



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

Civil Suit 201 of 2000

SUNRAY MERCHANTS LIMITED.....PLAINTIFF

VERSUS

VICTORIA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

DOROTHY K. KWONYIKE t/a

LUGUYAN ENTERPRISES.....2ND DEFENDANT

RULING

The application is dated 23rd of November 2006 expressed to be brought under **Order XVI rule 5 of Civil Procedure Rules**. It seeks to have the Plaintiff's suit dismissed for want of prosecution and an order of the court to have the proceeds of the sale of a lorry registration no. KAH 531L plus the accrued interest to date released to the 1st Defendant's credit.

The grounds for this application are that the pleadings in this case closed in the month of March, 2000 and that the Plaintiff has taken no steps to set the suit down for hearing. Further that the last time any step was taken in the matter was on the 17th February, 2003 when, on the application of the 1st Defendant, an order was made by the court that the ownership of the motor vehicle KAH 531L be vested in John Kiragu Wambugu and Synergy Industrial Credit Limited. Finally the learned counsel submitted that the Plaintiff has lost interest in the matter.

The Plaintiff was served with the application and a hearing notice through registered post to the Plaintiff's last known address, on the 27th May, 2008. The letter was never returned to the Defendant's address and neither were any papers filed by the Plaintiff in response to this application.

Mr. Wasuna argued this application on behalf of the 1st Defendant who is the Applicant. He relied on the supporting affidavit of Janet Wangu Maina the legal officer of the 1st Defendant. In that affidavit, **Mr. Wasuna** submitted, it is deposed that by an order of the court of 18th of December, 2002, the suit vehicle KAH 531L was sold for Kshs. 2,205,000/-, and the proceeds kept by the 1st Defendant in an interest earning account pending the hearing and determination of the suit. Counsel submitted that since it is now 7 years since the pleadings were closed and 4½ years since the last step in the matter was taken it was clear that the Plaintiff had lost interest in the matter.

I have considered this application, together with the affidavit sworn in support of the same and the submissions by Mr. Wasuna for the Applicant. **Order XVI rule 5 (a) and (d)** provides as follows:

“5. If within three months after-

(a) the close of pleadings; or

(b) ...

(c)

(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.”

I have perused the record of this case and do confirm that it is over seven (7) years since the pleadings were closed and over four (4) years since the last step was taken in the matter.

It is also clear from the record that the Plaintiff has failed to come for the hearing of the application or to oppose it by filing any papers. It can be inferred from the Plaintiff’s conduct in this matter that he has lost any interest in the suit. The suit has been pending for over seven (7) years. The delay in setting it down for hearing and determination is inordinate and worse still no explanation whatsoever is forthcoming. I do agree with the 1st Defendant’s advocate that the Plaintiff is no longer interested with the suit and that the circumstances of the case do justify its dismissal for lack of prosecution.

I have considered that there was a sale of the suit vehicle and that the proceeds were held with the 1st Defendant in an interest earning account. I will allow the application in the following terms:

(a) The Plaintiff’s suit against the Defendants be and is hereby dismissed.

(b) The Plaintiff to pay the costs of the suit to the Defendants and the cost of this application to the 1st Defendant.

(c) The 1st Defendant is granted seven (7) days within which to file a statement of account in which the proceeds of the sale of the motor vehicle KAH 531L were deposited pursuant to the court order of 18th December, 2002.

(d) This matter be mentioned for directions on 1st of July 2008.

Dated at Nairobi this 23rd day of June, 2008.

J. LESIIT,

JUDGE

Read and signed in presence of:

Ochieng holding brief for Mr. Wasuna for the 1st Defendant

J. LESIIT,

JUDGE