

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

Civil Case 767 of 2005

ELIJAH WYCLIFFE NYAKUNDIPLAINTIFF

V E R S U S

1. BEN MSHILA1ST DEFENDANT

2. GENERAL MOTORS E. A. LIMITED2ND DEFENDANT

R U L I N G

This is an application (by notice of motion dated 14th December, 2006) by the Defendants under Order 16, rule 5 (a) of the Civil Procedure Rules (the Rules). Under that rule, if, within three months after the close of pleadings, the plaintiff or the court on 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. There is a supporting affidavit sworn by one CAROLINE MATARA, the Senior Legal Officer of the 2nd Defendant.

The Plaintiff has opposed the application as set out in the replying affidavit sworn by him. In that affidavit the Plaintiff concedes that pleadings in the case have closed but argues that the suit is too new to have proceeded to hearing. He further argues that he is still desirous of prosecuting the suit and is ready to abide by any terms and conditions that the court may impose to ensure that the matter proceeds expeditiously to hearing. Finally, he argues that no prejudice or injustice has so far been occasioned to the Defendant by the delay.

At the hearing of the application there was no appearance for the Plaintiff, notwithstanding that the hearing date had been taken by consent.

I have duly considered the submissions of the learned counsel for the Defendant. I have also read the supporting and replying affidavits. Finally, I have perused the court record. Pleadings hearing closed on or about the 15th of June, 2005 as defence was served on the 1st of June, 2005 and no reply to defence was filed. See Order 6, rule 11 of the Rules. Since that date the Plaintiff has not set the suit down for hearing. No proper reasons emerge from the replying affidavit for this inactivity. The Plaintiff states in his replying affidavit that although pleadings have closed there are other legal requisites before the suit can be heard. Indeed that is so; for instance, discovery must be made by both parties under Order 10 rule 11A of the Rules. But the Plaintiff has not explained why he has not ensured that these legal pre-requisites are taken to enable the suit to proceed for hearing. The present application was filed on 15th December, 2006 that is, six (6) months after the close of pleadings. There was thus a delay of 3 months on the part of the Plaintiff to set down the suit for hearing. In the circumstances obtaining in this country with regard to judicial process, I do not consider that a three month delay is inordinate for a substantive hearing.

In the result, I must refuse this application. It is hereby dismissed. However I will award costs thereof to the Defendant because the Plaintiff is guilty of some delay in regard to prosecution of the case. I hereby assess those costs at KShs. 20,000/00. The same must be paid within 14 days of delivery of this ruling. In default the Defendant may execute for them. Those shall be the orders of the court.

DATED AT NAIROBI THIS 10TH DAY OF JULY 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 13th DAY OF JULY 2007