

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 129 of 1992

LOCHAB BROTHERS:.....PLAINTIFF

VERSUS

P.K. BHATIEA LTD:.....DEFENDANT

R U L I N G

LOCHAB BROTHERS the plaintiff/Respondents filed this suit in 1992 seeking for special damages of Shs2, 043,100/= being the loss of their vehicle registration No. **KAB 588A** which had collided with the defendants/applicants vehicle Reg. No. **KAB 695K**. They also prayed for damages for loss of user. The defendant filed a defence denying liability. On 24th July 2000 the two filed consent order in court where liability was apportioned at 50% - 50%. However since then the plaintiff did not take any steps to set the suit down for hearing. The defendant therefore brought this application under Order XVI rule 5, Order L rule 1 CPR and S.3A of CPA. He seeks court to dismiss the case for want of prosecution, and also costs of the suit.

Court was told that since July 2000 the plaintiff has not taken any steps to prosecute the case. Six and half years had passed by the time the application was filed.

The application was opposed. Mr. Kuloba an advocate swore an affidavit and stated that they had severally invited counsel for the applicant to come to court to take dates for hearing. He annexed a bundle of letters. Further he deponed that sometime in the year 2005 the court file went missing and when it was traced the applicant filed this application. It was also pointed out that the supporting affidavit is undated.

I have carefully considered the application. It is true that the affidavit in support of the application is undated but I don't think it is defective by that reason. It is promptly sworn and the commissioner of oaths affixed his stamp and signature. The name of the firm who prepared and filed it is endorsed. The deponent has signed it. I therefore decline to strike it out.

Further there is no dispute that the last time the matter was in court was on 24th July 2000 when the court order was recorded. It seems no other steps were taken after that. Mr. Kuloba however deponed that they had invited the defendants' counsels several times to take hearing dates but file was missing. He annexed copies of the letters. He also said that the file was missing since the year 2005. He annexed a letter – exh. **“ISK 2”** dated 29TH April 2005 addressed to the Deputy Registrar seeking for his assistance in trying to locate the file so that they could take further steps. Unfortunately this application was not served on the Deputy Registrar for his response to confirm if indeed the file was missing or not but from the correspondence annexed it seems that there is some substance in the respondents claim. Thus though I find the plaintiff had not taken necessary steps within the stipulated time, I am satisfied with the explanation given and will give them benefits of doubts.

In the circumstances the application is rejected. The Respondent will however pay the applicant the costs of the application which is assessed as Shs.6000/= to be paid within 30 days. The respondent is also directed to move with haste and take steps to prosecute the application immediately.

It is so ordered.

Dated and Delivered at Eldoret this 30th day of November,2007.

KABURU BAUNI

JUDGE.

DELIVERED IN PRESENCE OF:-

C/C - David

Mrs. Fundi for M/S Muthoga Gaturu & Co. for Applicant

Mr. Mwetich for Kuloba for Respondent