



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

**AT MOMBASA**

**CIVIL SUIT NO. 567 OF 1996**

**KAPA OIL REFINERIES LIMITED ..... PLAINTIFF / RESPONDENT**

**VERSUS**

**A.K. ABDULGANI .....DEFENDANT / APPLICANT**

**RULING**

This application is brought up by the defendant / applicant under Order X rule 20 of the Civil Procedure rules. It was filed on 27th March, 2001 and seeks for an order of dismissing this suit on the grounds that the Plaintiff has failed to comply with a consent order in this file dated 1st November, 2000.

During those days when our Civil Procedure Rules provided for summons for directions, the Defendant by an application dated 31st March, 1999 filed a Notice Under summons For Directions under the then Order 51 rule 7 that they intended to apply at the hearing of Summons for Directions for the Orders that:-

- (a) The plaintiff do give security in the sum of Kshs. 25,000/- for Defendants costs on the ground that the plaintiff had agreed that the (relevant) goods were to be transported at the owners' risk and have filed the suit notwithstanding such agreement.***
- (b) The Plaintiffs do within 15 days file and serve on the Defendant an affidavit of documents relating to issues raised in the pleadings.***
- (c) The Managing Director of the plaintiff do swear on oath the interrogatories specified in the document served herewith.***

When the Summons For Directions, came before the court on 1st November, 2000, the plaintiff raised no objection or proposed no variation to the sought for directions. Instead it agreed to file a consent order to comply with the directions sought above by Defendant and this court converted the said consent orders into court orders, only that the plaintiff would file the said affidavit within 60 days and in addition was ordered to pay Kshs. 2,000 being Defendants cost. The plaintiff failed to file the required document and failed to pay the costs ordered. By a letter written on 21st February 2001 by the Defendant's advocated, the plaintiff was warned that unless it obeyed the said orders within 10 days, the Defendant would apply to this court to strike out the plaint. Once again the plaintiffs failed or ignored to respond. As a result , the defendant filed this application to have the suit dismissed on the grounds aforementioned.

The plaintiff did not deny the Defendant's submission that this application, after being served upon it on 30th March 2001, was fixed for a hearing twice when for one reason or another it could not be heard. This means that the plaintiff was aware all along that Defendant was struggling to have its case dismissed under Order 10 rule 20 but did nothing to avert that eventuality. Indeed after being served with this application, the Defendant failed and / or ignored to file any replying affidavit or any statement of grounds of opposition. This remained the position until this application came before this court for hearing. That is when the plaintiff sprung into action. It through its counsel, applied for adjournment. For what purpose? To enable it to file a replying affidavit after a delay or failure to do so of almost eleven months. It is on the record that the application for adjournment was rejected by this court upon the grounds therein shown.

Before such rejection the Defendant made his intention to have the plaintiff barred from defending the application under Order 50 rule 16, and thus proceed ex parte. On being given a chance to respond to the plaintiff's reply in respect to adjournment this court expected to hear the Defendant's counsel request for leave to defend the application despite their failure to file a replying affidavit or a statement of grounds of objection. But this was not to be. Instead, the plaintiff's counsel stated that he had nothing to say to the reply made by the Defendant which included a request to proceed ex parte under Order 50 rule 16.

The result was that after the plaintiff's application for adjournment, was rejected, the Defendant was allowed to proceed ex parte.

*Order 10 rule 20 states as follows:- "Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if plaintiff, be liable to have his suit dismissed for want of prosecution ..... and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect, and an order may be made accordingly".*

In this case an order of court was made ordering the plaintiff to file its affidavit of documents intended to be discovered within 60 days. This is not a short time by any standards. The order, even more importantly resulted from a consent filed and/or signed by the plaintiff or his counsel and witnessed by the court clerk. The plaintiff did not comply with it within the specified time. The Defendant went out of his way to remind the plaintiff to comply. Once again the plaintiff ignored to act or even respond by writing back to the Defendant's counsel and explaining the cause of noncompliance and if necessary seeking for some accommodation, if any was needed.

No one but the plaintiff is to be blamed if a presumption is made that the plaintiff did not care whether or not the case would be dismissed. Indeed, the fact that it failed to or ignored to file a replying affidavit or a statement of grounds of opposition, confirms that presumption.

As things stand, this application before me went unopposed upon the grounds aforementioned. It was based on an affidavit of the applicant which proved strong grounds for allowing the application. This court is persuaded that the plaintiff is not much interested in the success of the suit. Plaintiff's conduct confirms this conclusion.

Orders made by the courts of law based on the law wherever it is coded or found are intended to be obeyed and if not obeyed are intended to yield into certain results. They are not one sided and always take into account both sides of the matter before the court. The consequences of non-compliance are not secret but are foreseeable to both parties of the case who are free to determine what course to take in the interest of one's case. In this case the plaintiff after failing to comply with the orders within 60 days and after further ignoring the reminder for compliance from the Defendant, must have foreseen the final result to be the dismissal of this case under the relevant order and rules. In my view, it foresaw and determined the consequences of its conduct.

The applicant herein proved that the court ordered the plaintiff to deliver the required documents within sixty days. He also proved that the plaintiff failed to comply. There are the two conditions which need to be proved to this court for a party seeking dismissal or a striking out of any relevant pleadings, to

succeed.

In the case of Bank of Credit & Commerce International (Overseas) Ltd versus Kurshi Limited and Three others being Mombasa High Court Civil Case No. 19 of 1988 Waki – J found before him a situation similar this before me. Although in that case it was the defendant who made an application to have the defence struck out for non-compliance with orders of discovery, he nevertheless found that the defendant on being served with the application to strike out the defence failed to file any replying affidavit or statement of grounds of opposition. The defendant's counsel who attended the hearing, did not press to be heard, even after failing to file the pleadings aforementioned and showed no enthusiasm, even when the applicant sought court's leave to proceed ex parte under Order 50 rule 16. He only sought for more time to file the pleadings aforesaid. Waki-J concluded that the defendant's were indolent and that the grounds put forward in support of the application for more time or failure to comply, were inadequate. He therefore proceeded to strike out the defendants defence, but refused to enter judgment for plaintiff straightaway until the plaintiff had to prove certain issues by sworn evidence, for which he ordered for a formal proof.

In this matter before me I am of the view and I so hold that upon the grounds in support of this application and upon the persuasive grounds put up in the arguments of the Defendant and also upon other grounds of fact and law canvassed hereinabove, this application must succeed. It is accordingly allowed. The plaintiff's suit herein is dismissed with costs of this application and of the dismissed suit to the Defendant. It is so ordered.

**Dated and delivered on 27th day of February, 2002.**

**D. A. ONYANCHA**

**JUDGE**

**Delivered in the presence of:-**

**Kimani for Nyamoye - for Plaintiff / Respondent.**

**Suchak for Kasmani - for Defendant / Applicant.**