



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

Civil Case 532 of 2005

KENYA GRANGE LIMITED PLAINTIFF

VERSUS

TURBO HIGHWAY ELDORET LTD. DEFENDANT

R U L I N G

This application is brought by a notice of motion dated 22nd February, 2010 and taken out under **Order XVI Rule 5 (a)** of the **Civil Procedure Rules**, and **Section 3A** of the **Civil Procedure Act**. It seeks an order that this suit be dismissed for want of prosecution and that the costs of the suit be paid by the Plaintiff/Respondent.

The application is supported by the annexed affidavit of Alfred King'ori Nyairo, Advocate, and is based on the grounds that –

- (a) *The Plaintiff filed the suit on 26th September, 2005 and the Defendant filed its defence on 13th January, 2006.***
- (b) *The Plaintiff has shown no interest in prosecuting the matter as no step has been taken to set down the suit for hearing since it was last listed for hearing on 24th September, 2007.***

A replying affidavit on record shows that it was sworn and filed in Court by Churchill Midwa, Advocate, on 30th April, 2010.

Order XVI Rule 5 of the **Civil Procedure Rules** under which this application is made states as follows –

“If, within three months after

- (a) *the close of the pleadings; or***
- (b) *.....***
- (c) *the removal of the suit from the hearing list; or***
- (d) *the adjournment of the suit generally, the Plaintiff, or the Court of its own motion on notice to the parties, does not set down the suit for hearing, the Defendant may either set the suit down for hearing or apply for its dismissal.”***

This matter last came to Court on 24th September, 2007. Since then, the Plaintiff has never taken any steps to set down the suit for hearing. Consequently, the application now before the Court was filed 5th March, 2010, and came for hearing on 3rd May, 2010. When it was called out for hearing, Mr. Waweru held brief for Mr. Nyairo for the Defendant/Applicant while Mr. Midwa appeared for the Plaintiff/Respondent. Mr. Midwa told the Court he had filed his replying affidavit on 30th April, 2010 but he had not yet served it. He accordingly applied for an adjournment to give him time to get in touch with the Respondent's erstwhile Advocates at Eldoret. Mr. Waweru opposed the application on the ground that the Respondents were served on 12th March, 2010 and therefore had sufficient time to reply. Mr. Midwa insisted that he had explained his difficulty and it was reasonable that he should be given more time. He therefore requested for an adjournment and applied for another date.

In its ruling, the Court observed that the Court record showed that Mr. Midwa was not properly on the record and therefore had no *locus standi* in the matter. His application for adjournment was accordingly dismissed even though he had no *locus* to make it in the first instance. His replying affidavit, which was sworn and filed on 30th April, 2010, was also struck out and the Court directed that the matter do proceed *ex parte*. Mr. Midwa then left the Court room. He came back as the matter was being called out and Mr. Waweru started arguing the application. Mr. Midwa then handed over a notice of change of Advocate to the court clerk who passed it on to the Court. This confirmed that Mr. Midwa had not been properly on record as earlier observed by the Court; that he should not have addressed the Court or applied for adjournment; and that he had no *locus* to swear the replying affidavit on the date when it was sworn. For those reasons, the Court declined to give him audience.

Mr. Waweru applied for the suit to be dismissed for want of prosecution. He argued that the suit was instituted in 2005 and the Defendant filed its defence on 13th January, 2005. The matter had last come to Court on 24th September, 2007. Since then, no action had been taken in the matter. It was in the interests of justice therefore, that the suit be dismissed with costs as it was causing the Defendant a lot of anxiety. He asked the Court to allow the application with costs.

Order XVI Rule 5 of the **Civil Procedure** is clear that if no action is taken on a matter within three months after the close of pleadings; or the removal of the suit from the hearing list or the adjournment of the suit generally, the Plaintiff or the Court on its own motion on notice to the parties may set the suit down for hearing and if it does not do so the Defendant is at liberty to set the suit down for hearing or apply for its dismissal. The Defendant herein has elected to come to Court under the second limb and apply for the dismissal of the suit. With the Plaintiff's replying affidavit having been struck out, the application is not opposed. I find that no good reason has been advanced to show that the suit should not be dismissed and it is accordingly dismissed with costs. The Plaintiff will also meet the Defendant's costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of June, 2010

L. NJAGI
JUDGE