



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

**CIVIL SUIT NO. 404 OF 2002**

**MARA FORWARDERS LIMITED.....PLAINTIFF**

**-VERSUS-**

**AL-NAKHIL ENTERPRISES LIMITED.....DEFENDANT**

**COMMERCIAL SPARES SUPPLIES LIMITED.....PURCHASER**

**HASSAN ABDULATIF MOHAMED.....THIRD PARTY**

**RULING**

1. Five (5) different suits were filed against **AL-NAKHIL ENTERPRISES LIMITED**, the Defendant herein. The suits were filed by various Plaintiffs for different amounts in 1997 at the High Court of Kenya at Nairobi, Central Registry. They were later moved to Milimani Law Courts when the registry was moved from Central Station of the Nairobi High Court to Milimani Commercial Courts.

2. On 4th December 2000, following an application by **HASSAN ABDULATIF MOHAMED**, the Third Party herein, Mbaluto, J. (as he then was) ordered that the five suits be transferred from the High Court at Nairobi to the High Court at Mombasa for trial and disposal. The suits were therefore transferred to Mombasa in November 2002. The details of the five suits are as follows:

**i. Mombasa HCCC No. 404 of 2002 (formerly Nairobi HCCC No. 2962 of 1997) in which MARA FORWARDERS LIMITED sued the Defendant herein for Kshs. 12,366,546.65;**

**ii. Mombasa HCCC No. 405 of 2002 (formerly Nairobi HCCC No. 2963 of 1997) in which IRONGI GENERAL CARGO LIMITED sued the Defendant herein for Kshs. 5,145,361.00;**

**iii. Mombasa HCCC No. 406 of 2002 (formerly Nairobi HCCC No. 2964 of 1997) in which JARIBU RESOURCES LIMITED sued the Defendant herein for Kshs. 30,843,266.00;**

**iv. Mombasa HCCC No. 407 of 2002 (formerly Nairobi HCCC No. 2965 of 1997) in which TRANS AMAZON FREIGHTERS sued the Defendant herein for Kshs. 11,388,705.30; and**

**v. Mombasa HCCC No. 408 of 2002 (formerly Nairobi HCCC No. 2975 of 1997) in which WANYONYI CHEBUKATI t/a WANYONYI & COMPANY ADVOCATES sued the Defendant herein for Kshs. 1,322,500.00**

3. The suits were filed over 16 years ago and have been handled by various Judges in two different High

Court Stations. Some part of the record has gone missing or become mutilated and some documents have been mixed up in the process of filing. I have taken time to keenly go through the record and have managed to decipher the following from the record:

**i. Although the files are placed together, I have not seen any order on record that the five files be consolidated. The closest I have seen is the order made by Hayanga, J. (as he then was) on 5th May 1998 that three files namely HCCC No. 2962 of 1997, HCCC No. 2964 of 1997 and HCCC No. 2965 of 1997 be kept and mentioned together. Nevertheless, the record shows that all the files have been moving together with various applications being filed and heard together and various proceedings being undertaken together. I suspect this has been due to the fact that the Defendant in all the five cases is the same and the issues as well as the pleadings and applications have been more or less identical.**

**ii. The Defendant did not enter appearance in all the five cases and the respective plaintiffs requested for judgment in default of the Defendant's appearance. Judgments were accordingly entered for the plaintiffs as prayed in their respective Plaints.**

**iii. The Defendant later filed Notices of Appointment of Advocate dated 4th March 1998 in the five files and applications all dated 6th March 1998 seeking to set aside the default judgments. The record shows that on 15th October 1998, the application dated 6th March 1998 in HCCC No. 2963 of 1997 was dismissed for non-attendance by Kuloba, J. (as he then was). Although Kuloba, J. did not direct that his order of dismissal applies to the other four files, it appears parties in those other four files have been proceeding as though the order was to apply in all the files. For instance, I have seen an extracted order in HCCC No. 2962 of 1997 indicating that the application dated 6th March 1998 in that file had been dismissed. The handwritten proceedings however do not indicate so. Further, I have seen applications in the other four files seeking to reinstate their applications dated 6th March 1998 despite the fact that there is nothing on record showing that those applications were also dismissed on 15th October 1998. It is difficult to state that with all certainty because as I stated before, the record before court now is not foolproof due to the long history of the cases.**

