



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 1224 of 2002**

**SUNIL KAPILRAY DAVE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SUPREME HOTEL LIMITED.....DEFENDANT/APPLICANT**

**RULING**

The application is a Notice of Motion brought under Order XV1 Rule 5 and L Rule 1 of the Civil Procedure Rules. It is dated 17<sup>th</sup> February, 2009 and seeks the following orders:

1. THAT this suit be dismissed for want of prosecution.
2. THAT the Defendant/Applicant be provided with costs of this suit and of the current Application.
3. THAT any other or further relief deemed fit may be granted.

The grounds in support of this application are on the face of it as follows:

1. THAT since 8<sup>th</sup> day of April 2005 when I presented (sic) my Application dated 4<sup>th</sup> day of June 2003 seeking for orders of deposit of sum of Kshs.100,000/- as security by the Plaintiff/Respondent, no positive action has been taken (sic) till to date nor has the Respondent responded to the said orders issued on the 26<sup>th</sup> day of October, 2005.
2. THAT though the Defendant has interest in this suit the inactivity on the part of the Plaintiff or its Advocate is highly prejudicial to the interest of the Applicant herein.

The application is supported by an Affidavit sworn by one Adera Oyombe, an Advocate representing the Defendant, dated 10<sup>th</sup> March, 2009.

The Plaintiff's advocate was served with the application on 13<sup>th</sup> March, 2009. Despite this service no papers were filed in opposition to the said application. When the application came up for hearing on 29<sup>th</sup> April, 2009, only Mr. Adera for the Defendant appeared.

I have considered the submission by Mr. Adera which was very brief. He basically relied on grounds on the face of the application and those in the supporting affidavit. The Applicant cited Order VIA of Civil Procedure Rules which is the wrong order for this application. The correct order to cite is order XVI. I

will overlook the error as being typographical. In any event, order L rule 12 gives the court power to consider an application even where the order or rule relied upon is not stated.

In an application of this nature, the test to be applied is whether the delay is prolonged and inexcusable and that if it is, whether justice can be done despite the delay. In the Ivita v. Kyungu [1984] KLR 441, at page 449 Chesoni, J. as he then was stated as follows:

*“The test is whether the delay is prolonged and inexcusable and if it is can justice be done despite such delay. Justice is justice to both the Plaintiff and the Defendant, so both parties to the suit must be considered and the position of the Judge too because it is no easy task for the documents, and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the Court that he will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus even if delay is prolonged if the Court is satisfied with the Plaintiff’s excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”*

The Plaintiff is required to give an explanation for the delay in order for the court to determine whether the reason given for the delay was excusable and whether justice can be done to the parties despite the delay. The Plaintiff did not seize the opportunity accorded to him to give an explanation for the seven years delay in prosecuting this matter. The delay involved is prolonged. In the absence of any explanation whatsoever, the delay is inexcusable.

This suit was filed by the Plaintiff on 2<sup>nd</sup> December, 2002. It was in court on 8<sup>th</sup> April 2005 and on that date the learned Judge allowed the Defendant’s application in which it was seeking for security of costs to be provided by the Plaintiff in favour of the Defendant. That was the last time the matter was in court. No steps have been taken to have this matter prosecuted. The 8<sup>th</sup> of April, 2005 is four years ago. I find that four years is not only prolonged but inordinate delay in the prosecution of the case. The Plaintiff has not ceased the opportunity to explain this inordinate delay in prosecuting the matter. It does appear to me that he has lost interest in pursuing the suit.

For this reasons, I will allow the Defendant’s application, and dismiss the Plaintiff’s suit with costs of both the application and the suit to the Defendant.

Dated at Nairobi this 8<sup>th</sup> day of May 2009.

**LESIIT, J.**

**JUDGE**

**Read, delivered and signed in presence of:**

Mr. Adera for the Applicant

N/A for Respondent

**LESIIT, J.**

**JUDGE**