



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 1597 OF 2000

JAMES MUIGAI NGENGI.....PLAINTIFF

VERSUS

EAST AFRICA BUILDING SOCIETY.....1ST DEFENDANT

GATHOGO T/A VALLEY AUCTIONEERS.....1ST DEFENDANT

RULING

1. The defendants have moved this court by way of a notice of motion dated 5th July, 2010, seeking to have the plaintiff's suit dismissed for want of prosecution and the plaintiff ordered to bear the costs of the suit and the costs of the application. The defendants contend that since 14th June, 2007, when the plaintiff's suit was stood over generally, no other action has been taken to prosecute the suit.
2. It is evident from the court record that no action has been taken by the plaintiff to prosecute this suit. Pleadings were actually closed in August, 2006 after the reply to defence and counter claim were filed by the defendants' advocate. The plaintiff's advocate successfully applied for leave to cease acting for the plaintiff, because the plaintiff had neglected to give instructions to his advocate, and the advocate/client relationship had broken down.
3. The plaintiff is now objecting to the application contending that he was never contacted by his advocate nor was he informed about his advocate ceasing to act for him. The plaintiff explains that the delay in setting down the suit for hearing was inadvertent and can reasonably be explained.
4. I have given due consideration to this application. It is clear that the plaintiff has taken no action to prosecute his suit. Although he alleges that he was not aware of his counsel withdrawing from the suit, the court record reveals that the plaintiff was in fact served with his counsel's application to withdraw. The plaintiff neither responded to that application nor attended court.
5. This would have been an appropriate application for dismissal of the plaintiff's suit for want of prosecution. Nonetheless, the defendants have also filed a counterclaim. It was therefore the responsibility of both the plaintiff and the defendants to ensure that this suit is prosecuted so that both the plaintiff's suit and the counterclaim could be determined. It would neither be fair nor just to dismiss the plaintiff's suit and allow the counterclaim which was equally not prosecuted, to stand.

6. In the circumstances, I reject the application for dismissal of the plaintiff's suit and order that the parties shall duly exchange witness statements and their documents and comply with all the pretrial procedures as provided in the Civil Procedure Rules 2011 to facilitate the speedy disposal of this trial. I make no orders as to costs.

Dated and delivered this 16th day of May, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Ataka for the plaintiff
Advocate for the defendants absent
B. Kosgei - Court clerk