup> May 2014 which is under consideration in this Ruling.

4. By the affidavit in support of that Notice of Motion Defendant deponed that from 6<sup>th</sup> December 2009, the date that the pleadings closed, the Plaintiff went into "slumber" and had failed to set the case for hearing now for more than four years. That the delay was prejudicial to Defendant because some of its key witnesses have since retired from Defendant's employment and others would have lost institutional memory.

5. Plaintiff in response attributed the delay in setting the suit for hearing on the perennial shortage of Judges at Mombasa High Court; to elevation to the Court of Appeal of Judges from the Mombasa High Court; to Judges in High Court being assigned to hear Election Petitions; and others being absent due to further studies.

6. Plaintiff prior to the hearing of the Notice of Motion filed its witness statements and very bulky documents. By that Plaintiff was preparing or getting ready for pre-trial directions to be given by the

Court.

7. The Plaintiff although has delayed in setting down the suit for hearing has now been awoken from its slumber by the Defendant's Notice of Motion and has prepared for trial. The principles to guide the Court when considering an application such as the one before the Court were discussed in the following cases-

**“ET MONKS & CO. LIMITED –Vs- EVANS (1985)KLR 584-**

**In that case Kneller, J. as he then was held, inter alia;**

**‘Whether an application for dismissal of suit for want of prosecution should be allowed or not is a matter for the discretion of the Judge who must exercise it judicially. The Court shall among other things, consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was inexcusable. However, each case will turn on its own facts and circumstances.’**

**In the case of MOSES MURIIRA MAINGI & 2 OTHERS –VS- MAINGI KAMURU & ANOTHER – NYERI CIVIL APPEAL NO. 151 OF 2010. The Court of Appeal said-**

**‘The power of the Court to dismiss a suit for want of prosecution is discretionary power, but which should be exercised judicially.’**

8. It need however to be stated that the overriding objective of the Civil Procedure Act brought the management of cases within control of the Court. This was clearly stated in the case **MRADULA SURESH KANTARIA AND SURECH NANILLAL KAPTARIA CIVIL APPEAL NO. 277 OF 2005** (unreported) where the Court observed as follows-

**“In this regard, we believe one of the principal purposes of the double “OO” principle is to enable the Court to take case management principles to the centre of the Court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap.”**

9. Bearing the above cases in mind I am of the view that interest of justice and observance of the need to have proportionality, will best be served by allowing the Plaintiff to proceed to have its day in Court. In doing so I am of the view that the Defendant will not be prejudiced because it is expected that its evidence would be documentary evidence which can be produced by any of its officers. The retirement or loss of institutional memory does not play role with regard to such evidence.

10. Therefore exercising the discretion I have under Order 17 Rule 2(3) of the Civil Procedure Rules, I decline to dismiss the case for want of prosecution. Accordingly the Notice of Motion dated 22<sup>nd</sup> May 2014 is dismissed but the costs shall be paid by the Plaintiff.

11. Further I order the parties to comply with pre-trial directions by filing all their witness statements, their issues and all their documents within thirty (30) days from today's date. Parties shall thereafter take a date at the registry for Pre-trial Directions after the thirty (30) days. Failure of the Plaintiff to fix this matter for pre-trial directions within sixty (60) days from today's date this suit will stand dismissed with costs of the suit being awarded to the Defendant.

It is so ordered.

**DATED and DELIVERED at MOMBASA this 3<sup>RD</sup> day of MARCH, 2015.**

**MARY KASANGO**

**JUDGE**