



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Civil Case 13 of 2004

HABEL WESONGA SALASYA.....PLAINTIFF

VERSUS

ROBERT WERE WANGA.....DEFENDANT

RULING

The application before me is for the dismissal of the suit for want of prosecution. It is an application brought pursuant to the provisions of **Order 16 rule 5** of the Civil Procedure Rules.

According to Mr. Munyendo, the learned advocate for the defendant, the plaintiff had not taken any steps in the case for a period of more than 3 years. He said that the case was last in court on 7/6/2004.

That would imply that as at 29/10/2007 when the defendant filed the application herein, the plaintiff had not taken any steps in the case for over three years.

On the other hand, the plaintiff's advocate, Mr. Fwaya, submitted that the case was last in court on 1/11/05. Therefore, by the plaintiff's calculations, by the date when the application herein was filed, the period which had lapsed did not exceed three years.

The respondent also submitted that the pleadings in this case only closed in May 2006, as the Defence was only served upon the plaintiff on 17/5/2006. Before the pleadings closed, the plaintiff believes that he could not have taken any steps.

But the defendant's take on that aspect is that pursuant to **Order 4 rule 3 (1)** of the Civil Procedure Rules, pleadings closed 14 days after the date of service of summons to enter appearance.

For now, the case has been fixed for hearing on 12/5/2008. Therefore, the plaintiff feels that it would only be fair to let the suit proceed to trial, so that it can be determined on merit. In that respect, the plaintiff further points out that the subject matter of the suit is land.

In answer to those submissions, the defendant says that the plaintiff had acted too little too late, by fixing a hearing date after he was served with the application herein.

And just because the subject matter was land was not considered to be a good enough reason to delay the conclusion of the proceedings through dismissal; the defendant complains that the delay in bringing the case to a close was causing him undue anxiety on the ground.

He believes that the plaintiff had only been awoken by the present application.

As the parties do not appear to be in agreement about the date when the case was last in court, I did peruse the record of the proceedings, to enable me verify the factual position.

From the records, it is clear that the suit was commenced by a plaint which was filed in court on 5/2/2004. A copy of the summons to enter appearance, which is on the court file, shows that summons were issued on 22/3/2004.

Although there is nothing to indicate when the defendant was served with the plaint and summons to enter appearance, the court records show that on 28/4/2004, the firm of Namatsi & Co. Advocates entered appearance for the defendant.

A defence was thereafter filed in court on 20/5/2004. Thereafter, on 10/3/2005, the plaintiff filed an application for an interlocutory injunction to restrain the defendant from trespassing onto the suit land, **L.R. NO. NORTH WANGA/KHOLERA/1111**. That application was fixed for hearing on 1/11/2005.

However, as the defendant's advocates had not yet been served with the application, on 1/11/2005, the court adjourned the said application indefinitely.

From the above-cited chronology of events, it is evident that the case was not in court on 7/6/2004, as was asserted by the defendant herein. There is also no indication at all that the case was scheduled to have come up in court on that date. I am therefore left baffled as to wherefrom the defendant derived the information about the case having been in court last on 7/6/2004.

The record shows that the case was last in court on 1/11/2005, when the plaintiff's application for an interlocutory injunction was adjourned indefinitely. It therefore follows that as at 29/10/07 when the defendant filed his application for the dismissal of the suit for want of prosecution, three years had not lapsed from the date when the case had last been in court.

For some inexplicable reason, although the Defence was filed in court on 20/5/2004, both parties to this suit do agree that the Defence was only served on 17/5/2006.

The delay in serving the defence offends the provisions of **Order 8 rule 1 (2)** of the Civil Procedure Rules, which stipulates as follows:

“where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fifteen days after he has entered an appearance in the suit and serve it on the plaintiff within seven days from the date of filing the defence.”

A plaintiff who has served the defendant with a plaint and summons to appear is entitled to apply to the court for appropriate orders if the defendant does not serve him with a defence within 7 days from the date the defence was filed. It would otherwise be defeatist for a plaintiff to say that because he had not been served with the defence in time or at all, he could not take any further action in the case. As to what constitutes an appropriate relief in such circumstances I will leave the same to the ingenuity of parties and their legal advisers.

However, I am confident that if an application is brought before the court, we shall make appropriate orders which will make it abundantly clear that **Order 8 rule 1 (2)** of the Civil Procedure Rules was not made in vain.

The application herein was made pursuant to **Order 16 rule 5** of the Civil Procedure Rules. That rule provides as follows:

“If, within three months after –

(a) the close of pleadings; or

- (b) *(Repealed)*
- (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.”

From the wording of the rule it is evident that a defendant need not wait for three years to lapse from the date pleadings closed, or from the date the suit was removed from the hearing list, or from the date suit was adjourned indefinitely, before he can apply for the dismissal of the suit for want of prosecution. He need only wait for 3 months.

And when the defendant has made an application for the dismissal of the suit for want of prosecution, it is not necessarily an answer thereto for the plaintiff to immediately rush to fix a date for the hearing of the case. Notwithstanding such a step, if it is taken by the plaintiff, the court may still dismiss the case for want of prosecution.

In this case, the defendant’s delay in serving the plaintiff with the defence may have contributed to the delay in the prosecution of the case, as the plaintiff thought that until he was served with the defence, he could not take steps to prosecute the case.

In determining the application before me, I have borne in mind the fact that there are no interim orders which are in force. Therefore, the plaintiff is not deriving any undue advantage over the defendant, during the time when the case remains outstanding, in the sense that it had not been heard.

Meanwhile, as the suit had now been fixed for hearing in less than a month from the date of this ruling, I hold the view that the hearing of the case would not be prejudicial to any of the parties to the suit. Furthermore, the determination of the case on its merits is more likely than not to provide the parties with a real sense of true justice.

For those reasons, I dismiss the application dated 22/8/2007. However, notwithstanding the said dismissal, I still award the costs thereof to the defendant because I find that it is by bringing the application that he has pushed the plaintiff to set down the suit for hearing.

It is so ordered.

Dated, Signed and Delivered at Kakamega, this 17th day of April, 2008.

FRED A. OCHIEG

J U D G E