



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 988 of 2005

ABDALLA TAIRARA GODORO.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

R U L I N G

1. The application before court is the chamber summons dated

20.11.06, expressed to be brought under Order 16 Rule 5 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking orders:-

(a) THAT the plaintiff's suit be dismissed for want of prosecution.

(b) THAT costs of the application be provided for;

on the grounds that since the filing of the suit on 5.08.05, the plaintiff has not taken any step to prosecute the same while he continues to enjoy interim orders.

2. The application is also premised on the sworn affidavit of **Catherine Ngala**, advocate who says that she has the conduct of this matter on behalf of the defendant/applicant and therefore has the full authority to swear the affidavit in support of the application. She says that the plaintiff filed suit on 5.08.05 and that since then the plaintiff has not taken any action to set down the suit for hearing. She also says that in the meantime, the plaintiff is enjoying interim injunctive orders which are prejudicial to the defendant/applicant and that the longer it takes to have that matter heard and determined, the greater the damage to the defendant/applicant.

3. The application was duly served upon the firm of **Onyancha, Nyakundi and Co. Advocates** on the 6.02.08. By the time of the hearing of the application however, there were no replying papers filed on behalf of the plaintiff/respondent and the advocates for plaintiff/respondent did not also appear at the hearing. Mrs. Ngala who appeared for the applicant urged the court to find and hold that the plaintiff/respondent had indeed lost interest in his case and to dismiss the same for want of prosecution. She cited the case of **Mukisa Biscuit Manufacturing Co. Ltd. -vs- West End Distributors Ltd [1969] Ea 696**.

4. In the said **Mukisa case** the appellant (the defendant in the case before the High Court) asked the judge at the opening of the hearing, by way of preliminary objection to dismiss the suit for want of prosecution. The judge refused the objection on the grounds (a) That the case did not fall within any of the provisions of Orders 9 and 16 of the Civil Procedure (Revised) Rules, 1948 and (b) That he had no inherent power to dismiss the suit. The order was appealed against but in the meantime, the suit was heard and judgment entered for the respondent. On appeal against the order disallowing the preliminary objection, the court held:-

(i) *That the court had inherent power to dismiss the suit notwithstanding that the case did not fall within any of the specific provisions of the Civil Procedure (Revised) Rules 1948 which do not purport to be exclusive (Saldanha and*

Others v. Bhailal and Co. & Others ([1968] EA 28) overruled.

(ii) *Application to dismiss a suit for want of prosecution should be made by motion, and also that when both parties contribute to the delay in having the suit prosecuted, a court would not dismiss the suit for want of prosecution. The court then went ahead and set out the circumstances under which a suit may be dismissed for want of prosecution, which are similar to the present Order 16 of the Civil Procedure Rules.*

These are:-

a. *Under rule 2(1) the court may dismiss a suit in which no application has been made or step taken by either party for one year. In this case, and before the dismissal, the court may give notice in writing to the parties to show cause why the suit should not be dismissed.*

b. *Under rule 2(3) the court may dismiss the suit for non-compliance with any direction given under this rule.*

c. *Under rule 3, the court may also dismiss a suit for non-attendance in accordance with Order 9B rule 2 or 4(1) thereof.*

d. *Under rule 5, the court may dismiss a suit if within three months after ?*

i. *The close of pleadings; or*

ii. *The removal of the suit from the hearing list; or*

iii. *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.*

e. *Under rule 6 a suit may be dismissed if no step is taken for three years by either party with a view to proceeding with the suit..*

5. In the instant case, the defendant/applicant has come under Order (16) Rule 5 of the Civil Procedure Rules though it is not specified under which paragraph it does so. The plaintiff filed suit on 5.08.05 and contemporaneously with the plaint, the plaintiff filed an application by summons in chambers seeking an order of injunction to restrain the defendants, by themselves, their servants, workers or agents or otherwise however from evicting the plaintiff from shop No.18 Shauri Moyo Estate or otherwise dealing with the said shop No.18 Shauri Moyo Estate until the determination of this suit, for reasons that are the face of the application. On the 18.08.05, the court (Nyamu J) gave a temporary 14 day order of injunction and fixed the matter for *inter partes* hearing on 30.08.05. The application did not proceed on the 30.08.05 and by the consent of the parties, the matter was stood over to 5.10.05 for inter partes hearing. In the meantime, the interim order of injunction, which had been given for 14 days only on the 18.08.05, was extended to the 5.10.05. In my understanding of the rules the interim orders issued on 18.08.05 lapsed after the 14 days in accordance with order 39 Rule 3(1) of the Civil Procedure Rules.

