



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

**Civil Suit 1553 of 1999**

**CROWN BERGER LIMITED..... PLAINTIFF**

**VERSUS**

**SAGE INTERNATIONAL LIMITED.....1<sup>ST</sup> DEFENDANT**

**PAUL NYAMODI.....2<sup>ND</sup> DEFENDANT**

**RULING**

The defendant's Sage International Limited and Paul Nyamodi seek to have the plaintiff's suit dismissed with costs to the defendant, for want of prosecution. The application is said to be brought under order 3A of the Civil Procedure Rules and Order XVI Rules 5 & 6 of the Civil Procedure Rules. The grounds upon which the application is brought are that since 10<sup>th</sup> March, 2005 when this suit was stood over generally the Plaintiff has taken no steps to prosecute the suit, and that the plaintiff's conduct shows that it is no longer interested in prosecuting the case, and that the defendant is therefore prejudiced and oppressed by the pending suit.

The plaintiff, Crown Berger Limited, has responded to the application through grounds of opposition filed on 7<sup>th</sup> February, 2008. It is contended that the firm of O. P. Ngoge & Associates Advocates is not properly on record and that a decree was passed by this court on the 9<sup>th</sup> February, 2001 and further that the application dated 19<sup>th</sup> March 2007 is misconceived and bad in law. Ms. Mutea who appeared for the plaintiff submitted that the firm of O. P. Ngoge & Associates had not complied with Order III Rule 9A of the Civil Procedure Rules. Ms. Mutea stated that the plaintiff is interested in the suit and is still in the process of determining the agreed issues, upon which the plaintiff and the defendant have been unable to agree.

I have carefully perused the court record and have established as follows: The defendants were originally being represented by the firm of Mbari Kioni & Co. Advocates through whom they entered appearance and filed a defence.

Following an application for summary judgment made by the plaintiff, Kasanga Mulwa, J allowed the application on 31<sup>st</sup> January 2001 and a decree was subsequently issued on 27<sup>th</sup> February 2001. On 4<sup>th</sup> September 2003, P. M. Kiama & Company Advocates filed a notice of appointment on behalf of 2<sup>nd</sup> defendant. On 3<sup>rd</sup> October, 2003, the defendants through the firm of P. M. Kiama & Co. Advocates, filed an application under Order III Rule 9A, of the Civil Procedure Rules for leave to change advocates from

M/s Mbari Kioni & Co. to P. M. Kiama & Company Advocates. This application was allowed by consent of the parties on 30<sup>th</sup> October, 2003.

Thereafter on 27<sup>th</sup> November 2003, the defendants brought an application seeking to set aside the judgment entered on 21<sup>st</sup> March 2000, and leave to defend the suit, as well as a stay of execution of the judgment. That application was heard ex-parte before Ibrahim J, and the application allowed. On 2<sup>nd</sup> March 2005 the firm of O. P. Ngoge & Associates then filed a notice of change of Advocates.

It is Mr. Ngoge's submissions that no leave of the court was required at that stage as there was no judgment on record. The position taken by Mr. Ngoge would have been correct, except for the fact that the defendant's application which was allowed by Ibrahim J, was for the setting aside of Judgment entered on 21<sup>st</sup> March 2000. I have searched the court record but was unable to find any such judgment. The summary judgment entered in favour of the plaintiff was on 31<sup>st</sup> January, 2001. In that event, the order made by Ibrahim J, did not affect the judgment of 31<sup>st</sup> January, 2001. That judgment remained on record and the firm of O. P. Ngoge & Associates could not come on record without leave of the court. The application before the court is therefore incompetent and is accordingly struck out. I make no orders as to costs.

Dated this 20<sup>th</sup> day of February, 2008.

**H. M. OKWENGU**

**JUDGE**

**Delivered this 21<sup>st</sup> Day of February, 2008 in the presence of:**

Ms. Mutea for Respondent.

No Appearance for Applicant.

**J. W. LESIIT**

**JUDGE**