



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL SUIT NO. 100 OF 2009**

**KENYA SEED CO. LTD ..... PLAINTIFF**

**VERSUS**

**WILLIAM BUSIENEI T/A SOIYET AGROVET ..... DEFENDANT**

**RULING**

**Kenya Seed Co. Ltd**, the plaintiff herein, sued the defendant **William Busienei t/a Soiyet Agrovat**, vide a plaint filed herein on 19th August, 2009, in which the plaintiff was claiming a sum of Kshs.7,738,486/= for goods sold and delivered to the defendant at his own request.

The defendant denied the claim and filed a statement of defence on 21st August, 2009. However, on the 20th November, 2009, the plaintiff filed a Notice of Motion for summary judgment against the defendant in the sum of Kshs.7,738,486/= on admission. The application was dated 28th October, 2009 and was granted by the court in a ruling dated 13th December, 2011 delivered on the 27th January, 2012. Thereafter execution commenced but before it was completed, **Busienei Enterprises Ltd** (the objector herein), filed a Notice of Motion dated 18th May, 2012, for orders that the attachment levied by the plaintiff on its property set out in the proclamation dated 16th May, 2012, be set aside and/or lifted and that the plaintiff be condemned to pay the auctioneer's costs.

The application was brought under Order 22 Rule 51, of the Civil Procedure Rules which provides for objection to attachment. Rule 54 of Order 22 CPR provides that such an application shall be heard expeditiously.

It was therefore the objectors obligation to fix the application for hearing no sooner had the plaintiff intimated its intention to proceed with attachment pursuant to Rule 52 of order 22. Sum intimation was given by the plaintiff vide a Notice filed herein on the 30th May, 2012.

The objector fixed the application for hearing on the 26th September, 2012 but on that date the matter was adjourned and stood over generally at the instance of the plaintiff. Since then, no further efforts were made by the objector to have it fixed for hearing.

Consequently, after a period of one year, the plaintiff filed the present application dated 17th November, 2013 seeking orders that the objector's application dated 18th May, 2012 be dismissed for want of prosecution and that the attached property be sold and the proceeds be paid to the plaintiff/applicant who also seeks for costs of the application and the objection proceedings against the objector.

The application is made under section 1A, section 1B, section 3 and section 3A of the Civil

Procedure Act as well as order 22 Rules 54 and 55 of the Civil Procedure Rules. Ideally, such an application ought to be made under Order 17 of the CPR since the word “suit” under the Civil Procedure Act means all civil proceedings commenced in any manner prescribed.

Be that as it may and without giving undue regard to procedural technicalities, the application is based on the grounds contained in the appropriate Notice of Motion fortified by the averments in the supporting affidavit dated 17th November, 2013 deponed by the plaintiff's legal officer.

Learned Counsel **Mr. Nyakundi**, argued the application on behalf of the plaintiff while learned counsel, **Mr M. Wafula**, opposed the same on behalf of the defendant/respondent. The objector failed to appear at the hearing of the application but did file a replying affidavit to the application dated 6th February, 2014 deponed by its director Joseph Rono who avers that on several occasions his lawyers fixed the application for hearing but the same could not proceed as there was no judge in Kitale after the transfers of Justice Ombija and Ochieng to other stations and that for a long time the lawyers in Kitale boycotted the High court causing several matters including the material application to stall. The objector contends that it is ready and willing to prosecute the application because the attached property are owned by itself and not the judgment debtor.

Having considered the present application in the light of the supporting grounds and those in opposition thereto and also having heard the submissions by learned counsels for the plaintiff/applicant and the

defendant/respondent, it is the opinion of this court that indeed the objector

has gone against the overriding objectives of the Civil Procedure Act and Rules to facilitate the just, expeditious, proportional and affordable resolution of the present dispute.

The objector's application dated 18th May, 2012 and filed herein on 21st May, 2012 was only fixed once for hearing and that was on the 26th September, 2012 and after it was adjourned on that date, no further efforts and/or steps were taken by the objector to have it re-fixed for hearing without delayed and as required by Rule 54 of Order 22 CPA. Seems that the objector went into deep sleep with the knowledge that he had already obtained favourable orders defeating the plaintiff's intention to execute the decree granted in his favour against the defendant.

The presence of the defendant's advocate at the hearing of this application and his opposition of the same or the Basis of the replying affidavit by the objector strongly implies that the two are acting in concert to prevent the plaintiff from realizing the fruits of his judgment against the defendant . The reasons given by the objector for failing to fix its application for hearing for over one year from the date of the last adjournment are not substantial and are quite misleading and incompatible with the court record.

The present application by the plaintiff is therefore merited and is hereby allowed in terms of all the prayers contained in the appropriate Notice of Motion.

Order accordingly.

**J. R. KARANJA,**

**JUDGE**

**12/02/2014**

(Read and signed this 12th day of February, 2014).