



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 748 OF 2008

CHRISTOPHER XALLION ONDIEKIPLAINTIFF/RESPONDENT

VERSUS

SAFARICOM LIMITEDDEFENDANT/APPLICANT

RULING

On 24th February, 2012 the defendant filed an application under **Order 17 rule 2 (3)** and **Order 51 rule 1** of the **Civil Procedure Rules, 2010**, seeking dismissal of this suit for want of prosecution. The application was premised on the ground that no further steps had been taken in this suit since the ruling that was delivered by Khaminwa, J. on 31st July, 2009. In the said ruling the court held that it had no jurisdiction to handle the matter and directed that it be filed in the Industrial Property Tribunal.

In response to the defendant's application, the plaintiff filed a Notice of Preliminary Objection and raised three grounds which are as follows:

“1. THAT the application is misconceived, incurably defective, incompetent, frivolous, vexatious and therefore an abuse of the process of this Honourable Court.

2. THAT the applicant has no locus to file any proceedings and in particular the current application in this suit since the same has been overtaken by the ruling of the Honourable Lady Justice Joyce Khaminwa delivered on 31st July 2009 referring the respondent to the Industrial Property Tribunal for redress.

3. THAT this Honourable Court lacks jurisdiction to entertain and determine the defendant's/applicant's application dated 14th February 2012 and filed in court on 29th February 2012 and brought under Order 17 Rule 2 (3) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 since there is no suit pending between the parties herein.”

This preliminary objection was argued on 22nd March, 2012. **Mr. Odongo** for the plaintiff reiterated the aforesaid grounds and added that the plaintiff has filed an appeal against the ruling of Khaminwa, J. and should therefore be given an opportunity to pursue his appeal.

Mr. Oduol for the defendant responded that the plaintiff's filing of the Notice of Appeal meant that he had disagreed with the said ruling but that notwithstanding, he had not taken any step to prosecute his suit. He therefore urged the court to dismiss the suit for want of prosecution.

The ruling of 31st July, 2009 followed a Notice of Preliminary Objection by the defendant that:

“The proper forum for the determination of the issues arising from this suit is the Industrial Property Tribunal established under Section 113 of the Industrial Properties Act, No. 3 of 2001 and the jurisdiction of the High Court is appellate in accordance with Section 115 of the said Act.”

The court agreed that it had no original jurisdiction to determine the issues raised in the matter and directed the plaintiff to refer the matter to the Industrial Property Tribunal. That decision still stands, it has not been stayed or overturned by the Court of Appeal. It matters not that the plaintiff was dissatisfied with the ruling and has filed a notice of appeal against the same. Unless the appellate court states otherwise, this court cannot purport to have jurisdiction to determine the dispute and that being the case, it also does not have jurisdiction to dismiss the suit for want of prosecution.

Order 17 is headed – **“Prosecution of Suits”**. A plaintiff cannot prosecute a suit before a court which, at the instance of a defendant, has held that it has no jurisdiction to handle. In an application for dismissal of a suit for want of prosecution, a court may not grant the order sought but may instead make such other order as it may deem appropriate in the interest of justice, for example, it may direct the plaintiff to prosecute the suit within a given period of time.

In the circumstances, an application under **Order 17 rule 2 (3)** of the **Civil Procedure Rules** cannot be made before a court which has held that it has no jurisdiction to hear a case.

Consequently, I uphold the plaintiff’s preliminary objections and strike out the defendant’s application dated 14th February, 2012. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2012.

D. MUSINGA

JUDGE

In the presence of:

Alex/Muriithi – Court Clerks

Mr. Odongo for Plaintiff

Mr. Abitha for Ohaga for Defendant