



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL SUIT NO 657 OF 1989

SAGOO PLAINTIFF

VERSUS

BHARIJ..... DEFENDANT

RULING

This is an application for dismissal of the plaintiffs suit under the provisions of order 16 rule 5 of the Civil Procedure Rules. It is based on an affidavit sworn by the defendant's counsel, Mr Mervyn Morgan.

On 10th February, 1989, the plaintiff herein filed this suit against the defendant. It sought orders for-

“(a) Shs 160,000/=

(b) Costs of this suit

(c) Interest on (a) and (b) above at court rates.

(d) Any further or alternative relief this court may deem fit to grant”.

A defence to the said suit was filed by the defendant's counsel on 6th June, 1989 denying liability and praying for the plaintiff's suit to be dismissed with costs. No reply has been filed by the plaintiff to date. Consequently, by operation of order 8 rule 17 of the Civil Procedure Rules the pleadings closed on 15th June, 1989 as the defence was served on 7th June, 1989. After waiting for 5 months without the plaintiff taking out the summons for directions on setting it down for hearing, the defendant now seeks to have the suit dismissed under the provisions of order 16 rule 5 (a) of the Civil Procedure Rules, which appears to entitle a defendant to apply for dismissal of a suit if the plaintiff does not set it down for hearing within 3 months after closure of the pleadings. The plaintiff did not file a replying affidavit nor did he file grounds of objection under order 50 rules 16 of the Civil Procedure Rules. He, however, had sent to the court a letter dated 30th April, 1990 drawing the court's attention to the Court of Appeal's decision in *Evadus and Scrededur S S Sokhi* in which he stated that it had been held that no such application as the current one could be filed by a defendant. As the matter appeared to raise a legal point of great importance, I decided to hear the plaintiff's counsel, Mr Sharma notwithstanding the fact the he had not complied with order 50 rule 16 of the Civil Procedure Rules.

The defendant's submissions raised two matters. Firstly, Mr Morgan argued that as the plaintiff was in breach of order 16 rule 5 (a) of the Civil Procedure Rules, this court should exercise its discretion and dismiss the suit for non-compliance therewith. The second matter urged by the said counsel was that the

suit was very old and should be dismissed for want of prosecution by the court in exercise of its inherent jurisdiction. The plaintiff's counsel was of the contrary view. On the first issue, he argued that the defendant was not entitled to bring the current application as directions had not been obtained in the suit. On the inherent powers of the court, he argued that the suit was not old, having been only filed in 1989.

Order 16 rule 5 of the Civil Procedure Rules on which the current application is based provides as follows:-

“5. If, within three months after –

(a) the close of pleadings: or

(b) in the High Court, an order for the hearing on summons for directions; or

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

(d) the adjournment of the suit generally, the plaintiff does not set down the suit for hearing, the defendant may either set down the suit for hearing or apply for its dismissal”.

As can be seen from the above, the rule gives a number of grounds on which a plaintiff's suit can be dismissed. They appear to me to be alternative grounds which do not depend on each other, for if it were not so, then rule 5(a) would need to be qualified by the words “except in the High Court” which is not the role of this court to supply where the words are clear. The said subrule does not in my opinion appear to conflict with the others as it is intended to make a plaintiff act fast, as, under our legal system, it is for the plaintiff to prosecute his case and not for the defendant to prosecute himself. I would have therefore thought that the defendant was entitled to bring this application under that provision. However, in view of the Court of Appeal decision in *CA No 17 of 1984*, involving *W F Evadus and Another vs S S Sokhi*, I am bound to find that a defendant is not entitled to proceed under rule 5(a) of order 16 of the Civil Procedure Rules.

As regards the inherent powers of court, by way of approach, I wish to observe that in such applications as the current one, it is not the practice of our courts to exercise this drastic power unless it is satisfied –

“(1) that there has been intentional and continuous delay e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court.

(2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers

(b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or is such as is likely to cause or to have caused serious prejudice to the defendants whether as between themselves and the plaintiff or between each other or between them and a third party”. See *Njuki Gachungu vs Githi* [1977] KLR 108.

In the present case it is common ground that the case was only recently filed, i.e. 1989, no specific order has been willfully disobeyed nor has it been shown that any prejudice has occurred or is likely to occur. In the result it would not be justified to take such a drastic step in this case.

It is however observed that the suit herein relates to an action which is said to have arisen way back in 1985 and although it is based on a written contract, further prolonged delay is likely to prejudice the defendant's case as payments to third parties are being relied upon as discharge of the plaintiff's claim. Consequently, unless the plaintiff's suit is disposed of soon, the defendant may lose his rights against third parties in case it is held that such payments were not good or valid discharge of the plaintiff's claim.

For the aforesaid reasons, I would dismiss the defendant's application. To ensure that the plaintiff does not go to sleep on his rights and / or does not use this suit *ad terrorem*, I order that the plaintiff should take out summons for directions within 30 days from the dated hereof. In default, the plaintiff's suit to

stand dismissed with costs.

Dated and Delivered at Nairobi this 13th Day of June, 1990

G.P. MBITO

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JUDGE