



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**(MILIMANI LAW COURTS)**

**CIVIL CASE 126 OF 2006 (O.S)**

**CHIHI HOLDINGS (K) LIMITED .....APPLICANT**

**V E R S U S**

**S. THUO MUHIA**

**(T/a S. Thuo Muhia & Co., Advocate) .....RESPONDENT**

**R U L I N G**

On 10<sup>th</sup> February, 2006 **Chihi Holdings (K) Limited** (hereinafter called the **Client**) brought the originating summons herein under **Order 52, rules 4 and 10** of the **Civil Procedure Rules** (the **Rules**) seeking the main order that **S. Thuo Muhia (t/a S. Thuo Muhia & Company Advocates)** (hereinafter called the **Advocate**) do deliver to the Client

“a full cash account for the amount received as deposit for sale of L.R. No. 209/12363/2 together with the interest (accrued) at the rate of 12% per annum from 5<sup>th</sup> June, 2003 to the date of delivery of ....such account”.

It appears from the record of the court that a replying affidavit was filed in response to the originating summons, but I have not seen any such replying affidavit on the court record. Be that as it may, it is to be noted that under **rule 10(2)** of the same Order, no appearance need be entered to the summons and no affidavit in reply need be filed, and all parties may be heard without entering an appearance. Clearly, proceedings under Order 52 are intended to be as simple and quick as possible.

On 18<sup>th</sup> July, 2008 the Advocate filed a notice of **motion dated 21<sup>st</sup> May 2008** seeking an order for dismissal of the originating summons for want of prosecution. The application was brought under **Order 16, rule 5(d)** of the Rules. Under that rule, if within three months after adjournment of the suit generally the plaintiff, or the court of its own motion on notice 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. That application is the subject of this ruling.

On 8<sup>th</sup> October, 2008 a replying affidavit was filed on behalf of the Client in opposition to the application. The affidavit was sworn by one **Oscar Avedi**, the Client’s advocate. On 21<sup>st</sup> October, 2008

a supplementary affidavit was filed by the Advocate in response to the replying affidavit.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing, including the cases cited. An issue was raised as to whether an originating summons under Order 52 is amenable to dismissal for want of prosecution under Order 16 of the Rules. That Order provides for prosecution of suits and adjournment, and also makes provision for dismissal for want of prosecution.

Section 2 of the **Civil Procedure Act, Cap. 21** (the Act), defines “suit” as

**“all civil proceedings commenced in any manner prescribed”.**

The present originating summons has been brought as prescribed under Order 52 of the Rules. It is thus a suit within the meaning of the aforesaid definition. I must therefore hold that originating summonses under Order 52 are amendable to dismissal for want of prosecution under Order 16 of the Rules.

I have perused the court record herein. The originating summons was filed on **10<sup>th</sup> February, 2006**. Later in the month it was fixed for hearing on **9<sup>th</sup> May, 2006**. On that date the summons was by consent taken out of the hearing list and stood over generally. The present application was thereafter filed on 18<sup>th</sup> July, 2008. So, there had been a delay of nearly two years in prosecuting the suit. This delay is inordinate in the circumstances of this case. Has it been explained?

Although it is stated in the supporting and replying affidavits that the originating summons had also by consent been fixed for hearing on 7<sup>th</sup> and 8<sup>th</sup> November, 2006, and also on 6<sup>th</sup> and 7<sup>th</sup> March, 2006, this is not borne out by the record of the court. At any rate, the Client blames its previous advocates for the delay in prosecuting the suit since it was stood over generally on 9<sup>th</sup> May, 2006. The Client pleads that the lapses of its then advocates should not be visited upon it.

I do not consider that the Client has given a satisfactory explanation for the inordinate delay in prosecuting the suit after 9<sup>th</sup> May, 2006. Notwithstanding the unexplained inordinate delay, if I am satisfied that the suit can still be expeditiously heard without prejudice to the Advocate, I should refuse the application for dismissal.

In the present case it appears that no oral testimony of any witnesses will be required. Further, there is no allegation that any necessary documents may no longer be available because of the delay. It has not been demonstrated in the supporting affidavit what prejudice, if any, the Advocate is likely to suffer by permitting the Client to belatedly prosecute his originating summons.

I am satisfied that a fair trial of the suit is still possible notwithstanding the delay in prosecuting it. Whatever inconvenience the Advocate may suffer as a result of the delay, an award of costs will do justice to him. Even from the point of view of the Advocate, it is probably best, given the nature of the originating summons, that the same be disposed of on merit.

Having considered all matters placed before the court, I will refuse the application by notice of motion dated 21<sup>st</sup> May, 2008. The same is hereby dismissed. But I will award the costs thereof to the Advocate. They are hereby assessed at KShs. 15,000/00, and must be paid within 14 days of delivery of this ruling. In default the Advocate may execute for the same.

I also direct that the Client do within 30 days of delivery of this ruling take demonstrable steps towards prosecution of the originating summons. In default the Advocate may apply for review of the order of dismissal herein. Those will be the orders of the court.

**DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY, 2009**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED THIS 8<sup>TH</sup> DAY OF MAY, 2009**