



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1573 of 1999

NYALIKA ENTERPRISES AND ENGINEERING COMPANY LTD
.....PLAINTIFF

V E R S U S

AFROFREIGHT FORWARDERS LTD
DEFENDANT

R U L I N G

On 3rd December, 2004 the court (Mutungi, J) dismissed the suit herein, apparently under rule 2(1) of Order 16 of the Civil Procedure Rules (the Rules). The court record shows that notice to show cause dated 4th November, 2004 why the suit should not be dismissed under that rule was issued for service upon the parties; however, there is no return of service. But there was appearance for the Plaintiff on 3rd December, 2004. There was no appearance for the Defendant.

Rule 2(1) of Order 16 aforesaid provides:-

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

The Defendant has now come to court by notice of motion dated 10th May, 2005 expressed to be under sections 3A, 27 and 80 of the Civil Procedure Act (the Act) and Order 44, rules 1, 2 and 4 of the Rules. It seeks a review of the order of 3rd December 2004 in order to include an award of costs of the suit to itself. The grounds of the application appearing on the face thereof are:-

- (a) That there is an error apparent on the face of the record.
- (b) That the Defendant was not served or notified before the dismissal and could have applied for costs if it had been served.
- (c) That the Defendant having been wrongly brought to court was entitled to its costs.
- (d) That the Defendant came to know of the dismissal order on 14th March, 2005 when its advocates attended court to file an application for dismissal of the suit for want of prosecution.
- (e) That the Plaintiff's suit was unmeritorious and could not succeed, and that that is why the Plaintiff

was not keen to prosecute the same.

(f) That it is in the interests of justice that the Defendant be awarded costs.

There is a supporting affidavit sworn by the Defendant's advocate, VERONICA W. MAINA. I have read the same. It confirms that from 23rd September, 2002 (when the suit came up for hearing but was taken out of the hearing list at the Plaintiff's instance) until it was dismissed on 3rd December, 2004, neither party made any application or took any step in the suit, a period of over two years. See paragraphs 8, 9 and 10 of the supporting affidavit.

The application was duly served upon the Plaintiff; it did not file any papers in response thereto. Nor was there any appearance for it at the hearing thereof.

I have considered the submissions of the learned counsel for the Defendant. No authorities were cited. There is no explanation at all in the supporting affidavit why the Defendant did not make any application or take any step in the suit during the two years mentioned above. So, what explanation could it have given on 3rd December 2004 if it had been duly served with notice to show cause?

I am not saying that it was not necessary to serve the Defendant; indeed it ought to have been served. But it was duty bound in the present application to explain to the court's satisfaction, as it could have been obliged to do on 3rd December 2004, why, on its part, it did not act at all in the suit between 23rd September, 2002 and 3rd December, 2004. It has not even attempted to do so.

I think, with respect, that by seeking costs of the suit now without bothering to explain its own inactivity as set out above, the Defendant is seeking to reap where it has not sown. If it wanted costs it should have applied for dismissal of the suit under rule 5 of Order 16 before the court moved itself to dismiss the suit.

In the event, I find no merit in the application by notice of motion dated 10th May, 2005. It is hereby dismissed with no order as to costs. Order accordingly.

DATED AT NAIROBI THIS 29TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 31ST DAY OF AUGUST, 2007