



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 126 OF 2004

TITUS MWIRIGI.....PLAINTIFF

VERSUS

PETRO OIL KENYA LIMITED.....RESPONDENT

R U L I N G

This application has been brought by the Defendant under **Order XXV rule 5(1) and 6 of Civil Procedure Rules** seeking to have the Plaintiff's suit dismissed for failure or neglect to furnish security for costs to the Defendant in the sum of Khs.400,000/-. The order to furnish the said security was made by this court on 18th June 2007 and it gave the Plaintiff 45 days within which to furnish the security failure to which the suit would stand dismissed.

The application was unopposed.

I have considered submissions by **Mr. Ogunde**, Counsel for the Defendant and affidavit sworn by **Allen Waiyaki Gichuhi** dated 2nd November 2007.

The application is a simple one. The Defendant sought an order for security of costs on grounds that it had learned that the Plaintiff had left the jurisdiction of the court. I noted that the Plaintiff's advocate had filed an application dated 15th March 2007, expressed to be brought under **Order III rule 12** of the **Civil Procedure Rules**, seeking leave to withdraw from acting for the Plaintiff. The application was stood over generally on the day it was to be heard, i.e. 14th June, 2007, for reason that the Plaintiff had not properly been served. The application has remained unprosecuted. That means that, as provided under **Order III rule 12(1) (i) (ii) and (iii)** of the **Civil Procedure Rules**, the Plaintiff's Advocate on record remains the Advocate for the Plaintiff, until the matter is finalized or leave to cease acting for the Plaintiff is granted.

I note that the Plaintiff's Advocates on record were served with the instant application within the prescribed time, before the application was heard. Even though the Advocate's staff declined to sign for and stamp the process on grounds that the Advocate no longer had instructions to act for the Plaintiff, they were not entitled to decline to accept the service as the Advocates firm remains the duly appointed

Advocates for the Plaintiff. Their refusal to accept service was of no effect.

Having found that the Advocates on record for the Plaintiff were duly served with the Application and considering the application was not opposed, the next issue to consider is whether the application should be allowed.

On the 18th June 2007, **Warsame, J.** granted the Defendant's application dated 22nd January 2007, ordering that the Plaintiff should furnish security to the Defendant in the sum of Kshs.400,000/-, within 45 days and in default the suit would stand dismissed.

Order XXI rule 5(1) and 6 of Civil Procedure Rules gives the prerequisites to dismissal of a suit. The rule requires that an application be made for the dismissal of suit where security for costs ordered has not been provided and where the suit has not been withdrawn. The rule is phrased in mandatory terms to the effect that once the application is made to the court, and where the two conditions prerequisite to the issuance of the order are met, the court shall dismiss the suit. I find that all the prerequisites necessary for the dismissal of the suit under **Order XXV rule 5(1)** have been met. I, therefore, allow the application and order that the Plaintiff's suit herein be and is hereby dismissed with costs of the suit and of the application to the Defendant.

Dated at Nairobi, this 7th day of March 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

No appearance for both parties.

LESIIT, J.

JUDGE

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