REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 104 OF 2010

REV. EDWARD MWAI.....1ST PLAINTIFF

KENNEDY OJUNG'A.....2ND PLAINTIFF

AGNES WANJIKU.....3RD PLAINTIFF

(suing as officials and on behalf of JESUS WINNER MINISTRY)

VERSUS

PASTOR JOEL MAINA.....DEFENDANT

(sued on his own behalf and on behalf of JESUS WINNERS FELLOWSHIP)

RULING

1. In the application dated 4th April 2013, the Defendant herein seeks the dismissal of the Plaintiffs' suit for want of prosecution. The Application is premised upon the provisions of Order 17 rule 2 of the Civil Procedure Rules 2010 (the Rules), and Section 3A of the Civil Procedure Act, *(Cap. 21, Laws of Kenya)* the grounds on the face thereof and the Supporting Affidavit of Jimmy Aggrey Simiyu Advocate sworn on 4th April 2014.

2. Order 17 rule 2 & 3 of the Civil Procedure Rules donates to both the court of its own motion upon notice in writing or any party upon application, the discretion to have a suit dismissed in which no step has been taken to prosecute it, for a period of one year.

3. The Defendant/Applicant's case is that the suit herein was filed way-back on 21st April 2010, and that since their, Plaintiffs'/Respondents', application for interlocutory injunction was dismissed in a Ruling delivered on 7th July 2011, that is a period of over one year, the Plaintiffs'/Respondents' have taken no other steps to prosecute their suit.

4. However, in opposition to the application, the Respondents submit that this was a classic case where a party who seeks to stall a hearing of a matter while at the same time accusing the other party of doing the same. The Respondents contend that it is the Defendants/Applicants who have stalled the hearing of the case by failing to comply, in particular, with the requirements for pre-trial directions and conferences required under Order 11 of the Civil Procedure Rules, and in particular Order 11 rule (3)(a) thereof, which in turn require compliance with Order 3 rule (2) and 7 rule (5) of the Civil Procedure Rules.

5. Order 11 rule (3)(a) requires the court within thirty (30) days of the close of pleadings to convene a pre-trial conference to establish whether the case would be *"Fast Track"* or *"multi-track"* to be

respectively completed within 180 or 240 days/pursuant to Order 3 rule (2) aforesaid.

6. On the other hand, Order 7 rule (5)(b)(c) and (d) requires every defence and counter-claim *(if any)* to be accompanied with -

i. ***a list of witnesses to be called at the trial,***

ii. ***written statements signed by the witnesses except expert witnesses; and***

iii. ***copies of documents to be relied upon at trial.***

7. In this case, though the Plaintiffs/Respondents filed their list of documents on 15th March 2012, that is more than two years ago, the Defendants/Applicants have yet to file their list of documents.Instead the Defendants/Applicants have filed an application for dismissal of the Plaintiffs' suit.In addition, counsel for the plaintiffs contends that Section 3A *(the court shall make such orders as meet the ends of justice)*, does not assist a party who has applied to have a suit dismissed without first complying with the basic requirements of the law.

8. I have considered these rival arguments. **Firstly,** whereas Order 17, rule 2 empowers both the court of its own motion, or a party by an application, to have a suit dismissed for lack of prosecution, it is my considered view, with all humility, that the power to dismiss a suit under Order 17, rule 2, cannot be exercised either by the court or a party without reference to the provisions of Order 11 which are, I think, observed more in breach rather than application.

9. **Secondly** for pleadings to be closed under Order 2 rule 13 of the Rules, the Defendant needs to comply with the requirements of Order 7, rule (5) of the Rules. **Thirdly,** the court will not lightly call for the pre-trial conference under Order 11 rule 2 without reference to Order 7 rule (5) to ascertain compliance with the said rule. **Fourthly,** and lastly it is an abuse of process for a party which has failed to comply with the requirements of Order 11(3), Order 3, rule (2) and Order 7 rule (5), as set out above, to have a suit dismissed.

10. Lastly I think, an amendment to Order 17 rule (2) is necessary to cure the mischief employed by litigants who avoid the full application and compliance with the requisite rules of pleadings and in particular, Order II. Such an amendment would take the following lines -

Order 17

PROSECUTION OF SUITS

1. *(1)*

(2)

2(1) In any suit in which no application has been made or step taken by either party for one year after directions have been given under OrderII, 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)

(3)

11. In conclusion therefore the Defendant's Notice of Motion dated and filed on 4th April 2014 is, for all the above reasons dismissed with costs to the Plaintiffs/Respondents.

12. It is so ordered.

Dated, signed and delivered at Nakuru this 24th day of October, 2014

M. J. ANYARA EMUKULE

JUDGE