6. On the 5.10.05, the court was informed that Mr. Owino who had the conduct of the matter on behalf of the plaintiff/respondent was bereaved and with the consent of Mrs. Ngala, the application dated 5.08.05 was stood over to the 16.11.05 at 2.30 p.m. for inter partes hearing. The temporary orders of injunction were again extended to the 16.11.05. When the matter came up for inter partes hearing on 16.11.2005, the court was informed that Mr. Owino was indisposed and was therefore not available to prosecute the plaintiff's application dated 5.08.05. Though Mrs Ngala objected to the application for adjournment and sought to have the interim orders vacated, the application for adjournment was allowed and the application dated 5.08.05 was stood over to 12.11.05 for inter partes hearing. Again the interim orders were extended.

7. The matter came up again on 24.11.05, but initially both parties were absent and the matter was stood over generally. Later, a Mr. Okeyo appeared in court and persuaded the court to have the matter stood over generally and the interim orders were extended. As it were, these are the same interim orders which Mrs. Ngala says are still being enjoyed by the plaintiff/respondent. Although the plaintiff/respondent filed a Certificate of Urgency on 12.08.05, seeking to have the application dated 5.08.05 heard as a matter of priority during the Summer Vacation, that application has never been heard inter partes to date, and on every occasion when the application has come up for hearing, it is the plaintiff/respondent who has caused the same not to proceed, except for the 24.11.05 when even counsel for the defendant/applicant did not appear before court for the hearing.

8. On the 7.06.06, counsel for the defendant/applicant fixed the plaintiff's application dated 5.08.05 for hearing on 2.10.06, but there is no record to show what may have transpired on that date. Again on 4 04.07, Mrs Ngala & Co.

Advocates for the defendant/applicant fixed the plaintiff's application dated 5.08.05 for hearing on the 19.07.07. In between 7.06.06 and 4.04.07 the defendant/applicant filed the present application on 3.04.07. The application is dated 20.11.06.

9. I have perused the court file but I do not find or see a copy of the defendant's defence. The record also shows that there is another application still pending for inter partes hearing, and which application the plaintiff/respondent has made no effort whatsoever since 24.11.05 to set down for hearing. The defendant/applicant on the other hand has made attempts at setting down that application for hearing and according to the rules, the defendant had no obligation to do what he did. The duty is always on the plaintiff to pursue his matter to its logical conclusion. It is even surprising that the plaintiff did not take advantage of the defendant's failure to file defence to request for judgment in default of defence. Such apathy on the part of the plaintiff can only mean one thing: That the plaintiff is not interested in presenting this suit.

10. Taking all circumstances of this case into account, I have found that though the application is brought under Order 16 Rule 5 of the Civil Procedure Rule, it does not sit squarely upon the shoulders of the said rule. I am however persuaded that in the circumstances of this case the plaintiff has lost interest in not only the suit but also the application by which he obtained temporary relief from imminent eviction from the suit premises. It is my view that the continued presence of both the suit and the application for injunctive orders is highly prejudicial to the defendant/applicant who is unable to deal with the suit property in its best interests.

11. I have also to determine whether the instant application should have come by motion and not by way of summons in chambers. It is clear from the **Mukisa case** that an application for dismissal of a suit for want of prosecution should be by motion. Order 16 itself is silent on how such applications should be made, and that therefore brings such application under the purview of Order 50 Rule 1 of the Civil Procedure Rules which provides that

“(1) All applications to the court save where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open court”.

12. The question to ask is whether the defendant/applicant has any way of escape. In my view Order 50 Rule 12 should provide a way of escape for the defendant/applicant. The rule provides that:?

“(12) Every order, rule or other statutory provision under or by virtue of which any application is made, must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule”.

I also think that Order 6 Rule 12 would provide a further safety valve for the defendant/respondent regarding its application dated 20.11.06.

13. In the result, I would allow the defendant's application dated 20.11.06 and filed in court on 3.04.07 that the plaintiff's suit be and is hereby dismissed for want of prosecution with costs to the defendant/applicant. I would also dismiss the plaintiff/respondent's application dated 5.08.08 since it would have no legs to stand on once I have dismissed the suit. In any event, the plaintiff/applicant is guilty of inordinate delay in having the said application prosecuted inter partes. I would also order costs for the application to be paid to the defendant/applicant.

It is so ordered.

Dated and delivered at Nairobi this 25th day of June 2008.

R.N. SITATI

JUDGE

Delivered in the presence of: