

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Case 83 of 1998

JOHN NJANTHI.....PLAINTIFF

VS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

RULING

The defendant/applicant has filed the application dated 26.6.2006 under section 3(A) and 63 (e) of the Civil Procedure Act and Order 4 Rules 3, Order VI Rule 13 (D) and 016 r.5 and Order 50R.1 of the Civil Procedure Rules. He basically seeks 2 prayers as hereunder:

- a) *That the plaint dated 10/11/1998 and filed in court on 10/11/98 be struck out and the suit against the defendants dismissed.*
- b) *That in the alternative the suit be dismissed for want of prosecution.*

He also seeks an award for costs. The application is premised on the 5 grounds on the face of the application and supported by the affidavit of one Francis G. Kabindo dated 20.5.2006. The application was served on the plaintiff/respondent on 26/7/2006. Although the same was received under protest – saying that counsel for the respondents had no diary for 2007. It is noted that no reply by way of grounds of objection or a replying affidavit was filed in respect of the same.

The said application therefore remains unopposed. It is also noted that the counsel for the respondent did not come to court to defend the said application. The same was therefore heard ex-parte. I have keenly considered the cited grounds along with the contents of the supporting affidavit. I have noted the contents of the authority cited to me by counsel. I nonetheless note that the said authority i.e. MOBIL KITALE SERVICE STATION -V- MOBIL OIL KENYA LIMITED & ANOTHER is distinguishable from this case. In that case, the plaintiff had not taken out and served the summons to enter appearance and so the defendant had been unable to file his defence. In our case however, although summons had not been taken out, the defendant had been served with the plaint and had even filed a memorandum of appearance and filed a defence. The fact that the summons were not taken out and served on him is merely academic and did not prejudice the defendant in any way. That ground would not therefore compel me to strike out the suit.

I will nonetheless consider the alternative prayer as to whether the suit should be dismissed for want of prosecution. The plaintiff filed this suit on 10.11.98. Along with the plaint, he filed the Chamber Summons seeking injunctive orders. Those orders were granted ex-parte. I have gone through the record before me. I do not see if and when the application was ever heard inter-partes. The plaintiff got the orders for injunction, stashed them into his pocket and went into a deep slumber. He never bothered to have his suit heard. From the court record, on the several times the matter was fixed for hearing, it was counsel for the defendant who took the hearing date. There is no single incident in the file showing that the plaintiff took a hearing date or that he ever invited the defendants' counsel to take a hearing date by consent. An accurate inference can be made from the plaintiff's conduct that he had no intention of ever having his matter heard and brought to a conclusion. The only time the plaintiff was ever represented in court was on 24.11.98 which is about 6 years before this application for dismissal was filed. I appreciate the efforts made by the defendants to have the matter listed for hearing before. This shows that they

exercised the 1st option available to it under OXVI r. 5(d) of the Civil Procedure Rules. It served the application which already had a hearing date and the same was ignored. What else would the defendant be expected to do? It is the duty of a plaintiff in a suit to ensure that his matter is heard and determined expeditiously. It is actually not the duty of the defendant to kick a sleeping plaintiff out of his slumber. As an act of good faith however, the defendant who wishes the matter to be disposed of will move the court himself by taking a hearing date and serving the plaintiff. When a defendant does so and the plaintiff remains in a state of inertia, then when such a defendant moves the court for dismissal of the plaintiff's suit, his application is taken seriously. In this case, even the application for dismissal did not elicit any response from the plaintiff who continues to enjoy interim orders at the expense of the defendant. The court should not stand aside and allow such a plaintiff to enjoy such orders. This amounts to blatant and gross abuse of the court process. As the matter stands now, no reason has been given by the plaintiff to explain his blissful inactivity for the last almost nine years. I have no reason whatsoever to deny the applicant herein the orders he seeks. He has convinced the court that the only justifiable order in this matter is to have the plaintiff's suit dismissed with costs for want of prosecution. Accordingly, the application dated 26.6.2006 is hereby allowed. The plaintiff's suit is hereby dismissed with costs to the defendant/applicant. Orders accordingly.

W. KARANJA

JUDGE

DELIVERED, Signed and Dated at Bungoma this 12th day of June 2007

in the presence:- Mr. Watanga for Mr. Makokha for applicant.