



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

**Misc Appli 1356 of 2003**

**HOLBERT D. NJOROGE.....**  
**.....APPLICANT**

**versus**

**JOSEPH W. KAMAU & 3 OTHERS.....**  
**RESPONDENT**

**RULING**

Before me is the Chamber Summons dated 9<sup>th</sup> March 2005 and filed in court on 16<sup>th</sup> May 2005. It is expressed to have been brought pursuant to Order 16 Rule 5 of Civil Procedure Rules and all other enabling provisions of law. The applicant seeks the following orders;

- 1) That the Notice of Motion filed herein on 28<sup>th</sup> November 2003 be dismissed for want of prosecution
- 2) That this court be pleased to lift the orders of 13<sup>th</sup> November 2003 and allow the applicant to proceed with execution of the decree in Civil Suit HCC 3313 of 1985 at Nairobi.
- 3) Costs of the suit be awarded to the applicant.

The grounds upon which the application is premised are two:

- a) That there has been inordinate delay on the part of the 1<sup>st</sup> respondent in bringing this suit to a conclusion and the delay is prejudicial to the applicant's enjoyment of the fruits of his judgment in HCC 3313/85.
- b) That the 1<sup>st</sup> respondent has shown total lack of interest in the matter and should not continue to enjoy the order staying execution.

The application was further supported by an affidavit sworn by Njenga Wanjehia Advocate, from the firm of Waruinge and Waruinge Advocates. He has conduct of this case. He depones that judgment in this matter was obtained in 1992 for Kshs.744,205/95 and attempts at execution have been thwarted by the 1<sup>st</sup> respondents' numerous applications in that case, HCC 3313/85. But the said applications have been dismissed. It is then the applicant filed this application and obtained a stay on 11<sup>th</sup> November 2003. The matter was fixed for hearing on 18<sup>th</sup> February 2003 and it was stood over generally to 25<sup>th</sup> March 2004

and has never come up for hearing since. It is over twelve months since and he prays that the same be struck out.

The application was opposed and Samson Ndegwa counsel for the respondent swore an affidavit dated 19<sup>th</sup> May 2005 opposing the application. He opposes it on two grounds; That they have been liaising with Commissioner of Insurance regarding the status of Kenya National Assurance which had insured the respondent/applicant herein. He annexed correspondence to that effect and that a fund was supposed to be set up to cater for those who were supposed to be compensated by Kenya National Assurance. Their case is that the Kenya National Assurance should be the one compensating for the claims that have arisen as a result of the insurance policy but not the individual insured.

The second ground of opposition is that the Notice of Motion that is pending before this court is filed pursuant to provisions of Order 53 Civil Procedure Rules and that Order 53 which is an exclusive set of Rules does not provide for dismissal of a suit as prayed.

I have considered the application before me, the affidavits filed and submissions by both counsel. I do agree with counsel for the respondent that the application by way of Notice of Motion that is sought to be dismissed is brought pursuant to order 53 Civil Procedure Rules. Order 53 Civil Procedure Rules is said to be a special jurisdiction whose powers are donated by Section 8 and 9 of the Law Reform Act. In the case of **REPUBLIC V HOTEL KUNSTE LTD 1995 EA 234** the Court of Appeal held that it is a special jurisdiction and when the court exercises its jurisdiction under that order, it is neither exercising civil nor criminal jurisdiction. (See S.9 Law Reform Act)

The Court of Appeal held that the provisions in other statutes do not apply when the court exercises such jurisdiction.

In another case of **R V COMMUNICATIONS COMMISSIONER OF KENYA AND OTHERS CA 175/00**, the Court of Appeal again held that when exercising jurisdiction under Order 53 Civil Procedure Rules, one cannot invoke provisions of the Civil Procedure Rules. In that case an application had been brought to strike out the proceedings under Order VI Civil Procedure Rules. The court held that the application should have been brought under the inherent jurisdiction of the court.

I find that this being an application for Judicial Review, the applicant cannot invoke provisions of Order 16 Civil Procedure Rules. He should have filed an application for setting aside of the leave and order of stay under the court's inherent jurisdiction under Order 53 Civil Procedure Rules. This court has not been properly moved for the grant of the orders sought and on that ground alone, the court orders the application dated 16<sup>th</sup> May 2005 struck off with costs.

Dated and delivered this 17<sup>th</sup> day of May, 2006.

R.P.V. WENDO

JUDGE