



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CC NO. 641 OF 2006

PETER MUNYUA KIMANI.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED & TWO (2) OTHERS.....DEFENDANT

RULING

1. The defendants filed the Notice of Motion dated 18th June, 2010 which is brought under the provisions of Order 16 Rule 5(d) order 50 Rule 1 of the Civil Procedure Rules and Section 3A of the Act. The applicants are seeking for orders that the suit be dismissed for want of prosecution with costs to the defendant. This application is predicated on the grounds that the plaintiff has taken no steps to set the suit down for hearing after the pleadings closed after the defence was filed on 15th September, 2008. The delay in setting the suit down for hearing is inordinate and prejudicial to the defendants who have been denied a fair trial of the matter.
2. It was also contended failure to set the suit down for hearing is an indication that the plaintiff lost interest in the matter. The application is also supported by the affidavit of N'cruba Ojiambo sworn on 24th June, 2010. In further arguments, counsel for the applicant submitted that under Order 16 Rule 5 an application had been made for dismissal of the suit for want of prosecution if, within three months after –
 - (a) the close of pleadings ; or
 - (b) in the High Court, an order for the hearing on a summons for directions; or
 - (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.

According to counsel, the pleadings closed on 16th September, 2008. Under the Provisions of Sections 1A and 1B of the Civil Procedure Act the business of Court should be conducted expeditiously without delay or unreasonable expenses. This is also a legitimate expectation especially by parties who are brought in court and it is in line with public policy.

- 3 This application was opposed by the respondent he relied on preliminary objection on points of law

that a similar application dated 9th February, 2009 was made by the applicant and dismissed for want of prosecution, that dismissal order has not been vacated or varied and filing a similar application is tantamount to an abuse of the court process. Counsel relied on the case of **Meshallum W. Wanguku V K Kania {1982-88} 1 KAR** where the Court of Appeal held that

4. I have carefully considered this application, the affidavit in support and the arguments by counsel for the applicant. Similarly, I have considered the preliminary objection on points of law raised by counsel for the plaintiff. The issue for determination, is whether the plaintiff's suit should be dismissed for want of prosecution on the grounds stated in support of the application. I have gone through the record, it is common ground that the defence was filed on 16th September, 2008. It is also common ground that on 20th February, 2009 the defendants filed an application seeking the dismissal of the suit they did not attend court on 22nd March, 2009 when the application was dismissed for non attendance. The defendant filed this similar application on 29th June, 2010 and it was fixed for hearing on 14th July, 2010. Between 20th February, 2009 to 22nd May, 2009 no action could have been taken on the file because this application was pending. The plaintiff can only be blamed for not fixing the matter for hearing or taking any steps between 22nd May, 2009 to 29th June, 2010. However, the plaintiff is claiming that the plaintiff's application is a duplication of an earlier application that was dismissed for non attendance. This now leads me to the issue of whether the applicant is abusing the court process by ignoring the dismissal order of the first application. **The decision of Meshallum W Wanguku(supra) resolves this issue.**

5. For that reason, I will not order the plaintiff's suit dismissed because dismissing a suit is a drastic measure that is sparingly done especially when the pleadings are hopeless and do not disclose a triable issue see the case of: DT Dobie & Co. Limited Vs Muchina {1982} KLR. As per Madan JA:

In this case I find it will be the interest of justice and proportionality to give the plaintiff a chance to prosecute this matter. Accordingly I order that the plaintiff do take steps to fix the matter for hearing within six months from the date of this ruling. If no steps are taken, this suit shall stand dismissed for want of prosecution with costs to the defendant.

Ruling signed and submitted for delivery on 9th day of November 2010

MARTHA KOOME

JUDGE

Delivered and countersigned on 12th day of November 2010.

P KIHARA KARIUKI

JUDGE