



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.731 OF 2003

ALEX KIARIE THIRUPLAINTIFF

V E R S U S

CANNON ASSURANCE (K) LIMITEDDEFENDANT

R U L I N G

The defendant by chamber summons dated 13th May has moved this court under Order XVI Rule 5 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act. The defendant seeks:-

- (i) The suit be dismissed for want of prosecution;**
- (ii) that the defendant be allowed to prosecute its counter claim against the plaintiff;**
- (iii) that the defendant be awarded the costs of the suit against the plaintiff.**

The application is made on the basis that more than three months since the close of pleadings have passed and the plaintiff has not set down the suit for hearing.

The plaintiff filed this suit on the 14th November 2003 and the defendant filed a defence and counter claim on 15th December 2003.

The plaintiff responded to the said defence and counter claim on 23rd December 2003 and the defendant in turn replied to the said defence to counter claim on 15th January 2004.

Although the defendant in its computation of time states that the pleadings closed on 30th January 2004, the court is of the view that pleadings closed 7 days after service upon the plaintiff, see Order VIII Rule 17 of the Civil Procedure Rules.

It therefore does seem that the three months period, prerequisite to the application under Order XVI Rule 5, begin from 23rd January 2004.

The defendant's counsel stated that the defendant although it had an option to either set down the suit for hearing or to apply for its dismissal it chose the latter.

The plaintiff in opposition to the application states that the suit is not ready for trial since discovery has not taken place and it was argued on the plaintiff's behalf that the defendant ought to have finished with the discovery before making this application.

The Order under which the defendant has moved this court clearly states that if within 3 months of close of pleadings the suit is not fixed for hearing the same can be dismissed.

That order does not lay any obligation for the defendant to ensure discovery is under taken.

That as it may be the court is persuaded by the case HCC.No.670 of 2001 EMPRESS DAWDGER COMPANY LTD -VKENYA CULTURAL CENTRE where the court held that the defendant before applying for dismissal of suit for want of prosecution ought to ensure that at least the issues have been agreed and in the absence of agreement separate sets of issues are filed.

The court is of the view here that the defendant ought to have prepared the issues hereof before embarking on filing the present application.

The court, having said so, is not entirely satisfied with the reasons given by the plaintiff for failing to set down this suit for hearing. The plaintiff in the replying affidavit stated that after the close of pleadings he began negotiations with the defendant with a view to settle this matter out of court.

The plaintiff in support of that preposition annexed two letters written by him which alluded to telephone conversations with the managing director of the defendant.

The defendant's counsel stated that he was unaware of such discussions taking place.

The court although will not grant the orders prayed at this instance will require the plaintiff to set down the suit for hearing within the period of two months.

Accordingly the court hereby orders as follows:-

- (a) That the plaintiff will within two months from this date hereof draft the issue in this suit and set the suit down for hearing.**
- (b) In default of (a) above the plaint will stand dismissed hereof.**
- (c) That the costs of the plaintiff's application dated 13th May 2004 will be in the cause.**

Dated and delivered this 14th day of July 2004

MARY KASANGO

AG. JUDGE