



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT MILIMANI COMMERCIAL COURTS NAIROBI**

**CIVIL CASE 351 OF 2003**

**JOSEPH MUINDI..... PLAINTIFF**

**V E R S U S**

**THE CO-OPERATIVE BANK OF KENYA LTD.....1ST DEFENDANT**

**BASELINE AUCTIONEERS.....2ND DEFENDANT**

**CHEPTALAM KALE.....3RD DEFENDANT**

**R U L I N G**

The application before the court is dated 28th January, 2005 and brought by way of a notice of motion under O.XVI rule 5 (d) of the Civil procedure Rules. It seeks from the court orders that this suit be dismissed for want of prosecution and that the costs of this application and of the suit be borne by the plaintiff. It is based on the ground that the plaintiff has failed to take any steps to set the suit down for hearing or take any other steps in the suit for over one year since the ruling delivered on 28th October, 2003.

The application is opposed. In his replying affidavit, the respondent avers that he is one of the defendants in HCCC No.479 of 2003 which touches upon matters that are relevant to this suit. He also alleges that this application is brought mala fides in order to pre-empt the taking of further steps against the defendants. He also avers that the application is a bare faced attempt to have his suit dismissed so that he may not access justice from the illegal and unlawful acts of the defendants.

During the oral canvassing of the application, Ms. Nyambura appeared for the applicants while Mr. Gatuguta appeared for the respondent. Ms. Nyambura argued that it is more than one year since this matter was last in court on 28th October, 2003 and there is no reasonable explanation given as to why the plaintiff has not set the suit down for hearing. She referred to **KABANSORA FLOUR MILLS v. JAMBO BISCUITS LTD. HCCC NO. 5418 of 1992** and submitted that failure by the respondent to give a reasonable explanation should give way to dismissal of the suit. Secondly, HCCC No.479 of 2003 is not a test suit and there is no stay preventing the plaintiff from prosecuting this case. Finally, she submitted that the application was not an abuse of process of the court; that the 1st and 2nd defendants feel oppressed by the suit hovering over their heads. She therefore applied for orders as prayed with costs to the applicants.

Opposing the application, Mr. Gatuguta for the respondent argued that this suit touches upon an auction sale at which the respondent alleges that he was the highest bidder but because of collusion between the 2nd and 3rd defendants, the property was purchased by a third party. The original owner of the property then sued the defendants in this suit including the plaintiff in HCCC No.479 of 2003, and the

matters therein are relevant as they will pave the way for this suit. Counsel then sought to distinguish HCCC No.5418 of 1992 on the ground that it was dismissed after a much longer period than that which has elapsed in this case. He thereupon prevailed upon the court to exercise its discretion and grant the plaintiff an opportunity to proceed with the matter as the two suits involve the same parties and the same subject matter.

In reply, Ms. Nyambura reiterated her earlier submission and added that discretion should be exercised judicially, and the respondent has not demonstrated a good reason for the exercise of that discretion. She further submitted that HCCC No.479 and this suit are different as they have not been consolidated, and that the continued existence of this suit is oppressive to the defendants. However, should the court indulge the plaintiff, then he should be given a period within which to fix the suit for hearing.

I have considered the application and the respective submissions of counsel for both sides. There is no dispute that this suit was last in court on 28th October, 2003 when the court delivered a ruling dismissing the plaintiff's application for an interlocutory injunction against the defendants. Since then, neither the plaintiff nor the court of its own motion on notice to the parties, has set down the suit for hearing. This is an affront to O.XV1 rule 5 (d) of the Civil Procedure Rules. In such circumstances, the defendant may either set the suit down for hearing or apply for its dismissal. The defendants in the instant case have opted to apply for the dismissal of the suit, and they are entitled to do so.

The suit may be saved from dismissal if a reasonable explanation can be offered as to why no action has been taken to set the suit down for hearing.

The only reason advanced by the respondent is that this suit raises issues which are very similar to those in HCCC No.479, and that the latter suit would pave the way for the present one. Counsel for the respondent, indeed, submitted that the two suits involve the same parties and the same subject matter. Such circumstances demand that such suits be consolidated or one of them be stayed. None of those steps has been taken in this matter. Nor has this suit been set down for hearing pursuant to O.XVI rule 5 (d). However, so that the plaintiff may appreciate that the applicants are not bent on non suiting him just for the sake of it as he seems to perceive, and that there are procedures governing all court proceedings, I am inclined to give him an opportunity to keep this action alive.

I accordingly order that the plaintiff/respondent be and is hereby given 60 days with effect from today within which to take appropriate action to sustain this action. Failure to do so will render the suit liable to dismissal for want of prosecution without further ado. The respondent will also pay the costs of this application to the 1st and 2nd defendants.

It is so ordered.

Dated and delivered at Nairobi this 14th day of July 2005

**L. NJAGI**

**JUDGE**