



**REPUBLIC OF KENYA**

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

**Civil Case 984 of 2002**

**HERON COURT HOTEL LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NAIROBI CITY COUNCIL.....DEFENDANT/APPLICANT**

**RULING**

City Council of Nairobi (hereinafter referred to as the Applicant) has moved this court under Order XVI rule 5 and Order XXXIX rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders for dismissal of the Plaintiff's suit for want of prosecution or alternatively discharge of the injunctive reliefs currently in force in favour of the Plaintiff.

The Plaintiff who is Heron Court Hotel Ltd filed its claim against the applicant on 9<sup>th</sup> August 2002 in which the plaintiff sought an order of permanent injunction restraining the Defendant by itself, its agents, employees and/or servants from discontinuing, cutting off, and/or otherwise interfering with the Plaintiff's water supply, and a further order that the Plaintiff do replace the damaged meter at the Plaintiff's cost. On the same day the Plaintiff came to this court by way of a Chamber Summons under Section 3A & 63e of the Civil Procedure Act and Order XXXIX Rules 1, 2, 2A and 3 of the Civil procedure Rules and the court granted an order of a temporary injunction pending the hearing of the application inter-partes. Hearing was set for 19<sup>th</sup> August 2002 on which date the application was adjourned to 23<sup>rd</sup> September 2002 and temporary orders extended. On 23<sup>rd</sup> September 2002 application was again adjourned and applicant ordered to file a replying affidavit by 15<sup>th</sup> October 2002 in default of which the application dated 8<sup>th</sup> August 2002 was to be granted in terms of prayer (3) thereof. The matter next came before the court on 17<sup>th</sup> November 2002 by which date the applicant not having filed any replying affidavit the application dated 8<sup>th</sup> August 2002 was allowed in terms of prayer 3 and costs ordered to be in the cause.

On 24<sup>th</sup> August 2004 the applicant having failed to enter appearance or file defence an interlocutory judgment was entered in favour of the

plaintiff. Subsequently the applicant applied to have the interlocutory judgment set aside and on 1<sup>st</sup> October 2004, the parties agreed by consent to have the interlocutory judgment entered against the applicant set aside. Thereafter the applicant filed a memorandum of appearance and a defence on the 7<sup>th</sup> October 2004, and a reply to the defence was filed by the plaintiff on the 14<sup>th</sup> October 2004.

From the court record no further action appears to have been taken by the plaintiff and it is on that basis that the applicant now seeks to have the plaintiff's suit dismissed for want of prosecution.

In the replying affidavit sworn by the plaintiff's advocate Paul Otieno Mungla it is contended that the delay in fixing the matter for hearing was due to attempts by the parties to settle the matter out of court, and that a request for particulars served on the applicant has not been responded to, to date.

From the record it is evident that the plaintiff has been interested in this matter, there is also evidence

that there were on-going negotiations between the parties. It cannot therefore be said that the delay is unexplained or that it is inordinate.

Although the applicant is complaining about the injunctive relief, the same was granted by the court without any opposition from the defendant. While I appreciate however that consumption of water is an on-going

exercise in respect of which Bills are incurred monthly it has not been alleged that there is any default in payment so as to justify interfering with the interlocutory injunction.

The upshot of the above is that although there has been some delay, it is not so inordinate as to justify the extreme measure of dismissing the plaintiff's suit. I do therefore reject the application. I make no orders as to costs.

Dated, Signed and Delivered at Nairobi this 15<sup>th</sup> day of March 2007

**H. M. OKWENGU**

**JUDGE**