



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 424 of 2002

INTERCITY UTILITY SERVICES LIMITED.....APPLICANT/PLAINTIFF

Versus

NAIROBI CITY COUNCIL.....RESPONDENT/DEFENDANT

RULING

On 29th April 2009, I granted the Defendant's Notice of Motion dated 18th September 2008, seeking to dismiss the Plaintiff's suit herein for want of prosecution.

The Plaintiff has now come back with this new Notice of Motion dated 26th October 2009 praying for review of the dismissal Order I made on 29th April 2009.

Though stated brought under Order 44 Rule 1 (a) of the Civil Procedure Rules, reading through the ground the basis of this Notice of Motion, the relevant grounds stipulated under Order 44 Rule 1 (a) are difficult to see.

The Notice of Motion is opposed by the Defendant/Respondent on the basis of a Replying Affidavit dated 19th November 2009. Mr. Owang represented the Applicant while Mr. Omotii represented the Respondent.

When I dismissed the Plaintiff's suit on 29th April 2009, Counsel then representing the Plaintiff was M/s Wasike.

The gist of the matter is that Mr. Owang is now trying to say that when the suit was dismissed for want of prosecution, negotiations were going on for a settlement and the parties had agreed to have the suit herein stood over generally because there was another suit HCCC No. 936 of 2005 between the parties. Mr. Owang is now saying that that information or evidence had not been brought before me. He goes on to blame the Respondent's Counsel just as he blames the Applicant's Counsel but claims at the same time that the evidence in question was discovered after hearing and determination of the application. He says that after stating that had the Plaintiff/Respondent in the Notice of Motion dated 18th September 2008 filed a replying affidavit, the evidence in question was to be found in that replying affidavit. Mr. Owang does not therefore hide the fact that the evidence he is talking about is evidence which at least the Plaintiff had, and if not produced before the court it was because of failure by the Plaintiff himself. He however, tries to extend the blame to the Defendant's Counsel, a blame which does not assist his case as Mr. Omotii rightly pointed out.

To cut a long story short, the Plaintiff in this matter is a party who filed this suit in the year 2002 the month of May. By 18th September 2008 when the Defendant decided to file the Notice of Motion which gave rise to the questioned court order of 29th April 2009, the Plaintiff had not prosecuted the suit. When the Defendant filed that Notice of Motion, the Plaintiff did not care to file a replying

affidavit.

That application first came before me on 3rd November 2008 and I granted the Plaintiff leave to file the replying affidavit. The Plaintiff failed to use that opportunity to file the replying affidavit and all that despite the fact that I did allow the parties or any of them to take another hearing date at the Registry.

That other date was taken to be 29th April 2009. But when the case was called out and Counsels in the matter appeared, the Plaintiff's Counsel wanted to delay the matter further by applying for adjournment which I declined to grant. The learned Counsel, M/s Wasike, thereafter fully participated in the hearing of the Notice of Motion up to the end when I granted the prayers dismissing the suit.

From the proceedings of that day, there is no doubt that during their submissions for and against M/s Wasike's oral application for adjournment, both parties referred to negotiations for a settlement and the existence of HCCC No. 936 of 2005 thereby making it clear that each side was aware of the negotiations and the civil case. I considered all they said in my ruling dismissing the oral application for adjournment. That information or evidence did not come into proceedings at the time I was now hearing the Notice of Motion dated 18th September 2008 because, as I have stated earlier, it was not in the affidavit evidence before me, the Plaintiff having failed to file a replying affidavit.

Clearly, however, that information or evidence was within the knowledge of both Counsels before me more so within the knowledge of the Plaintiff's Counsel.

On the whole therefore, there is completely nothing falling within the remedies provided by Order XLIV Rule 1 of the Civil Procedure Rules and this Notice of Motion dated 26th October 2009 ought not have been filed by the Plaintiff unless the said Plaintiff is determined to have the suit herein remain pending indefinitely.

I am not allowing him to do that and therefore do hereby dismiss this Notice of Motion dated 26th October 2009 with costs to the Defendant/Respondent.

Dated this 28th day of May 2010.

J.M. KHAMONI

JUDGE