



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO 250 OF 2008

IYALE ACADEMY.....PLAINTIFF

VERSUS

1. JIM MUGAMBI
2. JAMES N. MBUGUA
3. JOHN KARUMBA

NDEGE.....DEFENDANTS

RULING

1. By an application dated 8/2/2011 the defendant seeks the discharge of an order of injunction granted in the suit in 19/9/08 and subsequently extended by consent of the parties “until the hearing date.” The injunction restrained the defendants from removing the plaintiff’s goods and equipment from the suit premises in recovery of arrears of rental to the date of the suit. The defendant/applicant contended that the existence of the injunction order over 34 months since it was issued and the failure by the plaintiff to prosecute the case since the 20th November 2008 are prejudicial to the defendants and contrary to the constitutional obligation of the court under Article 159 to determine disputes between parties expeditiously.

2. The plaintiff opposes the application arguing that the defendants have not been prejudiced because they have continued to receive rent due and that all the order restrained was the distress over a sum of Ksh.1.47 million paid into the society at a time when it was experiencing leadership wrangles. The plaintiff further states that it did not prosecute the suit as there were ongoing engagements towards amicable solution of the dispute between the parties. The plaintiff pleads that the discharge order of 20/11/2008 will prejudice it because of attachment of school equipment and disruption of studies for the school students.

3. I have considered the application and I find that in addition to the principle that justice shall not be delayed there is the equally important constitutional principle under Art 159 that justice shall be done to all. I find that the discharge of the consent order will open the plaintiff to immediate attachment pursuant to the distress of rent proclamation of 6/9/2008 for arrears of rent which are disputed and which have been the subject of ongoing restrictions between the parties.

4. I also observe that the defendant could have fixed the suit for hearing or applied for its dismissal when the plaintiff delayed its prosecution. Significantly, the defendant has never filed a defence to the suit despite its advocate filing a notice of appointment on the 20/11/08 on the same date of the consent order.

5. Accordingly, I find that the equities are equal as both parties have taken no steps towards the early determination of the suit and therefore decline to discharge the interim order of 20/11/2008 as requested by the defendants. I, however, direct the defendant to file its defence within the next seven (7) days and the parties to process the case for trial in accordance with Order 11 of the Civil Procedure Rules 2010 and that the matter be mentioned for pre-trial case conference within 30 days from today. Costs in the cause.

Dated and delivered this 28th day of October 2011

EDWARD M. MURIITHI
JUDGE

In the presence of

.....for the Applicant

.....for the Respondent

.....court clerk

EDWARD M. MURIITHI
JUDGE