



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HIGH COURT CIVIL CASE NO. 470 OF 2011

AHMED MOHAMED AHMED PLAINTIFF

-VERSUS-

AHMED MOHIDEEN1ST DEFENDANT

KENYA UNITED STEEL COMPANY 2006 LTD. 2ND DEFENDANT

RULING

[1] The applicant in this case files this application by way of Notice of Motion and prays that the suit filed by the plaintiff against the defendants be dismissed with costs.

The grounds of his application is that the defendant was ordered by the court to furnish security for costs to the second defendant in the sum of Kshs. 1,000,000. The amount was to be placed in a joint interest earning account in a reputable bank in the names of counsels for the plaintiff and the second defendant within 30 days of that order.

The plaintiff did not comply with that order. He instead filed an application seeking to stay the order pending appeal. The application for stay came before the court on 10th December 2012. The application was dismissed.

The applicant was given a further 30 days with effect from 10th December 2012 to comply with the court order. He did not comply with the second order. The applicant thereupon filed this application to have the suit dismissed.

[2] When this matter came for hearing for the application to dismiss the suit Mr. Gichuki Learned Counsel for the applicant applied for the suit to be dismissed for non compliance with court order.

Mr. Khatib learned counsel for the respondent conceded there was delay. He argued that the delay was caused by the fact that this was a representative suit that plaintiffs and beneficiaries were to be brought on board. He argued that they were ready with the deposit but the applicant served them with th application to dismiss the suit on 14th February, 2013. He argued that the delay was 25 days. Further that if you took the period between the 21st December and 13th of January, when time does not run according to Civil Procedure Rules, the delay was only 3 days. He argued that the delay was not inordinate and that the Court should not rely on technicalities. He cited Article 159 of the Constitution. He argued that no prejudice shall be suffered by the applicants.

[3] Sec.1A (3) of the Civil Procedure Rules reads;

"A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court."

This section enjoins party to civil proceedings to assist the court to further the overriding objective of the Court. It mandates the parties to comply with the directions and orders of the court. The respondent has admitted having failed to comply with the orders of this Court on two separate occasions. He is in breach of Section 1A(3) aforesaid. The respondent is in breach of the oxygen principle¹. The Court of Appeal has held that litigants and their advocates must know that '*they have a powerful ally where they are advancing its (O₂ principle) aims and a powerful adversary where they are bent on subverting its aims.*'² The Court of Appeal went further to state.

"It is a requirement of O₂ principal that the exercise of any power under the act or rule must be exercised in line with its principal aims. Similarly the interpretation of any provisions in the Act(s) and rules has to be O₂ complaint"

The respondent has continually subverted the overriding objective of the Civil Procedure Rules. He cannot therefore be helped by the same rules he has flaunted.

The Notice of Motion dated 1st February 2013 is allowed as prayed with costs.

Dated and delivered in open Court at Mombasa this 23rd day of August, 2013.

S.N. MUKUNYA

JUDGE

In the presence of:

Khatib for the plaintiff'

P. Buti for the respondents

¹ See Hunker Trading Company Ltd and Elf Oil Kenya Ltd Civil Appl. 6 of 20110 and HCC. No. 1785 of 2010

² See Hunker Case page 5 para 4