



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL DIVISION, MILIMANI
CIVIL SUIT NO 1421 OF 2000

BILSON STEPHEN MUTUKUPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....1ST DEFENDANT

DILIGENT AUCTIONEERS LTD2ND DEFENDANT

SAMMY GICHUKI WAIGWA3RD DEFENDANT

R U L I N G

The 3rd defendant's chamber summons dated 14th May 2004 is brought under Order 16 Rule 5 (a) of the Civil Procedure Rules.

The defendant seeks an order for the dismissal of the suit for want of prosecution.

The 3rd defendant successfully bid for the suit property on 28th July 2000 but states in his defence that the bid was on behalf of his client. The 3rd defendant was brought in these proceedings by an amendment of the plaint amended on 19th March 2001. The 3rd defendant filed his defence on 7th May 2001.

The court record shows that the last time this matter was in court was on 25th September 2002 and indeed, there it lay to sleep until the present application was filed.

The 3rd defendant seeks dismissal of the suit on the basis that it is more than three months since the pleadings closed.

The plaintiff's counsel opposed the dismissal on the basis that this matter was being handled by his former partner who has since left for employment and that the present counsel did not know that any matter was pending in court in this file. Those explanations are not sufficient to warrant the court not to grant the prayers sought by the 3rd defendant.

Plaintiff's counsel in submission stated that the 3rd defendants application was incompetent for failing to have a supporting affidavit. Order 50 Rule 7 requires an applicant by summons to state in general terms the grounds of the application and where the summons is based on evidence by affidavit a copy of that affidavit is to be served. The 3rd defendant stated the ground upon which he sought the dismissal and since that is ascertainable from the court file that did not require an affidavit. I therefore reject that line of argument.

The Plaintiff's counsel further stated that the 3rd defendant application is incompetent because it seeks the dismissal of the plaintiffs suit yet it ought to be the dismissal of the suit as against the 3rd defendant.

The plaintiff in making that objection failed to state what prejudice he suffered as a result of failure of 3rd defendant to so particularize. Order 6 A Rule 5 (1) provides power to amend an error in any proceedings for the purpose of determining the real question in controversy. The applicant is clearly the 3rd defendant and he has never in this matter held himself to act for any other defendant, accordingly by the power donated to me by the aforesaid order I do hereby amend the chamber summons dated 14th May 2004 to read in prayer as follows:

“That suit herein, as against the third defendant, be dismissed with costs for want of prosecution.”

The third defendant has sufficiently proved that the action as against him ought to be dismissed for want of prosecution.

Accordingly the order of this court is that the suit herein as against the 3rd defendant is hereby dismissed for want of prosecution and the costs of the suit and the costs of the application dated 14th May 2004 are awarded to the 3rd defendant as against the plaintiff.

Dated and delivered this 10th day of December 2004.

MARY KASANGO

AG JUDGE