



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL NO. 70 OF 2009

NELSON KAZUNGU CHAI

LAWRENCE KAZANI GOH

WYCLIFF TEMBO MWANGOMBE

SAID HASSAN HEMED

IBRAHIM ABDI

FESTUS MWARERE LENGA

LENNOX MKUTANO NGALA

SHDRACK NDUNDI

PRUDENCE MAPENZI MWANGORI
PLAINTIFFS

VERSUS

PWANI UNIVERSITY COLLEGE.....
DEFENDANT

RULING

1. The brief background to the present application is as follows:
2. The defendant, Pwani University as the successor of Kilifi Institute of Agriculture in June 2009 evinced its intention to evict the plaintiffs who partly occupied and still occupy land parcels LR.5046/1 and 5024/1 which the defendant claims to be its property.
3. The plaintiffs successfully moved the court and obtained orders to restrain the defendant. According to the records of proceedings, much of the court's time since October, 2010 when the injunction was granted, was taken up with interlocutory matters such as the delay by the plaintiff's to file a defence to the counterclaim, alleged non-observance of court orders by the plaintiffs etc.
4. Eventually the suit was set down for hearing on 13-10-11 but the plaintiffs' counsel being absent, was adjourned to 5-12-2011.
5. On the latter date, Mr. Kuria for the defendant informed the court of his instructions to file the present

application for security of costs under Order 26 rule 1, 5 and 6 of the Civil Procedure Rules.

6. The application had been filed on 25- 11-11 and is seeking that the plaintiffs be ordered to furnish security for costs in the sum of shs. 5000,000/- within thirty (30) days, failing which the suit should be dismissed.

7. The grounds in support of the application can be summarized as follows;

- (a) Apart from the plaintiffs herein, other alleged claimants are an amorphous group and it is doubtful that there are 308 claimants as alleged.
- (b) The plaintiffs have failed to prosecute their case and the suit has become dormant since the grant of interim orders.
- (c) The defendant is incurring expense and loss due to the actions of the plaintiffs

8. The application is supported by the affidavit of Professor M. S. Rajab, which gives a detailed account of the proceedings in this matter.

9. In response, the plaintiff filed a replying affidavit through Nelson Kazungu Chai. Therein, the plaintiffs assert the strength of their claim citing the interim orders as proof, and accused the defendants of attempting to circumvent the process of justice; and finally, that the application is an afterthought and is untenable.

10. The application was disposed of by way of written submissions.

I have read these together with the material canvassed in respect of this application. I take the following view of the matter:

11. A party in whose favor interlocutory injunctive orders have been issued is obliged to prosecute his case diligently and with dispatch. The days when such a party continued to enjoy such orders ad infinitum were phased out with the adoption of the new Civil Procedure Rules in December 2010.

12. Order 40 rule 6 in particular was drafted as a remedy for such mischief. It reads:

“where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reasons the court orders otherwise.”

13. Granted, the subject orders in this suit were made prior to the adoption of the new rules but by virtue of the provisions of Order 54 rule 2 of the Civil Procedure Rules, there is nothing to bar the court from applying the new rules to the immediate situation.

14. In saying so, I am guided by the overriding objective prescribed in Section 1A of the Civil Procedure Act and the duty imposed on the court under Section 1B of the said Act. Section 1B(1) of the Civil Procedure Act provides:

“For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

- (a) the just determination of the proceedings;***
- (b) the efficient disposal of the business of the Court;***
- (c) the efficient use of the available judicial and administrative resources;***

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties;

15. We before the adoption of the new rules, courts in this country were expressing concern about negligent and indifferent litigation before them. In the case of **MAWJI VS LALJI & OTHERS (CIVIL APPEAL NO. 236 OF 1992)** the Court of Appeal quoted with approval a passage in the judgment of Lord Griffiths in **KETTLEMAN VS HANSEL PROPERTIES LTD [1988]ALL ER 38**, at page 62:

“a judge must weigh...the balance of the pressure on the courts caused by the great increase in litigation and consequent necessity that, in the interests by the whole country, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards negligent (indolent)...litigation as was perhaps in a more leisured age.”

16. Although the issue at hand in that case related to negligence by lawyers, I think the words are relevant in the present case where the plaintiffs have shown negligence by the following recorded lapses:

- 1) Failure to file their defence to counterclaim in good time.
- 2) Willful flouting of court orders leading to lengthy arguments before the court.
- 3) Failure to prepare for the hearing of their case on 13-10-2011.

17. While I do not agree that the plaintiffs are an amorphous group merely because no other parties have applied to join the representative suit, I think that the plaintiffs cannot use an equitable order made in their favour as a shield for their indolence. The suit cannot be defeated by the nonjoinder and ought to proceed with the parties actually before the court. (Order 1 rule 9 of the Civil Procedure Rules)

18. Looking however at the material before me, it appears that the plaintiffs' may not be well endowed financially. An order for the deposit of shs. 5million as security for costs would effectively mean that their access to the seat of justice is barred. That would be a travesty of justice, the plaintiffs' conduct notwithstanding.

19. At the same time, it is not lost on this court that the defendant is an entity in which the whole country, not just the plaintiffs, has a vested interest. It behooves the plaintiffs do move with dispatch.

20. I am of the view that in the interest of justice, the court must set timelines for the prosecution of this case, and prescribe a sanction.

21. In the circumstances, I disallow the defendant's application but order that:

- (a) The plaintiffs do prosecute this case to completion within eight (8) months of today's date.
- (b) In default of (a) above, the interim injunction will lapse automatically.
- (c) Costs in cause.

Delivered and signed on this 24th day of February, 2012 at

Malindi in the presence of Mr. Mwadilo holding brief for Mr. Kuria for the plaintiffs,

Defendants – No appearance.

C. W. Meoli
JUDGE