



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 321 OF 1999**

CHARLES KAKAI ..... PLAINTIFF

VERSUS

ALI NASSOR SALIM ..... DEFENDANT

**RULING**

By Chamber Summons taken out under Order 16 rule 5 of the Civil Procedure Rule the Defendant in the main suit seeks an order:

***“That in suit and the Application dated 6 th July 1999 be dismissed for want of  
pursecution”.***

The Application referred to was a chamber Summons taken out by the plaintiff in the main suit seeking a mandatory injunction under Order 39 Rule 1 (a) 2 (1) 2, 3 of the Civil Procedure Rule. It was dated 6th July 1999 and filed on 15th July 1999. Although a Certificate of urgency was issued on 16th July 1999 to have the application heard interpartes, it is still pending hearing. It came up in Court on two occasions on 22nd July 1999 and 23rd September 1999 but was adjourned for reasons on record. When it came up again one year later on 21st September 2000, counsel for the plaintiff Mr. Lumatete applied to have it adjourned with a view to enabling his Firm to apply to withdraw from acting for the plaintiff. An order was issued that the application for withdrawal be filed within 14 days of that date. Nothing was done. Eight months later on 16th May 2001 the matter came up again and this time round the plaintiffs Advocates through Mr. Ochwa, Advocate sought a similar order which was rejected.

As far the main suit itself, it involves a Landlord/Tenant relationship, the plaintiff Tenant alleging that he was illegally paid forcibly enucted from his rented property at Kisauni. Other that’s filing the Summons to enter appearance with the plaint on 15th July 1999, no action has been taken by the plaintiff to obtain them for service.

In all those circumstances there is every justification for the complaint made by the defendnat through learned counsel Mr. Khatib that the plaintiff is no longer interested in the suit or the application. Mr. Khatib further submitted that the validity of the Summons to enter appearance has expired and there has been no application to extend it. The suit would therefore be incompetent.

I would certainly agree with Mr. Khatib as respects the Application dated 6th July 1999 that the plaintiff has lost interest and the provisions of Order 16 rule 5 Civil Procedure Rule therefore come into play. The Rule provides:-

***“If within three months after -***

***(a) the close of pleadings; or***

***(b) the removal of the suit from the hearing list; or***

***(c) the adjournment of the suit generally, the plaintiff, or the court of its own motion on totice 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”.***

There was no challenge to the Application either by way of applying Affidavit or submissions from

counsel. Mr. Ochwa who was present shortly before the Application was argued deserted the Court. I would grant the application and discuss the Chamber Summons dated 6th July 1999.

As respects the main suit however, I think the application is made prematurely. None of the events stated under Rule 5 have occurred in respect of the main suit. The Summons to enter appearance was issued on 15th July 1999. Its validity would expire within 12 months unless there is an application made for its extension. Those are the provisions of Order 5 Rule 1 (1) and 1 (2). The suit may only be dismissed without Notice however upon expiry of 24 months from the issue of the original Summons. That is what subrule 7 g Rule 1 says. That period has not expired. I am not a liberty therefore to strike out the main suit although it is a ford candidate for extreme censure. The matter may be brought up on maturity.

As the Defendant/Applicant has only been partially successful. I grant only half the costs of the application.

Orders accordingly.

**Dated this 23rd day of May, 2001.**

**P. N. WAKI**

**JUDGE**