



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 408 of 2004

KAJWANG' TOM JOSEPH FRANCIS t/a

KAJWANG' & KAJWANG' ADVOCATES.....PLAINTIFF/RESPONDENT

VERSUS

BEN AGINA.....1ST DEFENDANT/APPLICANT

THE STANDARD LIMITED.....2ND DEFENDANT/APPLICANT

RULING

1. This is an application brought by way of Notice of Motion under Order 16 Rule 5(a) and Order 50 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and other enabling provisions of the law by which the Applicant/Defendant seeks **ORDERS**

(1) *THAT the suit against the Defendant/Applicant herein be dismissed for want of prosecution.*

(2) *THAT the costs of the suit and the application be borne by the Plaintiff/Respondent.*

2. There are three grounds on the face of the application which in a nutshell allege that the Plaintiff has failed to take any active steps in prosecuting the suit since close of pleadings in July 2004. There is also an affidavit in support of the application sworn by NELLY MATHEKA, the Assistant Director – Legal of the 2nd Defendant/Applicant. She says therein that this suit was filed on 23/04/2003 and that the Plaintiff sought general damages for alleged defamation against him by the Defendants. She also says that the Defendants/Applicants filed the Memorandum of Appearance on 21/06/2004 and a defence on 1/07/2004 denying all the Plaintiff's averments. The deponent also states that from information given to her by Rubeena Dar, advocate of Daly & Figgs Advocates who are on record for the Defendants, the Plaintiff has never taken any action towards having this suit prosecuted since July 2004 when pleadings closed. In her view the deponent believes that the Plaintiff/Respondent has lost interest in the case and that it is only fair and just that the same be dismissed for want of prosecution.

3. The firm of Odhiambo & Weda Advocates filed Grounds of Objection in opposition to the application. The grounds state –

(1) *That due to the congestion in the High Court, the cases for the year 2004 are generally not confirmed for hearing at the call-over even if listed hence the case could not be prosecuted in the circumstances in the absence of special reasons.*

(2) *The Plaintiff is anxious to have the case heard and is ready for full hearing at any time if the court allows.*

(3) *The application is bad in law, frivolous and will prevent the suit from being listed down for hearing in view of the prevailing directions that any suit with a pending application cannot be confirmed for hearing.*

(4) *The Plaintiff is ready to be given a special hearing date at the earliest opportunity and is available any time.*

(5) *He stands to be heavily prejudiced if the application is allowed.”*

4. At the hearing of the application, counsel reiterated the averments as per their pleadings in support and against the application respectively. Miss Gathaara also referred the court to two authorities:-

(i) *Milimani HCCC No. 34 of 2003 Dipak Premchand Shah & 6 Others –vs- Akiba Bank Ltd.*

(ii) *NRB HCCC No.314 of 2002 – Harbinder Singh Sethi –vs- The Standard Limited.*

5. Mr. Weda for the respondent contended that the court ought to take judicial notice of the congested court diary and find that the Respondent’s hands were tied behind his back. He also submitted that the cited cases should not be relied on by this court since they are only of persuasive authority. Mr. Weda also submitted that since the instant application was on record, the main suit could not have been set down for hearing. He also contended that the power to dismiss a suit should be exercised judiciously since it was harsh. Miss Gathaara was quick to say that the Plaintiff has not explained what action he took, if any between July 2004 when the pleadings closed and the filing of this application on 13/11/2007. She also submitted that the Plaintiff has not adduced any evidence that he has ever invited the Defendant for fixing of hearing dates and further that the Plaintiff has not submitted any agreed issues for consideration by the Defendants herein. Miss Gathaara submitted that the pendency of this suit is an unnecessary burden to the Defendants and that the same should therefore be dismissed with costs of the Defendants.

6. The question that arises is whether the Plaintiff has demonstrated that the delay in having the suit set down for hearing is excusable. In my view, the Plaintiff has not done so. It is clear that since July 2004 the Plaintiff has literally been asleep and only woke up from his slumber when he was served with the instant application. The Plaintiff has not shown that he made attempts to have the suit set down for hearing and never managed to get a date. The record shows that since 1/07/2004 when the Defendants filed their defence, no other activity is recorded on the file until 14/11/2007 when Counsel for the Defendants attended the registry to take a date for the instant application. Order 16 Rule 5 of the Civil Procedure Rules is clear in its provisions in the following terms:-

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. In the instant suit, it was forty months since the pleadings closed without any action being taken on the part of the Plaintiff. I am satisfied that the Plaintiff has indeed lost interest in his case. In the case of Joseph Soita & 30 Others –vs- Abrolite Industries Ltd. – Nrb HCC No.2007 of 1994, the court, (Lenaola J) referred to the Court of Appeal ruling in Interact Limited Sudhir J, Patel vs Diners Club Africa Limited – Civil Appeal No. 3 of 2000 where the Court of Appeal held that –

“There is also inherent power in the court to dismiss the suit if the delay in prosecuting it is inordinate – see also Mukisa Biscuit Company –vs- West End Distributors [1969] EA 696.”

8. In my view there was inordinate delay in the instant case, and the Plaintiff has made no effort to explain the forty months delay.

9. In the circumstances, I have no choice but to allow the Applicants’ application dated 8/10/2007 and to order that the Plaintiff’s suit be and is hereby dismissed for want of prosecution. Costs of the application and the suit shall be borne by the Plaintiff/Respondent.

It is so ordered.

Dated and delivered at Nairobi this 17th day of October, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

.....For the Plaintiff/Respondent

.....For the Defendant/Applicant