



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 423 OF 1996

NIAZ MOHAMED JAN MOHAMED PLAINTIFF

-VERSUS

1. THE COMMISSIONER OF LANDS

2. MUNICIPAL COUNCIL OF MOMBAS

3. NANDLAL JIVRAJ SHAH

4. VIMAL NANDLAL SHAH

5. MEHUL N. SHAH) T/A JIVACO AGENCIES DEFENDANT

R U L I N G

The plaintiff filed suit as against the defendants on 8.8.96 in which he had sought orders which would effectively declare the creation and grant of allocation of the land comprised in Title No.9665 Sec.1 M.N. a nullity for reasons that it is meant to be a road reserve. Contemporaneously with the suit he also filed an application by Chamber summons seeking an order for an injunction as against the 3rd, 4th and 5th Defendants. The application was allowed on 9.10.96.

Upon being served with the summons, the 1st defendant failed to either enter appearance or file a defence while 2nd Defendant filed a defence on 9.9.96 and the 3rd, 4th and 5th defendants on 18.9.96. Upon the grant of the injunction it would appear no other action was taken and the only other entry to appear on the file is dated 6.3.02 when the Firm of J.M. Mburu Advocates filed a Notice of change of Advocates in respect of the 2nd Defendant and on the 25.6.02 the application filed by Notice of motion dated 4.6.02 under the Provisions of order 26 rule 5 of the Civil Procedure Rules seeking an order for the dismissal of the suit for want of prosecution. However the application was adjourned on two occasions on account of Mr. Mburu's ill-health.

The application is supported by an affidavit sworn by John Mbau Mburu dated 4th June, 2002. The reasons for seeking the said orders are given as the failure by the plaintiff to take any steps towards the prosecution of the case.. There is no doubt from the reading of the Court record that no action was taken from the date of the injunction was granted no further action has been taken in the matter. Mr. Asige argued that the applicant has not shown that pleadings have been closed but neither has he shown that they are not if at all. He further argued that the application was defective in that the heading did not specify under which of 3 heads under order 16 rule 5 were the orders sought. That I agree, but from the arguments advanced there is no doubt that the applicant was clear on what orders were being sought. In

my view, the failure to specify the sub-section or head under which an order is sought as in this case and where it is clear from the arguments that the applicant is clear on the orders being sought, and in my mind this cannot be either but the protection afforded under Rule 5a and the said failure is not one that can be termed as so grave as to render the application fatally defective.

I now will consider whether the suit herein can be dismissed for want of prosecution. The Provisions of Order 16 rule 5(a) provide as follows:

“5. if within three months after: : (a) the close of the pleadings ----- The plaintiff or the Court on its own motion or notice to the parties does not set down the suit for hearing, the defendant may either set down the suit for hearing or apply for its dismissal”

The Defendant under this sub-rule is under an obligation to prove that the plaintiff has indeed failed to set down the suit for hearing and most important that three months have elapsed after the close of the pleadings Rule 11 of order 6 of the Civil Procedure does state at what stage Pleadings are to be considered as closed. It Reads as follows:

“11. The Pleading in a suit shall be closed fourteen days after service of the Reply or defence to counter -claim or if neither is served, fourteen days after service of the defence not withstanding that any order or request for particulars has been made but not complied with”

(“Underlining Mine”)

I have read the Court file and although there is a defence filed by the 2nd Defendant there is no evidence of service of the same nor a Reply to the defence has been filed. The 2nd Defendant has not provided any evidence in it’s application to prove that indeed Pleadings had been closed. I would have stopped here but I find it necessary to address another issue raised by the plaintiff’s Counsel, and that is though – there are 3 other parties involved and who according to the orders in force are the once directly affected by the Injunction yet they were not served with the current application. The 2nd Defendant’s argument was that it did not matter whether they are served as it is the 2nd defendant who sought the order. However, my reading of order 16 rule 5 does not show that such an applicant under the said provision has a discretion as to whom among the parties to a suit to serve. Whether the outcome of the application would be to the benefit of all parties or not, they have a right to know and have a chance to participate in the proceedings. In all, and for the reasons given, I find under the circumstances given, I would be reluctant to issue the orders sought. The application is therefore dismissed with costs.

Dated and delivered at Mombasa this 14th day of February, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE