



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 155 & 156 of 1994**

A.C.A. D'SOUZA

ABDULSHAKOOR KHANDWALLAPLAINTIFFS

VERSUS

E.A.B. SOCIETY LTD.DEFENDANT

R U L I N G

East African Building Society Ltd., the defendant/applicant herein, invoked the provisions of order XVI rule 5 of the Civil Procedure rules and applied for this suit to be dismissed for want of prosecution. The Motion is supported by the affidavit of Ushwin Khanna, learned advocate for the defendant.

The Plaintiffs opposed the Motion by replying on the affidavit of Abdulshakoor Khandwalla.

It is the submission of the defendants that seven years have lapsed since the plaintiff took a step to have the case prosecuted. It is also averred that it is over 11 years since this suit was filed by the plaintiff against the defendants and that the plaintiff has not made any move to list the same for hearing.

The plaintiff sought to explain the cause for the delay by giving the chronology of events leading to the current position. Mr. Ushwin Khanna advocate for the defendant agreed with those facts deponed in the affidavit of Abdulshakoor Khandwalla.

In brief, the plaintiffs denied that they had failed to take any steps as alleged by the defendant. The plaintiffs gave the details of the steps they took in an attempt to have the dispute heard and finalized. It is averred that the plaintiffs obtained an order of injunction restraining the defendant from distressing for rent sometimes in the year 1994. The defendant filed an appeal against the decision in the court of Appeal and the court of appeal confirmed the orders on 25.7.97 on condition that the difference of the increased rent be deposited on an interest earning account in the joint names of the counsels. It is said that the appeal could not proceed for hearing because the tribunal records went missing and this fact prompted Mr. Justice Maraga to stay the assessment of the rent and directed the matter to be heard *de novo* before the tribunal. It is said the aggrieved party preferred an appeal against Justice Maraga's decision. The appeal is still pending for hearing before the court of appeal.

The facts as stated by the plaintiffs are not contested. It is further stated by the plaintiffs that it has become extremely difficult to secure a hearing date in the High court Registry, Mombasa because

hearing dates are given on quota basis.

I have considered the submissions of both M/s Kasmani advocate for the plaintiffs and Mr. Khanna advocate for the defendant. I have further taken into account the material placed before me. It is trite law that a suit will be dismissed where the delay or default is intentional and contumelious. In this case I am satisfied that there is a delay but the delay is not intentional. I am convinced that the plaintiff's Counsel has given good reasons to excuse the delay.

In the end, the motion is ordered dismissed with each party meeting its own costs.

Dated and delivered at Mombasa this 16th day of June 2006.

J.K. SERGON

J U D G E

Suchak h/b Kasmani for the plaintiff.

Okongo for the defendant



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