



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 135 of 2011

MWALIMU KALUME CHARO

FRANCIS TSALWA WASHIALI.....PLAINTIFFS

VERSUS

FRESHCO INTERNATIONAL LTD

PETER KAHARA MUNGA

JAMES KAMAU MUHORO

JOHN MURIUKI MUHARA

JAMES GICHANGA KARANJA.....RESPONDENTS

RULING

1. The Application before me is the one dated 23rd October 2012 and filed on 4th January 2013. The Application seeks for the dismissal of the Plaintiff's suit for want of prosecution with costs.
2. The Application is premised on the ground that the Plaintiff's advocate has never set down the suit for hearing since it was instituted.
3. According to the Affidavit sworn by the Defendant's advocate on 23rd October 2012, the Plaintiffs' advocate has failed to set down this matter for hearing for a considerable period of time; that it is oppressive to have the suit hearing in perpetuity and that in the interest of justice, the suit should be dismissed with costs for want of prosecution.
4. The Plaintiffs/Respondents filed their Replying Affidavit on 26th February 2013 in which he deponed that the suit was filed on 18th August 2011 and that he thereafter prepared and filed a Chamber Summons Application for directions dated 25th July 2012 which was fixed for hearing on 23rd October 2012.
5. According to the Plaintiffs/Respondents, the Chamber Summons Application dated 25th July 2012 for directions was stood over to 3rd December 2012 for hearing on which day the matter did not proceed. The same was stood over to 26th March 2013 way before the current Application was filed.

6. The Plaintiffs/Respondents have further deponed that in the meantime, parties have been prosecuting the lower court matter, to wit, Kilifi SRMCC No. 211 of 2009; Kifalu Karisa Kitsao -Vs- Mwalimu Kalume Charo and another which involves the same parties. The said matter was scheduled for Ruling on 13th March 2013.
7. The Advocates for the respective parties made oral submissions on 15th April 2013. Mr. Nyange, counsel for the Applicant reiterated the counts of his Supporting Affidavit.
8. The Applicant's counsel submitted that the Respondent has never served him with the Chamber Summons which he has alluded to neither was he invited to fix a hearing date for the said Chamber Summons.
9. The Applicant's counsel further submitted that the civil suit in the lower court cannot be by the Respondent as a reason for non-prosecution of the current suit.
10. Mr. Akanga, counsel for the Plaintiffs/ Respondents submitted that he did file an application for directions on 25th July 2012 and the said application came up for hearing three times. According to counsel, the said Application and the proceedings in respect to the same are not on the court file; that he has taken steps in this matter by fixing the Application for directions three times and that the Applicant also has a duty to ensure that the matter is fixed for hearing.
11. Counsel finally submitted that he has filed an application in the lower court, Kilifi, seeking to stay the matter in Kilifi because the lower court does not have jurisdiction to entertain it and that the delay in prosecuting this matter is not inordinate.
12. I have considered the Applicant's Application together with the Supporting Affidavit and the Plaintiffs' Replying Affidavit. I have also considered the submissions by the two learned counsels.
13. I have deeply reflected on the submissions and the Replying Affidavit of the Plaintiffs and more particularly on the Chamber Summons dated 25th July 2012 which is alleged to have been fixed for hearing three times.
14. The said Chamber Summons is not in the court record. There are also no proceedings showing that such an application was ever fixed for hearing. According to the Plaintiffs' counsel, a different advocate held his brief on all the occasions that the Chamber Summons for directions came up for hearing. It is inconceivable that an application can be filed in this court and come up for hearing three times without any record to reflect that position.
15. In any event, and having realised that the Application for directions was not on record, the Respondent would have annexed the said Application on his Replying Affidavit to show that such an Application was indeed filed served upon the Defendant/ Applicant.
16. There is also no evidence that the Applicant's advocates were ever invited for the fixing of the said Application for hearing. The only conclusion I can arrive at is that the alleged Application for directions was never filed and whoever was purporting to hold brief for the Respondent's counsel misled him.
17. The fact that there is a pending suit in the lower court involving the same parties is not a good reason to delay the prosecution of a matter in this court. It may be true that the prosecution of an application for stay of the lower court matter pending the hearing of the present suit could have distracted the Respondents' counsel from setting this matter for hearing. This coupled with the fact that the Respondent's counsel seems to have been misled that a Chamber Summons for directions had been listed for hearing three times is a plausible excuse.
18. In the circumstances, and considering that land has traditionally dictated the pulse of families

and clans in this country, I shall allow the Plaintiffs to take directions and fix the Originating Summons for hearing within 90 days from the date of this Ruling.

19. For the reasons I have given, I disallow the Applicant's Application dated 23rd October 2012 without costs.

Dated and Delivered at Malindi this 28th day of May, 2013.

O. A. Angote
Judge