

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 6 OF 2001

ESTHER CHEMELI KETER.....PLAINTIFF

VERSUS

CHARLES KIRUI.....1ST DEFENDANT

STEPHEN GESISA BUGE.....2ND DEFENDANT

KENYA COMMERCIAL BANK LTD.....3RD DEFENDANT

JIMMY JOSHI.....4TH DEFENDANT

RULING

This is an application made by the 3rd defendant, Msrs Kenya Commercial Bank Ltd, under **Order XVI Rule 5(a) of the Civil Procedure Rules** seeking to have the plaintiff's suit dismissed as against the 3rd defendant for want of prosecution. The ground in support of the application is that the plaintiff had failed or neglected to take any step to prosecute the case since it was stood over generally on the 18th of May 2004. The application is supported by the annexed affidavit of Paul Ogunda, an advocate in the firm of Hamilton Harrison & Mathews Advocates who act for the 3rd defendant. The application is opposed. The plaintiff has filed grounds in opposition to the application. She has stated that the application filed by the 3rd defendant was incompetent, bad in law and incurably defective. She has further averred that the application was vague, ambiguous and meant to delay the fair trial of the case. She further stated that the application was frivolous, vexatious and scandalous.

At the hearing of the application, Mr Wamaasa Learned Counsel for the 3rd defendant reiterated the contents of the application and the supporting affidavit and urged the court to allow the application as prayed. Mr Gitonga, Learned Counsel for the plaintiff submitted that the period between the time the application was stood over generally and the time the application for dismissal was filed (a period of about seven months) did not constitute sufficient ground to warrant the dismissal of the suit. He submitted that the plaintiff had done everything within her powers to have the suit heard and determined. Learned Counsel urged the court to consider the conduct of the parties before arriving at a decision whether or not to allow the application. In the plaintiff's view, the application filed by the 3rd defendant was in bad faith. Mr Gitonga urged the court to dismiss the 3rd defendant's application with costs.

I have considered the application filed by the 3rd defendant and the reply made thereto by the plaintiff. The issue for determination by this court is whether the plaintiff's suit ought to be dismissed for want of prosecution putting into consideration the period which the plaintiff had failed to prosecute the case. Order XVI Rule 5 of the Civil Procedure Rules provides that:

“If, within three months after –

(a) the close of pleadings, or

(c) the removal of the suit from the hearing list; or

(d) the adjournment of the suit generally, the plaintiff, or the court on 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.”

I have perused the record of the court. Since the plaintiff filed this suit against the defendants, she has only fixed this case twice for hearing, i.e. on the 12th of March 2003 and the 10th of May 2004. On both occasions the hearing of the case did not take place. In the first instance, the hearing failed to take off because issues had not been agreed on and further the plaintiff had failed to serve all the defendants. At the second appearance, counsel for the plaintiff and the 3rd defendant agreed by consent to stand over the hearing of the suit generally.

While it is conceded that the plaintiff has been indolent in not attempting to fix this case for hearing, having read the pleadings filed in court by all the parties to the suit, it is clear that the matter in dispute between the plaintiff and the 3rd defendant cannot be separated with the matters in issue between the plaintiff and the other three defendants. The matters in issue are intertwined and therefore inseparable. If this court were to strike out the plaintiff's suit as against the 3rd defendant alone, it would fatally compromise the plaintiff's suit as against the other defendants. If all the defendants have made similar applications to dismiss the plaintiffs' suit for want of prosecution, this court would have been in no difficulty in allowing the application. In the circumstances of this case, and in the interest of justice, I will decline to grant the 3rd defendant's application. I will however urge the plaintiff to fix the hearing of this suit within three months from today's date failure of which the 3rd defendant will be at liberty to file a similar application. I assure the 3rd defendant that its application at that time will definitely be considered favourably.

The application by the 3rd defendant is therefore disallowed. In view of the circumstances of this case and the fact that it is the plaintiff's indolence that has delayed the disposal of this case, I will order the plaintiff to pay the costs of the application.

DATED at NAKURU this 3rd day of October 2005.

L. KIMARU

JUDGE