



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL DIVISION MILIMANI**

Civil Suit 323 of 2004

ALUTA HOLDINGS LTD.PLAINTIFF

VERSUS

CHARLES GITAHİ GITHINJI1ST DEFENDANT

MOFFAT MOGONDU GITHINJI.....2ND DEFENDANT

GRACE WAIRIMU GITHINJI (*Sued as the Legal Representative of*

***the Estate of LAWRENCE GITHINJI MOGUNDU*)..... 3RD
DEFENDANT**

RULING

This Ruling Concerns the Defendant's Application dated 16th March 2005 brought by way of a Notice of Motion pursuant to the Provisions of Order XVI rule 5 of the Civil Procedure Rules and all enabling provisions of the law. In it, the defendant seeks orders that –

- (a) the Plaintiff's Chamber Summons dated 25.06.2004 and filed under a Certificate of Urgency against the Defendants be dismissed for want of prosecution,**
- (b) costs of this suit and this application be awarded to the Defendants.**

The application is supported by the annexed affidavit of Charles Gitahi Githinji and the GROUNDS that –

- (a) the Plaintiff/Respondent has failed to list the case for hearing or take any steps to finalising it,**
- (b) the Plaintiff has shown no interest in prosecuting this suit.**

To this application, the Plaintiff filed a Replying Affidavit sworn on 29th April 2005. Mr. Ongeru, Learned Counsel for the Defendant objected to this Affidavit being admitted in evidence because it was filed well outside the three days limit prescribed by Order L rule 16 (1) of the Civil Procedure Rules. Mr. Theuri learned Counsel for the Defendant was however quick enough to submit that the Court has a wide and unfettered discretion under Order L, rule 16 (3), to hear a party who has not filed an affidavit or grounds of opposition.

If the Court may allow the application to be heard ex parte it also means that the Court may allow the other party to be heard. In any event, it is a cardinal rule of natural justice that no man may be condemned

without being heard. I therefore admit the Affidavit of Nirish Chandal Shah sworn on 29th.04.2005 and will consider it in this Ruling. Having come to this view of the matter of the Replying Affidavit, I will now consider Mr. Ongeru's other submissions in this matter.

Mr. Ongeru submitted that the correspondence annexed to the Replying Affidavit of Viresh Chandul Shah is drawn by a firm of Advocates who are not on record in this matter. I agree, but this is a matter of inquiry between Mr. Ongeru and/or his firm with the said new firm of Advocates. I think the law is clear on this matter, a party may change his Advocates anytime without leave of the Court provided no judgement has been entered in the matter in which the Court's leave is required. To date however, Mr. Ongeru's firm are the Advocates on record, and have the right of audience until there is Notification of Change of Advocates.

Mr. Theuri, learned Counsel for the Defendants opposed the application on two grounds. Firstly, Counsel submitted that Order XVI rule 5 is inapplicable in an application to strike out an application in a suit. To the extent that the application is founded upon the said order and rule, it is misconceived and it should be dismissed. The second ground for opposition to the application was that the parties had been negotiating a settlement of the matter, and the agreement had been reached as to the amount payable, and the only outstanding issue is the mode of payment. That is what the letter of Gitonga Muchiri & Co. Advocates dated 17.03.2005 and the Reply thereto by Theuri Wanjohi & Co. Advocates letter of 29.03.2005 are trying to address. In the event therefore, the Replying Affidavit has caused no prejudice to the Plaintiff that it was filed out of time.

Turning to the merits of the Application, Mr. Wanjohi submitted that the application was misconceived and should be dismissed. I think it is so misconceived, and the reason is this – Firstly the Defendant has confused the application with the suit. The application herein is interlocutory, and is designed to preserve the status quo in the pendency of the suit . For the Defendant to strike it, it must found its application on some other rule of law except Order XVI rule 5 which reads -

"5. If, within three months after – (a) the close of pleadings,

(b) the removal of the suit from the hearing list, or

(c) the adjournment of he suit generally;

the Plaintiff or the Court of its own motion on notice to the parties does not set down the suit for hearing the Defendant may either set the suit down for hearing or apply for its dismissal,"

Although the Supporting Affidavit of Charles Gitahi Githinji refers to the suit being stood over by 3 months (paragraph 6), that the Plaintiff has taken no steps towards setting the case for hearing (paragraph 5) and that the matter came up for hearing on 14.10.2004 when the parties agreed to adjourn and negotiate an out of court settlement paragraph (14), the Defendant actually means and refers to the application of the Defendant dated and filed on 25.06.2004. The suit herein has never been set down for hearing and adjourned at any time since its filing on 21.06.2004. In so far as the application for striking out the Defendants Chamber Summons of 25.06.2004 is concerned, the same is truly misconceived and incompetent. Order XVI rule 5 only applies to suits and not interlocutory applications.

The Defendant's application dated 16th March 2004 and filed in Court on 16.03.2005 is therefore dismissed with costs. It is so ordered.

Dated and Delivered at Nairobi this 26th day of May 2005.

ANYARA EMUKULE

JUDGE

