

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 172 OF 2001

BONFACE MUTUNE KINYUA PLAINTIFF

versus

ISAAC KAMAU MWANIKIDEFENDANT

R U L I N G

On 5th July, 2007 the application dated 12th June, 2007 filed by the plaintiff decree holder came up for hearing. However **Mr. Nderi** holding brief for **Mr. Mwaniki** for the objector applied for adjournment on the grounds that the objector needed to file a replying affidavit to the application. Though the application was resisted by **Mrs Waweru** for the applicant, I nonetheless allowed the application and ordered that the same be heard interpartes on 30th July, 2007. The objector was further ordered to pay court adjournment fees as well as costs to the applicant assessed at Ksh.3,500/=. The payment was to be effected on or before the hearing date aforesaid.

When the application came up for hearing interpartes as aforesaid it transpired that the objector had not complied with the order requiring him to pay court adjournment fees as well as costs for the applicant. I declined to hear him in reply to the application unless and until the orders aforesaid were complied with. The objector was unable to comply and accordingly the application proceeded exparte.

Essentially the application by the applicant seeks that the application filed by the objector on 28th February, 2007 be dismissed for want of prosecution. The gravamen of the application is that since its filing as aforesaid the objector has not taken any steps to prosecute it. In the meantime, the vehicles which have been attached in execution of the decree continue to waste as a result of the automatic stay granted to the objector the moment he lodged the objection proceedings. Although the objector claimed that the application had been slated for hearing on 16th May, 2007 the same was never listed for hearing and to date the objector has taken no steps at all to prosecute the same.

From the record it is true that the objector filed an application dated 28th February, 2007 seeking that the proclamation by **Kiriiyu merchants** herein in respect of the goods listed in their proclamation be unconditional (sic) raised. Although on the face of the application the date for interpartes hearing indicated therein is 16th May, 2007, no minute is available in the record file showing that indeed the aforesaid date for interpartes hearing was given in court. It would appear that on filing the application, the objector simply chose not to take a hearing date. However for reasons that are unclear to me he inserted in the application served on the applicant that the same was to be heard interpartes on 16th May, 2007. I think that this was a deliberate ploy on the part of the objector to mislead the applicant and the court. There is no record at all to show that the alleged date was given in court. Small wonder that on the alleged date the application could not be listed for hearing as clearly the alleged date was but a figment of the objector's imagination and taken elsewhere other than in this court.

It has been two months since 16th May, 2007. Yet the objector has not demonstrated his desire to have the application disposed off. I do not think that the objector is keen on prosecuting the application

may be cause of the automatic stay in place. I have perused the replying affidavit (although ideally I should not in the light of the objector's failure to comply with orders requiring payment of adjournment fees and costs to the applicant) and noted that he claims that he is not to blame for the failure to have the application heard on 16th May 2007. He maintains that the application was truly scheduled for hearing on 16th May 2007. However as I have already stated, this allegation is not supported by the record. Even if that be case, why has he not taken any steps to prosecute the application since then. To me the objector is a person sitting pretty on the application in the knowledge that there is a stay in place and there is nothing the applicant can do. He must be startled from his deep slumber. Accordingly I will allow the application dated 12th June, 2007 with costs to the applicant.

Dated and delivered at Nyeri this 31st day of July, 2007.

M.S.A. MAKHANDIA

JUDGE