



REPUBLIC OF KENYA

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

Civil Case 807 of 2002

KENAFRIC DIARIES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

THE ADVERTISING COMPANY LTD.....DEFENDANT/APPLICANT

RULING

The application before the court is by the Defendant and is a Chamber Summons brought under Order IXB rule 8 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. It seeks to have the order of the court issued on the 7th July, 2008 dismissing the Defendant's application dated 13th December, 2005 for the non-attendance in court of the Defendant's counsel, set aside. The dismissed application sought to have the Plaintiff's suit dismissed. The application is based on grounds cited on the face of the application and supported by the affidavit of DICKENS MITAWIA OUMA dated 22nd July, 2008. In the affidavit, Mr. Ouma Advocate attempts to explain the reasons for the non-attendance of Defendant's counsel for the hearing of the application. The main reason given why no counsel appeared according to Mr. Ouma, is that Miss Joy Nyaga Advocate, who was ceased of the matter, was away from the office between 4th and 9th July, 2008 and that she handed over her matters to Mr. Ouma to handle. Mr. Ouma depones that the instant matter was not diarised by Miss Nyaga and therefore he was unaware that it was coming up for hearing.

The application has been opposed. The Plaintiff's Advocate has filed grounds of opposition raising four grounds. The first ground challenges the jurisdiction of the court to set aside orders made exparte in applications of interlocutory nature. The second ground states that no useful purpose will be served by reinstating the Defendant's application since the basis upon which the application to dismiss the suit was made was a triable issue that could only be determined at the full hearing. The third ground states that it is in the interest of justice that the matter should be allowed to proceed to full hearing on the basis that the case is over six years old and that the dismissed application was mainly aimed at delaying the speedy determination of the suit. The last ground states that the Defendant will not suffer any prejudice if the application is not reinstated as it still has an opportunity to raise the issues set out in the application during the hearing of the main suit.

For the record, the dismissed application sought to have the plaint struck out with costs to the Defendant for failing to disclose a reasonable cause of action and for being scandalous, frivolous or vexatious or an abuse of the court process.

I have considered the submissions by the counsel together with the pleadings. It is not denied that the Defendant's application dated 13th December, 2005 was dismissed on the 8th July, 2008 for non-attendance of the Defendant's Advocate. It is therefore correct that the provisions of the law invoked by

the Defendant in bringing this application do not apply. Order IXA rule 8 can only be invoked where the suit has been dismissed or judgment entered under that order. I agree with Miss Babu for the Plaintiff that for the purposes of the instant application, the correct provision should have been Order L rule 17 of the Civil Procedure Act. I also agree with Miss Babu that it is trite law that where a specific provision exists, section 3A of the Civil Procedure Act should not be invoked. Mr. Ouma's submission that the court should consider this application by virtue of section 3A of the Civil Procedure Act which the Applicant invoked is therefore untenable.

That is not the only consideration that causes this court not to exercise its jurisdiction in favour of the Applicant. I have considered other more weighty issues. I did consider that the application has been pending since 2005 and on the day it came up for hearing, 3 years down the line, the Defendant was not available to prosecute it. In the meantime, the Plaintiff could not set down the suit for hearing in view of the pending application.

I have also considered the basis upon which the application was made which is that the Defendant was an agent of a disclosed principle and that therefore the correct party to be sued was the principle and not the Defendant. The Defendant will not suffer any injustice if this application is not allowed since the issue raised as the basis of the application to dismiss the Plaintiff's suit, is an issue that ought to be determined fully during the trial of the case. There is no prejudice that the Defendant will suffer if the instant application is not allowed.

Having come to this conclusion, in view of all the considerations I have taken into account as set out in this ruling, I find no merit in the Defendant's application. Accordingly, I dismiss the Defendant's application with costs to the Plaintiff.

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

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Miss Lubami for Miss Babu for the Plaintiff

Mr. Ouma for the Defendant

LESIIT, J.

JUDGE