



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 53 of 1999

DICKSON MIRITI KAMONDE.
PLAINTIFF/RESPONDENT

VERSUS

KENYA COMMERCIAL BANK LTD
...DEFENDANT/APPLICANT

RULING

1. The Application dated 7.2.2005 is brought under Order XVI Rule 5 of the Civil Procedure Rules and seeks dismissal of the suit for want of prosecution. It is the argument on behalf of the Applicant that since filing suit on 15.9.1999 the Respondent who is the Plaintiff in this suit has fixed it for hearing on two (2) occasions only and it has been the Defendant/Applicant who has fixed the suit for hearing on seven (7) occasions, the last being on 7.5.2003 when the Plaintiff sought an adjournment to instruct another lawyer to prosecute the case on his behalf.

2. It is further argued by counsel for the Defendant that the Plaintiff obtained an injunction on 30.7.1999 restraining the Defendant from selling the securities offered by the Plaintiff for a loan facility extended to him and thereafter went to sleep while enjoying that temporary injunction. I am asked to follow the decision in Nilan vs Patel and Others [1969] E.A. 340 and find that since the delay is inexcusable, then the suit ought to be dismissed.

3. For his part, the plaintiff who is now representing himself filed a Replying Affidavit sworn on 25.11.2005 and his answer to the Application is that he is still desirous of proceeding with his suit and that he was unable to fix hearing dates as the court file could not be traced and that he visited the registry sometime after 7.5.2003 and found that the Application under consideration had been filed and set down for hearing on 15.11.2005. He also urges the court to look at him with favour as the sum involved in the dispute is large (Ksh.1.7 million) and that he is prepared to pay costs occasioned by the delay in having the suit finalized.

4. I have perused the record in this matter and it is true that the Plaintiff obtained an injunction to stop sale of the securities on 23.7.1999 and thereafter it came up for hearing on a number of occasions but could not proceed for reasons that are unclear as the record is scanty in that regard. Nonetheless on 7.5.2003, the matter came up for hearing before Mulwa J. when the Plaintiff sought time to engage another counsel. He did not do so and took no action whatsoever until the present Application was filed. His excuse is that the court file was not available yet he exhibits no evidence that he sought any intervention from the court in that regard. He also says that the amount in issue is large and that he desires to be heard. I have seen the Plaint as amended on 12.9.2001. It seeks a declaration that the

Defendant cannot exercise its statutory power of sale and that accounts be taken. If the Plaintiff was really and seriously desirous of pursuing these two claims he has had more than 7 years to do so. For purposes of this Application he did nothing between 7.5.2003 and the date this Application was filed 7.2.2005 a period of 1 ½ years . No evidence that the court file was unavailable has been given. The delay cannot be excused and an indolent party must reckon with the consequences of inaction.

5. I am not persuaded that I should look with favour towards the Respondent and I am satisfied that this is one case that must be dismissed for want of prosecution

6. Accordingly the Application dated 7.2.2005 is hereby allowed as prayed.

7. Costs thereof to the Applicant/Defendant.

8. Orders accordingly.

DATED SIGNED, AND DELIVERED AT MERU THIS 11th DAY OF JULY 2006

I. LENAOLA,

JUDGE

In the presence of:

Plaintiff in person

Mr. Mithega (absent)Advocate for the Defendant

I. LENAOLA,

JUDGE