



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 474 of 2010**

**SAMUEL MUSAU & 33 OTHERS.....PLAINTIFFS**

**VERSUS**

**ANDREW MAKAU & 10 OTHERS.....DEFENDANTS**

**RULING**

1. Before me is a notice of motion dated the 8/12/12 brought by the 11<sup>th</sup> defendant/applicant under Order 11 Rule 3 (2) (0), Order 2 rule 15(1) ( c) Order 40 Rule (7) of the Civil Procedure Rule section 1A, 1B 3 and 3A of the Civil Procedure Act and all other enabling provisions of the Law. The applicant is seeking the following orders:

- i. That the Court be pleased to strike out the suit.
- ii. That the Court be pleased to vary, discharge or set aside orders granted on the 21/3/12.
- iii. That the Court be pleased to make such orders or further orders it deems fit.
- iv. That cost of the application be provided for.

The application is premised on grounds (a) to (e) as follows.

- a) That the Court on the 21/3/12 granted the plaintiffs orders restraining the defendants from leasing/letting out premises situated at L.R No. 209/1951.
- b) By the dint the order of 21/3/12 the applicant stopped hiring out of premises which have cost Kshs. 150 Million to construct hereby incurring substantial loss.
- c) That the plaintiffs were to serve all the pleadings and were to fix the case for hearing.
- d) That the plaintiffs have not complied with the terms of the order and seems not keen to have the case determined as they are enjoying injunctive orders.
- e) That in the interest of justice the orders sought be granted.

2. The application is supported by the affidavit of Mr. Daniel Gacheru Ndiangui the Managing Director of the 11<sup>th</sup> defendant's company. In his affidavit he reiterates what is stated in the grounds on the face of the application and adds the following: that the plaintiff has not complied with the Court orders to serve the amended plaint and to comply with the provisions of order 11 on filing the list of witness, documents

and statements. That the Court therefore cannot give a hearing date. That they have sought a hearing date but the Court has declined to grant a date due to the plaintiffs' noncompliance. That the 1<sup>st</sup> to 10<sup>th</sup> defendants have nothing to lose. That it has invested heavily and is losing substantially. That from what has been happening the plaintiffs are not keen to have the suit heard. That it continues to service a bank loan on a premise that is not generating any income. That the plaintiff has not raised any just able cause of action against the 11<sup>th</sup> defendant and that the dispute between the plaintiff and the 1<sup>st</sup> to 10<sup>th</sup> defendants should not be a reason to deny the 11<sup>th</sup> defendants its rightful dues.

3. The application is opposed. The 27<sup>th</sup> plaintiffs' filed a replying affidavit dated 14/9/12. He depones at paragraph 4 that the plaintiffs' has endeavored to comply with the Court orders. At paragraph 4 (a) to (g) he details the actions that have been taken by their advocate to arrange meetings with the defendants. He states the 11<sup>th</sup> defendant did not attend the said meetings. He states further that after they demanded that the defendants file the defences, the 11<sup>th</sup> defendant entered appearance on the 11<sup>th</sup> April 2012 and filed his defence on the 10<sup>th</sup> May 2012 and they were served on the 14<sup>th</sup> May 2012. That they filed their amended plaint on the 16/11/11 and they saw no need to further amend the amended plaint. That it has become apparent that the defendants are not willing to reconcile and that they have requested their Counsel to request for judgment against the 1<sup>st</sup> to 10<sup>th</sup> defendants. That the Deputy Registrar has directed that the matter proceeds to trial. That their advocate has set draft issues to the 11<sup>th</sup> defendants Counsel for their approval and therefore they are pursuing the matter and it should not be dismissed.

4. Oral submissions were made at the hearing of the application under consideration. The issue is whether the plaintiffs' suit should be dismissed as sought. The applicants have moved the Court under Order 11 rule 3 (2) (0). Order 11 rule (3) provides for what should be done at a case conference. This case has not reached the pretrial conference stage. Order 3(2) (0) provides for orders the Court may make at the said conference. Order 2 rule 15 deals with striking out of pleadings. The applicant has to demonstrate that the plaintiff's case falls under any of the said grounds, that the plaintiffs disclose no reasonable cause of action against them, that the plaint is scandalous, frivolously or vexatious or that the plaint may prejudice, embarrass or delay the fair trial of the action or that it is otherwise an abuse of the process of the Court. This applicants main reason for dismissal of the suit is that he is losing income having invested heavily in the suit premises. From the facts deponed in the replying affidavit it is evident that the plaintiffs have sought to have the parties meet to reconcile. Pleadings have been filed. I have seen 11<sup>th</sup> defendant's defence and the plaintiffs reply to the said defence. There is the 11<sup>th</sup> defendant's list of documents and the applicants statements. Now that the Deputy Registrar directed the parties to comply with the provisions of order 11 on the 9/7/12 the parties should endeavor to do so. I am not persuaded that the suit should be dismissed the applicant has failed to demonstrate that what the plaintiff is doing is likely to prejudice if or an embarrass or delay a fair trial/or that it is an abuse of the process of the Court. I find too that the applicant has failed to persuade this Court to vary or discharge or set aside the order granted on the 21/3/12. I do note that the orders were given in March 2012. The parties have not moved expeditiously to have the matter fixed for pretrial conference. I will therefore make the following orders. Let all parties comply with the provisions of Order 11 of the Civil Procedure Rule with 30 days from the date of this ruling. Once they have complied they shall take a date for pretrial conference for the Court to give directions on the hearing of this matter. I therefore decline to grant prayers 1 & 2. I remind the plaintiff that the injunction orders shall lapse on the 20/3/13 and therefore they should move expeditiously. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 14<sup>th</sup> Day of December 2012

**R. OUGO**

**JUDGE**

In the Presence of:-

.....For the 11<sup>th</sup> Defendant/Applicant

.....For the Plaintiffs/ Respondents

.....For the 1<sup>st</sup> to 10<sup>th</sup> Defendants'

.....Court Clerk