



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)

CIVIL SUIT 495 OF 2005

ALFRED KARASHA SANKALE.....PLAINTIFF

VERSUS

UCHUMI SUPERMARKETS LIMITED.....DEFENDANT

RULING

1. By its Notice of Motion application 24/07/2009, brought under Order 16 Rule 5(d) of the Civil Procedure Rules, the Defendant prays that the Plaintiff's suit be dismissed for want of prosecution. The Defendant also prays for costs of the application. The application is premised on grounds that the Plaintiff has failed to set down his suit for hearing or to take any steps to prosecute the same for more than 3 years since the pleadings closed.
2. The application is also supported by the affidavit of **Wambui Maina** sworn on 24/07/2009. The deponent says that the suit herein was filed on 28/04/2005; that defence was filed on 8/07/2005 and served on the Plaintiff on 11/07/2005, and that the pleadings closed on 25/07/2005 being 14 days after service of the defence. The deponent also says that by an application dated 8/11/2005, the Defendant sought an order to compel the Plaintiff to give discovery and by an order of this honourable court, the application was allowed on 2/02/2006. The deponent says further that the Plaintiff filed his List of Documents on 22/02/2006 and that since then the Plaintiff has not taken any steps to prosecute this suit. The deponent also avers that the delay in prosecuting this suit is highly prejudicial to the Defendant in that most of the Defendant's employees who were in service at the material time have since been discontinued with the resultant misplacement and/or destruction of vital documents in support of the Defendant's case.
3. The application was duly served upon the Plaintiff's counsel, and later on 8/12/2009, a hearing notice dated 4/12/2009 was also duly served upon the same advocates, M/s Gitobu Manyara. Instead of Replying to the application, the said advocates filed an application dated 14/10/2009 seeking leave of this honourable court to cease from acting for the Plaintiffs. Neither the Plaintiff nor his counsel appeared for the hearing of the Defendant's application on 1/03/2010. For the above reasons, Miss Bubi advocate for the Defendant appeared on 1/03/2010 and urged the court to grant the orders of dismissal as prayed.
4. The history of this case has been given by the supporting affidavit sworn by Wambui Maina on 24/07/2009. The Plaintiff instituted this suit by way of a plaint dated 15/04/2005 and filed in court on 28/04/2005. The Plaintiff's

claim arose out of an alleged illegal and unlawful termination of the Plaintiff's services by the Defendant on or about 21/06/2004. The Plaintiff sought the following reliefs:-

- (a) *compensation for breach of his fundamental rights in accordance with Section 84 of the Constitution.*
- (b) *Damages for wrongful termination of employment.*
- (c) *Costs*
- (d) *Interests on (a), (b) and (c) above*
- (e) *such further order, writ and/or directions considered appropriate for the purpose of enforcing or securing the enforcement of the Plaintiff's fundamental rights.*

5. The Defendant entered appearance on 24/06/2005 and filed defence on 8/07/2005. The Defendant denied all the allegations made against it by the Plaintiff. On the 20/09/2005 the Defendant filed its List of Documents. On the 15/11/2005, the Defendant filed a Chamber Summons application dated 8/11/2005 for an order to compel the Plaintiff to file his List of Document's. Eventually on 22/02/2006, the Plaintiff filed his List of Documents as a consequence of the consent order issued by this honourable court on the 2/02/2006.
6. By their application dated 14/10/2009, the Plaintiff's advocates applied for leave to cease from acting for the Plaintiff. The parties appeared before the Chief Deputy Registrar on 12/11/2009 when the application was stood over to 19/11/2009 at 9.00 a.m. for hearing. When the parties appeared in court on the 19/11/2009 counsel for the Plaintiff told the court that she had tried to speak to the Plaintiff but to no avail. Counsel asked the court to allow her to serve the Plaintiff by registered post and the counsel's request was allowed. The application was stood over to 30/11/2009 for interpartes hearing. On 30/11/2009, the Plaintiff's counsel did not appear to prosecute their application dated 14/10/2009. On the application of counsel for the Defendant, the Plaintiff's counsel's application dated 14/10/2009 was marked stood over generally. Since then, counsel for the Plaintiff has not set the said application down for hearing nor dealt with it in any other way. On the 3/12/2009, the Defendant's counsel fixed the instant application for hearing on 1/03/2010. The Plaintiff's counsel was duly served, but did not appear and as earlier indicated, there is no Replying Affidavit to the Defendant's application seeking to dismiss the Plaintiff's suit for want of prosecution.
7. The court has now considered the Defendant's application dated 24/07/2009 and the authority cited by the Defendant to buttress its prayer for dismissal of the suit. The case cited by the Defendant is **Ivita –vs- Kyumbu [1984] KLR 441** in which Chesoni J (as he then was) in his discussion of Order 16 Rules 5 of the Civil Procedure Rules, held, inter alia, that *“a Defendant may take out a notice of motion to dismiss the suit for want of prosecution at any time after the three months limitation. A failure to take out such notice early does not prejudice the success of the Defendant's application.”*
8. I have also given careful thought to the provisions of Order 16 Rule 5 of the Civil Procedure Rules. I am satisfied that the Plaintiff has not taken any step since close of pleadings on 25/07/2005 to set this suit down for hearing. The Plaintiff's counsel's application, dated 14/10/2009 was, I think, an attempt by the Plaintiff to stem the Defendant's instant application. It is noteworthy that Plaintiff's counsel has not been keen to have the said application heard and determined. In the circumstances, it is quite apparent that the Plaintiff has lost interest in his case. If it were not so, he would have contacted his advocates with a view to having his case set down for hearing. He has not done so.
9. For the above reasons, I am satisfied that the Defendants Notice of Motion application dated 24/07/2009 has merit. The same is allowed. The Plaintiff's suit filed on 28/04/2005 be and is hereby dismissed for want of prosecution. The Defendant shall have the costs of the application and of the suit.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of March, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

No appearance for the Plaintiff/Respondent

Miss Bubi For the Defendant

Weche – court clerk