



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.980 OF 1996

RASIKBHAI MANIBHAI PATEL.....PLAINTIFF

VERSUS

VAIWIN LIMITED.....DEFENDANT

RULING

The defendant by way of Notice of Motion expressed to be brought under Order XVI Rules and Order VI Procedure Rules and all the enabling provisions of the Law seeks orders:

- (1) That the plaintiff's suit be dismissed with costs for want of prosecution.
- (2) That the Reply to the Defence and Counter claim and Reply to the Counter Claim to struck out and judgment be entered for the Defendant for:-
 - (a) Kshs.1,977,500/= in respect of rent from 1st January 1996 to 31st may 1996.
 - (b) Ksh.1,592,500/= in respect of rent from 1st June 1996 to 31st January 2004.
 - (c) Kshs.17,500/= for monthly rent payable to the Defendant by the Plaintiff from 1st February 2004 until the date of judgment. The application is based on the grounds that:-

- (1) The plaintiff filed this suit on 22nd April 1996 and abandoned it over three years.
- (2) The Plaintiff has failed to set down the suit for hearing although 3 years have elapsed after the said suit was last in court on or around 7th July 2000.
- (3) The Reply to Defence and Counter Claim and Reply to Counter Claim is otherwise an abuse of the process of the court.

The application is opposed on the following grounds:

- (1) That the application is an abuse of the court process.
- (2) That the application has no merit and is both vexatious and frivolous.
- (3) That there is no provision for the plaintiffs suit only being dismissed and the Counter Claim succeeding.
- (4) The prayers sought in the application are not supported by the prayers sought in the Counter Claim.

(5) The Defendant has taken no steps to prosecute the suit if what he alleges in the application and the accompanying affidavit has any merit.

(6) The Plaintiff has good and valid reasons for not prosecuting the suit.

Order XVI Rule 5 provides:-

“5” If within three months after the close of pleadings or the removal of pleadings or the removal of the suit from the hearing list or the adjournment of the suit generally, the plaintiff does not set down the suit for hearing the defendant may either set down the suit for hearing or apply for its dismissal”.

To dismiss a suit for want of prosecution the defendant must show that: (a) That the delay is inordinate

(b) That the inordinate delay is inexcusable or

(c) That the defendant is likely to be prejudiced by the delay.

Mr. Swani for the plaintiff submitted that an application by the defendant who has a counter claim that the plaintiff's suit be dismissed for want of prosecution is not tenable. A counter claim is a cross suit which puts the defendant on the same position as the plaintiff and has an obligation to set down the suit for hearing. In the event the plaintiff's suit is dismissed, the counter claim also goes with it. The alternative to the provisions of Order XVI Rule 5(d) is not available to the defendant who has a counter claim.

He has set down the suit for hearing so that he will also get the opportunity to prosecute his counter claim. The defendant also asks this court to strike out the reply to the defence and counter claim and reply to the counter claim dated 20th June 1996 and enter judgment for the defendant as prayed in the counter claim on the ground that the reply to defence and counter claim and reply to counter claim is an abuse of the process of the court.

I have had opportunity to peruse the reply to defence reply to counter claim and reply to reply to counter claim. For the court to enter judgment in the manner requested by the defendant, the counter claim must be in the nature of liquidated demand. Liquidated demand is in the nature of a debt i.e specific sums of money due and payable under or by virtue of a contract or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure requires investigation beyond mere calculation then the sum is not a debt or liquidated demand. In the reply to defence the plaintiff denies that he is a tenant of the defendant and liable to payment to the defendant.

If tenancy agreement is denied, this raises a triable issue and even if it is only one triable issue raised, judgment cannot be entered for the defendant as prayed.

The court can only exercise its powers to strike out a pleading in clear cases where the same does not raise even a single issue for trial.

The applicant's application is therefore dismissed. Costs be costs in the suit. Due to the age of the suit I make a further order that the parties do take a hearing date in the registry on priority basis.

Dated and delivered at Nairobi this 28th April 2005.

J.L.A. OSIEMO

JUDGE