



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 3 OF 2010

FRANCIS OYATSI..... PLAINTIFF

V E R S U S

THE STANDARD LIMITED..... DEFENDANT

R U L I N G

This is an application (**notice of motion dated 2nd March, 2011**) brought by the Defendant for dismissal of this suit for want of prosecution under **Order 17, rule 2(1) & (3)** of the **Civil Procedure Rules** (the **Rules**). Sub-rule (1) provides as follows:-

“1. In any suit in which no application has been made or step taken by either party for one year, 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.”

Sub-rule (3) gives any party to the suit the right to apply for its dismissal as provided in sub-rule (1).

There is no affidavit supporting the application. But the grounds for the application appearing on the face thereof are clear enough. They are:-

1. That no application has been made or step taken for over one year as is apparent on the court record.
2. That the delay or failure to set down the suit for hearing is inordinate and inexcusable.
3. That the Plaintiff has apparently lost interest in the suit.
4. That it is fair and just that the Defendant should be relieved of the burden of this litigation as every case should be concluded one way or the other within a reasonable time.

The Plaintiff has opposed the application as set out in his replying affidavit filed on 25th May, of 2011.

I have read that affidavit and perused the court record. I have also considered the submissions of the learned counsel appearing, including the one case cited.

This suit was filed by **plaint dated 7th January, 2010** lodged in court on the same date. The records show that **memorandum of appearance** was filed on 25th January, 2010 and **defence** filed on 27th January, 2010.

In the replying affidavit, the Plaintiff has asserted that he has never been served with the memorandum of appearance and is therefore unable to state when the Defendant entered appearance if at all. The Plaintiff further asserts that on 7th April, 2011, he was served with the defence filed on 27th January, 2010 contrary to the then rule in place (**Order VIII, rule 1 (2)** of the old Civil Procedure Rules) which required service of the defence within 7 days of filing.

There is no answer to these assertions of fact made by the Plaintiff as the Defendant neither filed an affidavit in support of the application nor a supplementary affidavit in answer to the replying affidavit.

It will be note that on 4th March, 2010 the Plaintiff filed a request for judgment in default of appearance and defence.

As already seen, the Plaintiff has asserted that he has never been served with a copy of the memorandum of appearance and that he was served with a copy of the defence only on 7th April, 2011 - a year after he requested for interlocutory judgment.

If the Defendant has been in breach of the Rules, as it appears to be, by not serving the Plaintiff a copy of the memorandum of appearance at all, and by not serving within the prescribed time a copy of the defence, it cannot be heard to complain that the Plaintiff is in breach of the same Rules.

All pleadings are now in place. If the Plaintiff has not been served a copy of the memorandum of appearance, I direct that he be served forthwith. The important thing now is for the suit to move forward so that it can be disposed off within the spirit of sections **1A** and **1B** of the **Civil Procedure Act, Cap 21**.

Those statutory provisions decree that the overriding objective of the Act and rules of procedure made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, such as the present suit. Technical objections which are purely designed to afford a party an easy way out of legal proceedings no longer have a place in our jurisprudence. The courts should no longer spend a lot of time and effort adjudicating over interlocutory applications which do not advance the course of justice in the matter at hand.

In the circumstances, I find no merit in the present application. It is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF JUNE 2011

H.P.G. WAWERU
JUDGE

SIGNED AND DELIVERED THIS 1st DAY OF JULY, 2011