



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 1530 of 2001

KANTILAL NARSHI SHAH.....1ST PLAINTIFF

DIPESH KANTILAL SHAH.....2ND PLAINTIFF

VERSUS

CHANDULAL NARSHI SHAH.....DEFENDANT

R U L I N G

The plaint herein was filed to seek orders to restrain the defendant to levy distress of alleged arrears of rent for the premises occupied by the Plaintiffs.

The parties are family members and there has been family dispute for distribution of family properties. The dispute was referred to a sole Arbitrator and during its pendency the plaintiffs were given the occupation of the premises and running of the business thereon.

When the Defendant tried to levy distress the suit was filed on 6th September, 2001. The Plaintiffs also filed an interlocutory application on 29th November, 2004 and it was allowed vide Ruling delivered on 4th March, 2005.

Hon. Kariuki J in his Ruling stated that

“In light of this evidence, I find and hold that the Defendant’s purported distress of the first Plaintiff’s property is contrary to an express agreement between the parties and the Arbitrator’s award and therefore unlawful.”

Unfortunately, instead of taking steps to get the suit heard and determined the Plaintiffs changed their Advocate, and got involved into the determination of the previous Advocates’ Bill of costs.

In the meantime, the Defendant filed a Notice of Motion dated 16th May, 2007 seeking the orders for dismissal for want of prosecution which is for my determination.

It is premised under Order XII (*sic*) Rule 31(2) of Civil Procedure Rules. I do presume it was meant to be OrderXLI Rule 31(3). However, I must point out that the said provision is not the right provision of the law under which this application should be made. It is also prescribed under the said rule that an application should be made by way of a chamber summons.

I could have dismissed the application only on that ground. However, I think I can use my discretion under Order L Rule 12 of Civil Procedure Rules, and proceed to hear the application as if the same was made under Order XVI Rule 5.

Under normal circumstances, this court would have agreed with the counsel for the Defendant that the prosecution of taxation of the Advocates Bill of cost is not a step taken with a view of proceeding of the hearing of the suit, but considering the facts of the case before the court, it shall be unjust to dismiss the plaint when the Advocate on record has been not taking appropriate steps in the direction of setting the suit for hearing. This court knowingly shall not be a party to an unjust order.

I thus dismiss the application with order that its costs be paid by the Plaintiffs.

I further direct that the date of hearing shall be given during the month of December 2007 or January 2008 by the registry to finalize this old matter.

The Plaintiffs' Advocate shall invite the Defendant to fix the date of hearing within 10 days from the date hereof.

Dated, Delivered and Signed on this 22nd day of October, 2007.

K.H. RAWAL

JUDGE