



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

Civil Case 466 of 2005

J.F.K. OMANGA.....1ST PLAINTIFF
 Y.B. OMITI.....2ND PLAINTIFF
 S.C. KIPLAGAT.....3RD PLAINTIFF
 B.K. ROP.....4TH PLAINTIFF
 N. ETALE.....5TH PLAINTIFF
 R.N. MUYIRA.....6TH PLAINTIFF
 V.K. OLUNGA.....7TH PLAINTIFF
 E. MWASHILA.....8TH PLAINTIFF

VERSUS

TELEPOSTA PENSION SCHEME

REGISTERED TRUSTEES.....DEFENDANT/APPLICANT

RULING

1. The application before me is the Chamber Summons dated 13/03/2008, which is brought under Order XVI Rule 5(a) and (d), Order VI Rule 13(1) (b), (c) and (d) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act and all others enabling provisions of the law. The Applicant seeks orders:-

(1) THAT the Plaintiff's suit be dismissed for want of prosecution and costs be awarded to the Defendant.

(2) THAT the Defendant's costs of defending the suit and the application be borne by the Plaintiffs.

2. The application is premised on the grounds exhibited on the face thereof namely

(a) That since the close of the pleadings the Plaintiffs have not taken any steps to prosecute the suit.

- (b) *That in the circumstances, it is in the interest of justice that the suit herein be dismissed.*
- (c) *That the suit is otherwise an abuse of the court process*
- (d) *That the continued subsistence of this suit is otherwise an abuse of the court process.*

The application is filed on behalf of the Defendants by the firm of **Kale Maina & Bundotich Advocates**.

3. The affidavit in support is sworn by Paul B. Jilani who says that he is the Defendant's legal adviser with instructions from the Defendant's Board of Trustees to swear the Affidavit. He depones that the suit herein was filed on 22/04/2005; that the Plaintiff's chamber application dated 24/05/2005 seeking injunctive orders against the Defendants was dismissed with costs on 15/02/2006. He also depones that on 4/07/2007 when the matter was last in court the Defendant withdrew its application dated 27/02/2006. The application dated 27/02/2006 sought to have the Plaintiff's suit struck out on grounds that the Plaintiffs had not served summons to enter appearance upon the Defendant. The deponent says further that it is apparent that the Plaintiffs have lost interest in the suit and that the same should be dismissed as prayed. He also depones that the Plaintiff's failure to prosecute the suit is deliberate and inordinate and is an abuse of the process of the court.

4. Though duly served with the application, the Plaintiffs did not file any Replying papers. At the hearing of the application, counsel for the Plaintiffs pleaded with the court to allow the Plaintiffs an opportunity to prosecute their case. Order XVI Rule 59(a) and (d) of the Civil Procedure Rules under which the application is brought forms part of the wider provision of the relevant rule which reads:-

"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".*

The above are the circumstances under which a suit can or may be dismissed for want of prosecution. Order VI Rule 13(1) also provides for the striking out of pleadings where the pleading

- (a) *does not disclose a reasonable cause of action*
- (b) *is scandalous frivolous or vexatious,*
- (c) *it may prejudice, embarrass or delay the fair trial of the action*
- (d) *it is otherwise an abuse of the process of the court.*

The Applicant in this case wants the Plaintiff's suit struck out under grounds (b) (c) and (d) of Order VI Rule 13(1) of the Civil Procedure Rules.

5. Briefly the facts of this case are that the Plaintiffs commenced suit by way of plaint on 22/04/2005 praying for judgment against the Defendant for:-

- a) **A declaration that the Plaintiffs' initial offer of sale of House Nos. 13, 17, 24, 8, 11, 9, 4 and 3, each comprising a maisonette and a servants quarter, the maisonette being erected on that land known as L.R. Nos. 1870/III/535, 1870/III/531, 1870/III/524, 1870/III/540, 1870/III/537,**

1870/III/539, 1870/III/544 and L.R. No. 1870/III545 and situated at Matundu Lane – Westlands has not lapsed.

b) A mandatory injunction restraining the Defendant and/or its agents from further receiving bids and opening the bids of House Nos. 13, 17, 24, 8, 11, 9, 4 and 3, each comprising a maisonette and a servant quarter, the maisonette being erected on all that land known as L.R. Nos. 1870/III/535, 1870/III/531, 1870/III/524, 1870/III/540, 1870/III/537, 1870/III/539, 1870/III/544 and L.R. No. 1870/III545 unless and until the Plaintiffs’ have expressly communicated their inability to satisfy the terms of the offer.

c) A mandatory injunction restraining the Defendant, and/or its agents from dispossessing the Plaintiffs’ of House Nos. 13, 17, 24, 8, 11, 9, 4 and 3 each compromising a maisonette and a servant quarter, the maisonette being erected on all that land known as L.R. Nos.1870/III/535, 1870/III/531, 1870/III/524, 1870/III/540, 1870/III/537, 1870/III/539, 1870/III/544 and L.R. No. 1870/III/545 respectively; unless and until the Plaintiffs’ have expressly communicated their inability to satisfy the terms of the offer.

d) Costs of this suit.

6. The Plaintiffs did not file summons to enter appearance until they were ordered to do so by court on 13/06/2006. Summons to Enter Appearance were thereafter duly served upon the Defendants who then entered appearance on 12/07/2006 and filed their Statement of defence on the same date, that is to say 12/07/2006. From the record, the Plaintiffs have not taken any other step in the matter, while the Defendants have moved the court on a number of occasions.

7. The question that arises is whether the Applicants have made out a case for the orders sought. It is clear that pleadings in this case closed on 12/07/2006 with the filing of the Defendant’s defence. Since then, the Plaintiffs, who are under a duty to set down the suit for hearing have not taken any step in that direction. The Plaintiff’s have not given any explanation as to why they have not taken any step in having this suit set down for hearing. Though duly served with the instant application, the Plaintiffs did not file any Replying Affidavit to explain the reasons for their inability to proceed with the matter since close of pleadings on 12/07/2006. It would therefore seem to me that the Plaintiffs have lost interest in their case. It follows therefore that to continue to have this case hanging over the Defendant’s heads would only embarrass the Defendants and amount to an abuse of the court process. The Plaintiffs’ conduct speaks loudly against them. It is not the duty of the Defendant or the court to force the Plaintiffs to prosecute their case.

8. In the result, I do hereby dismiss the Plaintiff’s suit for want of prosecution. Costs of the application and the entire suit shall be borne by the Plaintiffs.

It is so ordered.

Dated and delivered at Nairobi this 24th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

..... For the Plaintiff

.....For the Defendant