



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL SUIT NO. 66 OF 2005

ELIZABETH CLAIRE WRIGHTPLAINTIFF

VERSUS

SIRYA MWARUA MWAITHADEFENDANT

RULING

1. On 21st May, 2008 this suit came before Ombija J. for mention to confirm that issues had been filed by parties as previously ordered by the judge on 27th February, 2008. Upon confirming that issues had indeed been filed Ombija J. directed as follows:

“A hearing date to be taken in the registry after order X r 11(a) has fully been complied with”.

2. The Plaintiff has now approached the court under certificate of urgency seeking vide her application of 11th April, 2013 that the defence be struck out and the counterclaim be dismissed. The reason being that the Defendant has failed to comply with the court's order of 21st May, 2008. The Plaintiff also seeks to strike out the Defendant's application for dismissal of the suit for want of prosecution, filed on 30th September, 2009.
3. The Plaintiff's application is expressed to be brought under Section 1A, B, 3A of the Civil Procedure Act and Order 17 rule 2 of the Civil Procedure Rules. The plaintiff contends that the said application is an abuse of court process as the Defendant has failed to file his list of documents despite the court's order and notice by the Applicant's advocate.
4. In reply, the Defendant asserts that the Plaintiff's application is not warranted. He contends that the subject order is not a bar to the matter proceeding and that in any event he has no desire to put in any further documents or to prosecute the dismissal application.
5. Parties filed written submissions which I have considered alongside the affidavits and record of the proceedings herein.
6. There is no doubt that this is a very old case. It is not entirely believable that the order of 21st May, 2008 has been the sole bar to the Plaintiff setting it down for hearing. Indeed such a hearing date had been taken in the registry for 15th July, 2008 subsequent to the said order. That is not to say that the Defendant is not obligated to facilitate discovery as per the court's order. His default

in so doing in my view does not automatically attract the penalty of dismissal of his counterclaim or striking out of his defence. These are drastic orders of last resort.

7. The Defendant now having indicated that he has no further documents to file and eschewed the prosecution of his dismissal application, I think the prudent orders to make in the interest of justice are as follows:

1. The Defendant's application filed on 30th September, 2009 is marked as withdrawn.
2. This suit is to forthwith proceed to hearing as all preliminaries have been complied with.
3. The primary subject matter of the suit is the ownership of land parcel no. LR KILIFI/JIMBA/1213 the motor vehicles having already been released to the Plaintiff by order of Ouko J. made on 14th December, 2005.
4. In light of 3 above, I direct that this suit be mentioned before the Environment and Land Court on 28th November, 2013 for taking of early hearing dates.
5. Costs will be in the cause.

Delivered and dated at Malindi this 25th day of November, 2013

in the presence of

Court clerk – Samwel

C. W. Meoli

JUDGE