

REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT 383 OF 2000

FIROZ JUSAB SUMAR t/a MALINDI AUTO PARTS..... PLAINTIFF

- Versus -

BARCLAYS BANK OF KENYA LTD. DEFENDANT

Coram: Before Hon. Justice L. Njagi

Mr. Hamza for Plaintiff

Mr. Busiera h/b for Waruhiu

Kowade & Nganga for Defendant

Court clerk - Ibrahim

RULING

By a notice of motion dated 22nd March, 2007, the defendant seeks from the court orders that the plaintiff's suit against the defendant be dismissed with costs for want of prosecution, and that the costs of the application be provided for.

The application is supported by the annexed affidavit of JOB MWANGI THIGA, Advocate, and is based on the grounds that the plaintiff/respondent is not interested in prosecuting this suit and has failed to set the same down for hearing on merits within six months as ordered by the court; that he has slept on his rights and is guilty of laches; and finally that he is not serious, keen enough or interested in the suit.

At the hearing of the application on 4th October, 2007, Mr. Busieka appeared for the defendant/applicant but the plaintiff/respondent neither attended nor was he represented. Having been served by way of a registered letter dated 7th August, 2007, the court was satisfied that he was served in sufficient time to attend court and, in his absence, the court elected to proceed ex parte.

Mr. Busieka for the applicant invited the court to consider the application as unopposed. He also argued, that the suit herein had been dismissed in November, 2004, and that the plaintiff had not complied with the conditions laid down upon its reinstatement. He accordingly urged the court to dismiss the suit.

As indicated above, the court was satisfied that the plaintiff was duly served with the application and the hearing notice by registered post through his last known address. He did not file a replying affidavit or grounds of opposition. On the hearing date he did not deem it fit to attend court. In the circumstances, the application is truly unopposed.

The court record further shows that the same suit had previously been dismissed on 4th November, 2004, for want of prosecution pursuant to an application made in that regard. The plaintiff had not filed a replying affidavit or grounds of opposition, consequent upon which the orders were granted pursuant to Order L rule 16. The plaintiff thereafter applied for reinstatement of the suit by an application dated 25th November, 2004. The application was allowed on 11th May, 2005, and the plaintiff was ordered to fix the

case for hearing within six months. The six months came and went, and the plaintiff took no steps to set the suit down for hearing. His apathy attracted the defendant's attention, and the defendant filed this application on 17th April, 2007. Even after service of the application, the plaintiff was not moved. He elected not to file any documents, nor to attend court. In these circumstances, I agree with Mr. Busieka that the plaintiff is not keen, eager or diligent enough to have this matter heard and determined.

For the foregoing reasons, the defendant's application should succeed. I accordingly allow the application and order that this suit be and is hereby dismissed for want of prosecution, with costs to the defendant. The plaintiff will also meet the costs of this application.

Dated and delivered at Mombasa this 18th day of December, 2007.

L. NJAGI

JUDGE