



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

Civil Case 596 of 2000

DONALD KAMURU KIBERA.....PLAINTIFF/RESPONDENT

VERSUS

LONHRO MOTOR (E.A.) LTD.....1ST DEFENDANT/APPLICANT

**DEREK LEONARD.....2ND
DEFENDANT/APPLICANT**

RULING

1. By their application dated February 28, 2008 the two defendants/applicants ask for ORDERS:-

- (a) *THAT this Honourable Court be pleased to dismiss the plaintiff's suit for want of prosecution;*
- (b) *THAT the costs of this application and [of] the suit be awarded to the Defendant/Applicant;*

which application is premised on the grounds:-

- (a) *THAT the Plaintiff filed this suit against the Defendants on 14th April 2000*
- (b) *THAT the defendants in return (sic) filed their defence on 31st July 2000.*
- (c) *THAT this suit has never been fixed for hearing.*
- (d) *THAT it is only fair and just that the same be dismissed for want of prosecution.*

2. The application is also supported by the sworn affidavit of ROSALIND KAGURE MUTHIGA Advocate dated February 28, 2008. She says that in her capacity as advocate for the Defendants, she is competent and has the authority to swear the affidavit. She reiterates the grounds in support of the application and says that it is apparent that the plaintiff has by his conduct and record shown that he is not interested in prosecuting his claim against the defendants and that the suit ought to be dismissed for want of prosecution.

3. The firm of M/s Mbari Kioni & Co. Advocates who are on record for the plaintiff/respondent were duly served with the application on March 10, 2008. The said firm did not however appear at the hearing of the application, not did it file and replying pleadings to the application, so that the application proceeded ex-parte. The application is brought under Order 16 Rule 5(d), Order 50 Rule 1 of the Civil

Procedure Rules and Section 3A of the Civil Procedure Act. Rule 5 of Order 16 of the Civil Procedure Rules provides as follows:-

“5. *If within three months after –*

(a) *the close of pleadings; or*

(b) *Deleted by LN 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.”*

4. The history of this case is brief. The proceedings were commenced by way of plaint which was duly filed in court on April 14, 2000 by the firm of MBARI KIONI & CO. ADVOCATES. On July 17, 2000 and July 31, 2000, the defendant entered appearance and filed defence respectively. On August 3, 2000, the firm of MBARI KIONI & CO. ADVOCATES filed Reply to Defence and thereby closed the pleadings. From that date, until the instant application was filed on February 28, 2008 plaintiff/respondent took no other action whatsoever to have the suit set down for hearing. I find therefore that though the application is expressed to be brought under Order 16 Rule 5(d) of the Civil Procedure Rules as the principal provision, the proper rule should be Rule 5(a) of Order 16 of the Civil Procedure Rules. I am satisfied that from the history of this case, the plaintiff/respondent has lost interest in this case. Even his counsel, who was duly served with the instant application failed to turn up for the hearing of the application.

5. In the result, I allow the defendants/applicant’s application dated February 28, 2008 and accordingly dismiss the plaintiff’s suit for want of prosecution. The costs of this application and the costs of the entire suit shall be paid by the plaintiff/respondent to the defendants/applicants.

It is so ordered.

Dated and delivered at Nairobi this 11th day of July 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-