



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 358 OF 2003

SAMUEL KINGESI MUTUMA

(Suing on his own behalf and as the Administrator of the estate of the late VICTOR MULEI KINGESIPLAINTIFF/RESPONDENT

VERSUS

SEYANI BROTHERS & CO. LTD.....DEFENDANT/APPLICANT

R U L I N G

1. The defendant is the applicant in the Notice of Motion application dated July 31, 2007 and filed in court on August 16, 2007. The application which is brought under Order 16 Rule 5(c) and (d) and Order 50 Rule 1 of the Civil Procedure Rules asks for ORDERS:-

(a) THAT the plaintiff's suit against the defendant be dismissed with costs to the defendant for want of prosecution;

(b) THAT the cost of this application as well as the costs for the entire suit be granted to the defendant in any event.

2. There are four grounds in support of the application. The applicant says that since the filing of the suit on February 24, 1999, the same has been fixed for hearing only once on September 19 and 20, 2006 when the same was taken out of the hearing list due to the plaintiff's default during the call over on July 25, 2006, and that since then the plaintiff has taken no steps to proceed with the hearing of the case. The defendant contends that the continued delay in having the case prosecuted is highly prejudicial to the defendant/applicant as it faces the increasingly difficult task of tracing its witnesses when and if the suit is eventually set down for hearing.

3. The application is also premised on the sworn affidavit of **BERNARD MBAI**, dated July 31, 2007. The deponent reiterates the averments of the grounds in support of the application and says that it is manifestly clear that the plaintiff is no longer interested in prosecuting the suit at the utter detriment of the defendant and urges the court to dismiss the plaintiff's suit for want of prosecution.

4. The application is opposed by the grounds of opposition dated May 5, 2008 and filed in court on the following day. The grounds are that:-

(i) The said Application is not only a grave abuse of the process of this Honourable Court but the same does not lie.

(ii) The said application is not only lacking merit but the same is guilty of non-disclosure of material facts.(sic)

(iii) The said application is brought in bad faith as well as being premature just to delay the plaintiff's claim.

(iv) The plaintiff/respondent herein therefore prays that the said application dated 31st July 2008 be dismissed with costs.

5. While responding to these grounds, Mr. Wambua for the applicant says that the grounds as filed do not offer any explanation and/or apologies for the delay in having this suit set down for hearing. Mr. Wambua also says that the purported grounds of opposition run counter to rules of pleadings since they have raised points of fact, instead of raising points of law. Mr. Kamau for the plaintiff/respondent says that the application is brought in bad faith and only intended to circumvent the course of justice. Mr. Kamau urges the court to dismiss the application in the wider interests of justice so that the plaintiff is given an opportunity to prosecute his claim.

6. The question that arises is whether the applicant has satisfied the conditions set under Order 16 Rule 5 (c) and (d) of the Civil Procedure Rules under which the application has been brought. Order 16 deals with prosecution of suits and adjournments generally, and rule 5 thereof provides thus:-

“5. If within three months after –

(a) the close of pleadings; or

(b) (Deleted by L.N. 36/00)

(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.”

7. The law as set out above is thus clear that three months after the close of pleadings or the adjournment of the suit generally, the suit is liable to dismissal unless the plaintiff or the court on its own motion or the defendant sets down the same for hearing. In this case, the suit was removed from the hearing list on July 25, 2006 when it was not confirmed at the call over. The record clearly shows that since then the plaintiff has not set down this suit for hearing. The record of July 25, 2006 also shows that the plaintiff was condemned to pay the court adjournment fees of Kshs.500/= for causing the suit to be taken out of the cause list.

8. Taking all the circumstances of this case into account and in particular that between July 25, 2006 and the date of filing of the instant application the plaintiff did not make any attempts to set down the suit for hearing, I find that indeed the plaintiff has lost interest in prosecuting his claim against the defendant/applicant. The plaintiff has offered no explanation for the delay in having the suit set down for hearing.

9. In the result, I have no option but to allow the defendant's application dated July 31, 2007. Accordingly, the plaintiff's suit filed in court on April 17, 2003 is dismissed for want of prosecution. The costs of this application and the costs of the entire suit shall be paid by the plaintiff to the defendant.

It is so ordered.

Dated and delivered at Nairobi this 13th day of June 2008.

R. N. SITATI

JUDGE

Delivered in the presence of:-