



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1479 of 2002

**WILLIAM O. ODHIAMBO.....PLAINTIFF
VERSUS
KENYA ACCOUNTANTS AND SECRETARIES**

NATIONAL EXAMINATION BOARD.....DEFENDANT

RULING

The background information is to the effect that the plaintiff came to this court by way of a plaint dated 12th September, 2002, filed on 13th September, 2002 seeking judgment against the defendant for loss of future income and benefits of Kshs 5,272,000.00, exemplary damages, costs of the suit interest at court rates.

Summons to enter appearance are dated 16th September, 2002. There is no return of service to show when they were served but memo of appearance is dated 15th day of November, 2002 and filed on 19th November 2002, where as the defence is dated 26th November, 2002 and file don 28th November, 2002.

Discovery procedures were complied with by the plaintiff filing a list of documents dated 16th February, 2004 and filed on 17th February 2004. The defendants list of documents is dated 14th day of June 2006 and filed on 15th May 2007. There is no record of agreed issues or evidence of each party having filed their own.

Against that background information, the defendant has presented an application under Order XVI rule 5 © and Order L rules 1 of the Civil Procedure Rules by way of notice of motion. It is dated 25th day of June 2007 and filed on 16th July 2007. it seeks 2 prayers:-

- (1) That the plaintiff's suit against the defendant be dismissed with costs to the defendant for want of prosecution.
- (2) That the costs of this application be to the defendant in any event.

The grounds are set out in the body of the application, supporting affidavit and oral submissions in court and the major ones are that:-

- (1) The cause of action is alleged to have arisen in 2001.
- (2) The suit was file din 2002.

- (3) The defendant entered appearance and filed defence promptly and since then no action has been taken by the Plaintiff to set down the matter for hearing.
- (4) They contend the facts displayed herein demonstrate inordinate delay and no good reason has been advanced for the same to be excused.
- (5) They maintain it is the duty of the plaintiff to ensure that action filed by him is prosecuted speedily. He has a duty to make a follow up and ensure that steps are taken to process the application for hearing speedily.
- (6) They contend this court' should grant the dismissal which has been long over due on the basis of the sound ground established.

In response the respondent countered the applicants assertion by grounds set out in their replying affidavit. The major ones are that:-

- (1) The plaintiff instituted the suit claiming 5 million shillings and paid court fees which is an indication that he was serious when he filed the action.
- (2) That the suit had been filed by an advocate in the Counsels now on record firm's name without their knowledge and they only came to learn of the existence of the matter when the application for dismissal was served on them.
- (3) They have now made contact with the plaintiff and are now seized of the matter. For this reason they seek the courts indulgence to allow them prosecute the suit speedily.

On the courts assessment of the facts herein it is clear that the applicant has presented the application under Order XVI rule 5 (1) of the Civil Procedure Rules, it reads:-

“O.XVI r.5 if within three months after

(a) the close of pleadings

(c) the removal of the suit from the hearing list or

(d) the 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.”

On this courts construction of the said rule, is that in order for the applicant to succeed under it has to be demonstrated that no action has been taken in the matter 3 months after the last proceedings step in the matter. Under 5(a) the applicant is required to demonstrate that no action has been taken for three months after the close of the pleadings. The applicant is not relying on this provision.

Whereas in order to succeed under Order XVI rules 5 (c) it has to be demonstrated that no action has been taken in the matter for three months after the matter was taken out from the hearing list.

A perusal of the record and as mentioned earlier on in this ruling, the defendants own list of documents marking the end of discovery period though dated 14th June 2006, it was filed on 15th may 2007. From 15th May 2007 to 16th July 2007 when the application for dismissal was present three months had not elapsed.

As for sub rule 5(c), it can only apply, if the matter had been listed. From the applicants own submissions as confirmed by the record, the matter had never in fact been listed for hearing and so sub rule 5 (c) cannot aid the applicant.

For the reasons given above the application is misconceived. The same is dismissed with costs to the respondent/plaintiff.

DATED, READ AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2008.

R.N. NAMBUYE

JUDGE