



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 824 of 2004

NYOIKE MATHU & 2 OTHERS.....APPELLANTS

VERSUS

ATTORNEY GENERAL & 2 OTHERS..... RESPONDENT

R U L I N G

The Notice of Motion herein, dated 15/9/05, under Order 16 Rule 5 of the Civil Procedure Rules; seeks dismissal of the suit for want of prosecution. The grounds are: the Plaintiffs/Respondent have failed to set the matter for hearing in excess of 3 (three) months after the pleadings closed in September, 2004; the Plaintiffs/Respondents are not at all interested in the prosecution of the suit; there exists a Judicial Review, brought by Plaintiffs/Respondents, which if successful would avail orders similar to the ones prayed for in this suit; the suit is time barred. The Replying Affidavit was filed on 9/12/05, but served on 16/12/05, while the hearing was on 19/12/05. This violates Order 50 Rule 16 of the Civil Procedure Rules.

The application is supported by an Affidavit by Joe Karanja Njoroge, of even date.

In opposition, the Plaintiffs/Respondent **aver, inter alia**, that the 1st and 2nd Respondents failed to enter appearance or file defence within the prescribed period; the applicant's counsel had filed an application praying the court for leave to enter judgment against the said Respondents, which he filed on 18/4/05; that the 1st and 2nd Respondents filed statements of defence on 6/6/05, while the application was scheduled for hearing on 8/6/05, thus making the hearing unnecessary; further that the present application was filed before the issues were agreed upon.

I have perused the pleadings and considered the submissions by the Learned Counsel for all the sides and I have reached the following findings and conclusions.

Counsel for the 3rd Defendant/Applicant, Mr. Muriuki, submitted that the suit cannot stand in light of a Judicial Review, in Court, seeking similar reliefs. This court has not had the benefit of perusing such an application – Judicial Review as none is enclosed to this application.

I agree with Counsel for the 3rd Defendant, however, that the pleadings in the suit herein closed in September, 2004, and under the obtaining law, the Plaintiff/Respondent are required, within 3 months from the close of pleadings, to set down the suit for hearing. That was not done.

The contention that the 1st, and 2nd Defendants had not entered their defence until 6/6/05, does not

stop the 3rd Defendant/Applicant from making this application. The Defendants were served separately, not jointly. Hence failure by one cannot be attributed to the others or the other. Hence, the submission that pleadings could not have closed for one Defendant, before the others filed their defences does not hold any water.

Further, the issue of not setting the suit down for hearing because the issues had not been agreed upon is a hollow defence. Issues can, and are often drawn in court, even where the parties have failed to agree on issues.

I find the contention by Counsel for the Plaintiff/Respondent that the application herein is premature under Order 16 rule 5 of the Civil Procedure Rules, to be without merit having held that the pleadings had closed by September, 2004 for all the Defendants.

The Plaintiff was served on all the Defendants on 2/8/04. Under Order 8 Rule 1 (2) of the Civil Procedure Rules, each of the Defendants is given 15 days within which to file his defence and serve on the Plaintiff within 7 days from the date of filing the defence. Any defendant who had not complied with the above law, by the end of September, 2004 was in default.

Let me reiterate that in separate, as opposed to joint Defendants, each party is separately treated and the law applies to him/her accordingly – separately. In the present case, even if the application to enter judgment in default of defence had been allowed, the same would have applied to the 1st and 2nd Defendants. Not the 3rd Defendant, who is the applicant herein, and who had filed his defence in time, and as required by law.

For all the above reasons, this court rules as under:

1. Grants the application herein and dismisses the suit for want of prosecution with costs for this application to the 3rd Defendant/Applicant and costs for the suit to the three Defendants.

DATED and delivered in Nairobi, this 12th Day of July, 2006.

O.K. MUTUNGI

JUDGE