



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
ELC NO.37 OF 2012

**LAIKIPIA UNIVERSITY COLLEGE.....PLAINTIFF/
RESPONDENT**

VERSUS

**REGISTERED TRUSTEES OF CHILD WELFARE SOCIETY OF
KENYA.....DEFENDANT/APPLICANT**

R U L I N G

Background

1. By a Notice of Motion dated **14th March, 2014** the defendant/applicant sought to, *inter alia*, dismiss the plaintiff's suit herein for want of prosecution.
2. The court proceeded to write the ruling in respect of the application and issued a notice for the delivery of the ruling. On the date slated for delivery of the ruling, counsel for the plaintiff brought to the attention of the court some developments touching on the suit that had occurred between the time the defendant's application for dismissal of the suit was fixed for hearing and the time it came up for hearing. In this regard, counsel for the defendant informed the court that in an appeal the plaintiff had lodged against a ruling of this court delivered on **15th March, 2013**, the parties to the appeal had recorded a consent on 25th September, 2015 which he felt justified deferment of delivery of the ruling.
3. The court heard that the parties in this dispute, had recorded consent for maintenance of status quo pending the hearing and determination of this suit on its merits. Counsel for the plaintiff took issue with the conduct of counsel for the defendant who failed to inform the court of the changed circumstances of the case when the application for dismissal of the suit came up for hearing.
4. In opposing the application for deferment of delivery of the ruling, counsel for defendant, Mr. Njiri, acknowledged that parties recorded the consent referred to by counsel for the plaintiff. However, he denied having prosecuted the application in bad faith. In this regard, he submitted that his understanding of the consent was that any party could move the court to end the suit. According to him, the consent order had nothing to do with the application for dismissal of the suit which was pending before this court, as such, it did not stop the defendant from arguing his application for dismissal of the plaintiff's suit.
5. In a rejoinder, Mr. Mbugua reiterated that by prosecuting the application, counsel for the defendant

acted in bad faith. The court heard that on the date the application for dismissal of the suit came up for hearing, counsel for the plaintiff had sent a counsel to hold his brief. Unfortunately, that counsel failed to turn up in court.

6. Upon considering the new developments in the suit, the court agreed to defer delivery of the ruling to allow it to consider the new information.

7. Following the said order of the court, counsel for the defendant filed the protest note dated **29th October, 2014** in which it is, *inter alia*, contended :-

a) That there being no formal application made by the plaintiff's advocate relating to the delivery of the said ruling there was no legal basis for entertaining oral representations concerning the undelivered ruling;

b) That although the plaintiff has a right to protest against the said ruling, the protest ought to be raised in a formal and structured manner like, by application for review and/or setting aside or lodging an appeal against the ruling if unfavourable to it;

c) That the plaintiff's advocate ambushed the defendant's advocate with the protest against the delivery of the ruling;

d) That deferment of the ruling is highly prejudicial to the defendant as it may lead to an alteration or amendment of the ruling that was scheduled for delivery on **24th October, 2014**;

e) That the consent recorded at the Court of Appeal was intended, if successful, to finally determine the suit. For that reason any order made by this court in respect of the application for dismissal of the suit will not be in variance or contradict the said consent order.

8. For the foregoing reasons counsel for the defendant urges the court to deliver the ruling slated for delivery on **24th October, 2014** without any amendments or alterations and advise, the plaintiff, if aggrieved by it to formally apply to review or set aside the ruling or any order made in respect thereof if prejudicial to it.

9. With regard to the contention by counsel for the plaintiff that the defendant should not have prosecuted his application for dismissal of the suit in the wake of the consent hereto, it is submitted that the application at the court of appeal that led to the recording of the consent order was different from the application for dismissal of the plaintiff's suit which was pending before this court. It is contended that the Court of Appeal did not deal with the application for dismissal of the suit which was pending before this court.

10. The consent order recorded by the advocates for the parties in this suit before the court of appeal provides as follows:-

“By consent, status quo be maintained. The status quo being that the respondent is in possession of the suit property and the applicant is not in possession. The status quo is further that the respondent shall not continue or commence any construction or building on the suit property until the main suit is heard on merit before the High court.”

The status quo as stated heretofore shall be maintained until the final determination of the Nakuru High Court Civil Suit No.37 of 2012.”

11. When the defendant's application for the suit came up for hearing on **9th October, 2014** counsel for defendant addressed the court as follows:-

“The application is dated 14th March, 2014. The application was served on 18th March, 2014. see affidavit of service filed on 9th October, 2014. The application is not opposed. I rely on the grounds on the face of the application and on the affidavit of Irene Mureithi. This matter was last in court in March, 2013. The plaintiff appears to have lost interest of the matter. I pray that the suit be dismissed for want of prosecution.”

Analysis of the issues raised in the application by counsel for plaintiff and determination:

12. It is noteworthy that by the time the defendant's application for dismissal of the suit herein came up for hearing, a lot had changed from the time the application had been fixed for hearing. For instance, barely two weeks before the application came up for hearing, the parties to the dispute herein, through their advocates, had agreed to maintain the status quo obtaining as at the time the consent was executed pending the hearing and determination of the suit herein **on its merits**.

13. In my view, through the consent herein, the rights of the parties to the dispute were fundamentally altered. For the court to make an informed decision concerning the defendant's application for the dismissal of the suit for want of prosecution, the defendant and his counsel had a legal obligation to inform the court of the changed circumstances of the case. In this regard, see **Section 1A (3)** of the Civil Procedure Act, Chapter 21 Laws of Kenya, which puts an obligation on a party to civil proceedings or an advocate for such a party to assist the Court to further the overriding objective of the Act.

14. Under **Section 1A (1)** of the said Act the overriding objective of the Act and rules made thereunder, is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

15. By failing to draw the attention of the court to the changed circumstances of the case, counsel for the defendant, clearly breached his legal obligation to assist the court to further the overriding objective of the Civil Procedure Act and the rules made thereunder.

16. The suggestion by the defendant's counsel that this court should go ahead and pronounce the ruling it had delivered in respect of defendant's application for dismissal of the suit, when there is evidence that he failed to disclose information material to the court for just determination of the question the court is called upon to determine is, in my view, blatant disregard of the law and its purposes.

17. I find no prejudice that a party who has deliberately chosen to mislead the court will suffer if the benefit to be conferred on him by his disregard of the law is withdrawn, suspended or deferred indefinitely.

18. Having read and considered the consent order herein, I find and hold that by agreeing to maintain the status quo obtaining in this suit pending the hearing of the suit on its merit, the defendant impliedly compromised on his right to proceed with the application for dismissal of the suit in the manner it purported to do.

19. For the foregoing reasons, I find and hold that the plaintiff has made a case for suspension of the ruling hereto indefinitely. Parties are directed to take dates for hearing of the main suit at the registry. This order is informed by the realization that the parties, in the application before the Court of Appeal agreed to maintain the status quo obtaining in this case pending the hearing of this case **on its merits**. Hearing of the case on its merits does not, in my view, mean hearing and determination of the defendant's application for dismissal of the suit. If the parties wanted to maintain the status quo pending the hearing of the application for dismissal of the suit for want of prosecution, nothing would have prevented them from stating so. Hearing of the suit on its merits, in the circumstances of this case, cannot reasonably be taken to mean hearing of the defendant's application for dismissal of the suit.

Dated, signed and delivered in open court at Nakuru this 30th day of January 2015

L N WAITHAKA

JUDGE