



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 148 of 2004

WILLIAM KIMELI KIRUI.....PLAINTIFF
VERSUS
NATIONAL BANK OF KENYA.....DEFENDANT
RULING

The applicant seeks dismissal of this suit for want of prosecution and avers that more than three months had elapsed at the time this application was filed since the suit was removed from the hearing list.

The application is based on the provisions of **section 34** of the **Civil Procedure Act, Order 16 rule 5** and **Order 50 rule 1**. Although the respondent’s counsel filed grounds of opposition, the application was heard *ex parte* as he or the respondent failed to attend court despite service.

The respondent has averred that the application is frivolous, vexatious and bad in law; that similar application was dismissed on 3rd March, 2009 for non-attendance; that this application has been made after inordinate delay.

I have considered the arguments, both written and oral submissions by counsel for the applicant as well as authorities he has cited in support.

It is the applicant’s contention that four (4) years had elapsed by the time this application was brought since the suit was removed from the hearing list. That the applicant’s earlier application for similar relief was itself dismissed for non attendance on 3rd March, 2009.

As I have already noted, this application is brought pursuant to the provisions of Order 16 rule 5 of the Civil Procedure Rules, under which the applicant has an option either to list the suit for hearing or seek its dismissal if within three months after the:

- “ a) close of pleadings or
b)
c) removal of the suit from the hearing list, or
d) adjournment of the suit generally.”

and the plaintiff or the court on its own motion does not set down the suit for hearing. The plaintiff was filed on 19th May, 2004, while the defence was filed on 20th May, 2004. The respondent applied for a temporary order of injunction which does not appear from the record to have been granted simultaneously with the filing of the plaintiff,

On 2nd June, 2004, the applicant (in person) brought another application for an injunction. Then on 24th March, 2005 the applicant brought the first application to dismiss the respondent’s suit for want of prosecution.

After four (4) adjournments, the application was dismissed for non-attendance on 3rd March, 2009. A few days later, this application was made. From the foregoing background, can it be said that Order 16 rule 5(c) of the Civil Procedure Rules has been satisfied? Has the suit ever been listed for hearing and taken out of the hearing list? The truth is that the suit has not been set down for hearing as the respondent's two applications have not been heard and determined. No doubt it has been five years since the plaint was filed. Can the court on its own motion dismiss the suit under rule 6 where it is empowered to do so if for a period of three (3) years no application is made or step taken by either party to proceed with the case?

The respondent's first application for injunction was brought one year after the filing of the plaint. The applicant's first application for dismissal of the suit came two years after the plaint and the instant one brought three weeks after the dismissal of the first application.

It has been held in the case of Victory Construction Vs. Duggal (1962) E.A. 697 that where the only step taken on record is an interlocutory application, that could amount to such step as envisaged by Order 16 rule 6. It should be clear from the foregoing that the order sought in the present application is not available to the applicant. It may be asked whether the court can proceed to dismiss the respondent's two applications for want of prosecution.

From the language of Order 16 a motion or chamber summons cannot be regarded as a suit as they do not originate pleadings but are interlocutory steps. Order 16 rule 5(d) applies to a situation where the substantive suit itself has been set down for hearing and the same has been adjourned generally.

In the result, this application must fail and is hereby dismissed with costs.

Dated, Signed and Delivered at Nakuru this 15th day of January, 2010.

W. OUKO
JUDGE