**iv. The Defendant then filed another set of applications in the respective suits all dated 4th February 2000 in which it sought similar orders for the setting aside of the respective exparte judgments. The record shows that those applications dated 4th February 2000 have never been heard and determined to date.**

4. The Application under consideration is the Defendant's Notice of Motion dated 10th November 2008 and filed on 30th September 2009 (“**the Application**”) in which the Defendant prays that the suit be dismissed for want of prosecution. The application is replicated in all the other four files. The Defendant argues that over five years have elapsed since the suit was last in court for hearing yet nothing has been done by the Plaintiff.

5. As I have stated, there is no order on record that the five files be consolidated. However, since the history of the files indicates that they have been moving together and since the issues raised in all the five files have always been identical just like it is in the present application, I suggest that the decision of the court on the present application be applied *mutatis mutandis* to the other four files namely; **HCCC No. 405 of 2002**, **HCCC No. 406 of 2002**, **HCCC No. 407 of 2002** and **HCCC No. 408 of 2002**. It does appear that that has been the intention of the parties because sometimes they have only filed one set of documents such as their respective written submissions on the Application.

6. After the transfer of the files from Nairobi to Mombasa, nothing much happened save for the filing by PRIME BANK LIMITED of a Notice of Motion Application dated 15th July 2003 seeking to be enjoined in the proceedings and that the suits be transferred to Nairobi for hearing. That application came up for hearing on 21st August 2003 before Khaminwa, J. who allowed the prayer to enjoin Prime Bank Limited to these proceedings but directed that the application be served for hearing on the prayer to transfer the suits to Nairobi. Nothing happened thereafter until 30th September 2009 when the present Application

was filed.

7. Although the order of 4th December 2000 was that the cases be transferred to Mombasa for trial and disposal, there was anything left in the cases to be tried. This is because Judgment had already been entered against the Defendant in default of appearance and the same had not been set aside. Perhaps the only thing that was pending determination was the Defendant's Application dated 4th February 2000 in which it sought to set aside the exparte judgment.

8. **Order 17 Rule 2** of the Civil Procedure Rules, 2010 provides that:

**“2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**

**(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**

**(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

**(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”**

9. The Defendant submits that the Plaintiff has not taken any steps in these proceedings for five years and the delay in prosecution is causing an inconvenience and injustice to the Defendant.

10. **Order 10 Rule 4** of the Civil Procedure Rules, 2010 provides that:

**“(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in**

**Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.”**

11. The implication of Order 10 Rule 4 above is that where the claim is liquidated, like in the instant cases, there is no requirement to proceed to formal proof hearing. The judgment entered is final and is executable unless not set aside. This is in contrast to, for instance, a claim for pecuniary damages where the case must proceed to assessment hearing. Indeed the record shows that the Plaintiffs did extract the respective decrees in all the five cases. Once judgment was entered and the decrees extracted, there was no case left to proceed to hearing and which can therefore be subject to dismissal for want of prosecution. The Defendant's argument that the delay in prosecution is causing it inconvenience and injustice therefore does not lie. If anything, it is the Defendant who is guilty of lach for failing to prosecute its application dated 4th February 2000 in which it sought to set aside the exparte judgment. This suit does not fall under Order 17 Rule 2 under which a suit may be dismissed if no application has been made or step taken by either party for one year because judgment is already entered and decree extracted.

12. The Defendant's application must and it does therefore fail because there is no suit pending prosecution capable of being dismissed. Notice of Motion dated 10<sup>th</sup> November 2008 is dismissed with costs.

13. This Ruling does also apply in **Mombasa HCCC No. 405 of 2002, Mombasa HCCC No. 406 of 2002, Mombasa HCCC No. 407 of 2002** and **Mombasa HCCC No. 408 of 2008**.

**DATED and DELIVERED at MOMBASA this 9<sup>TH</sup> day of OCTOBER, 2014.**

**MARY KASANGO**

**JUDGE**