



REPUBLIC OF KENYA

High Court at Embu

Civil Case 95 of 2006

COSMAS N.E. KATHUNGUPLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....DEFENDANT

R U L I N G

This is the Defendant's Notice of Motion dated 28th June 2012 brought under Order 17 rule 2(1) and (3) and Order 40 rule 4(2) (4) and (6) Civil Procedure Rules for the following Orders;

- 1. That the suit be dismissed against the Defendant/ Applicant for want of prosecution.***
- 2. Cost of the application and entire suit be provided for.***

The main ground is that the Plaintiff/Respondent has not taken any steps to have this matter heard and finalised. In his affidavit Mr David Njuguna Njoroge for the Defendant/Applicant has a given history of the proceedings herein. The matter was last in Court on 24/11/2009 when parties were allowed time to carry out discoveries. And to date no steps have been taken.

Mr. Okwaro filed grounds of opposition to the application. He makes mention of the congestion in the Civil diary plus the fact that the parties have not complied with the Civil Procedure Rules.

Both Counsels have filed written submissions and authorities which I have read.

Perusal of the record herein confirms that the matter was last in Court on 24/11/2009 when parties were given time to do discoveries and take a hearing date. The order has never been complied with. My perusal of the record confirms that. It also shows that the Plaintiff/Respondent was given some injunctive orders by the Court on 18/4/2010. The Defendant/Applicant has come to Court under Order 17 rule 2(1) (3) and Order 40 rule 4 (2) (4) and (6) Civil Procedure Act because of the delay in hearing this matter.

Order 40 rule 2(6) Civil Procedure Rules provides;

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of 12 months from the date of the grant, the injunction shall lapse unless for any sufficient reason the Court orders otherwise”.

By virtue of the above provision the orders issued on 18/4/2010 died a natural death. It is the duty of a Plaintiff to move the Court to have his/her matter heard. Clear directions were given by this Court on 24/11/2009 to do discovery and fix the matter for hearing. There is no confirmation that discovery has

been done. The Plaintiff/Respondent cannot therefore hide behind the congested diary and/or limitation of matters to be fixed for hearing for failure to have the matter ready for hearing.

I take note of what the Court has gone through especially during the time there was no Resident Judge here to handle matters. And for that reason alone I will decline to grant the orders for dismissal. I however make the following orders;

- 1. The Plaintiff to file and serve witness statements, lists of exhibits plus exhibits relied on plus any other documentary evidence within 14 days.**
- 2. The Defendant/Applicant to do the same within 14 days of service by the Plaintiff/Respondent.**
- 3. Agreed issues to be filed within 14 days of compliance with No.2.**

Mention on 12/6/2013 for pretrial conference and/or directions.

Costs to the Defendant/applicant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU 14TH THIS DAY OF MAY 2013.

**H.I. ONG'UDI
J U D G E**

**In the presence of;
Mr. Okwaro for Plaintiff/Respondent
Njue – C/c**