

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 215 of 2004

PHILIP WAMBUA MASILA.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

The Application is a notice of motion brought under order **XVI rule 5(a)** and **(d)**. It seeks to have the Plaintiff's suit dismissed for want of prosecution, with costs to the Defendant. There are five grounds for this application which are set out on the motion as follows:

- (a) That the plaintiff has not taken any steps to fix this matter for hearing since 15th September, 2004 when the matter was adjourned upon the ruling dismissing the Plaintiff's injunction application.
- (b) The Plaintiff filed a Notice of Appeal on 27th October, 2003 which however does not act as a stay of proceedings herein.
- (c) The undue delay in setting this matter for the hearing after the dismissal of its injunction application on 15th September, 2004 has occasioned undue prejudice against the defendants in terms of loss of evidence and loss of memories.
- (d) Alternatively pleadings closed on 10.06.04, 7 days after the Defence was served on the Plaintiffs. The plaintiff has not taken any steps to file the suit for hearing.
- (e) That it is in the interest of justice and public policy that litigation should come to an end.

There is a supporting affidavit sworn by **Geoffrey Imende** an Advocate of the High Court. The gist of the application is to demonstrate that since 15th of September, 2003 when the Plaintiff's application for injunction was dismissed, and since 10th June, 2004, when the pleadings in this suit were closed, the Plaintiff has taken no steps to have the suit set down for hearing.

The application is unopposed. The Plaintiff has filed no grounds of opposition or replying affidavit to the application. **Mr. Luseno** who argued this application on behalf of the Defendant, submitted that it has been 5 years since the close of the pleadings and that no steps had been taken by the Plaintiff, of whatever nature. **Mr. Luseno** submitted that as averred in the supporting affidavit, the suit property was sold and transferred to other persons who are not parties to this suit. **Mr. Luseno** submitted that there was nothing left to litigate in the matter and that therefore, the application should be allowed.

I have considered the application by the Defendant. I have also perused the plaint, filed by the Plaintiff when this suit was instituted on the 27th April, 2004. Indeed it has only two substantive prayers. Prayer (a) sought a declaration that the intended sale of the suit property was illegal and unjustified and prayer (b) sought a permanent injunction restraining the Defendant from selling the suit property. Since the suit property was disposed off after the Plaintiff's injunction was dismissed by **Emukule, J.** on the 15th September, 2003, nothing was left in this matter to litigate except the issue of costs. Costs follow the

course and need not be litigated upon.

Since this application is unopposed and it is clear that no step has been taken in the matter since 2004, the Defendant's application is merited. I do find that the Plaintiff has lost interest in the matter, and that in any event, the suit is spent.

Having come to this conclusion, I do allow the Defendant's notice of motion dated 27th March, 2006. The Plaintiff's suit is hereby dismissed for want of prosecution, with costs of the application and of the suit to the Defendant.

Dated at Nairobi this 27th day of June 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:

Muthonu holding brief for Mr. Luseno for the Plaintiff

LESIIT, J.

JUDGE