REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 24 OF 2005

ELIUD CHEPTOO

MICHAEL CHERONO

JOSHUA CHERONO AND

94 OTHERS.....PLAINTIFFS/ APPLICANTS

VERSUS

COUNTY COUNCIL OF BARINGO.....1ST DEFENDANT/RESPONDENT

REGISTERED TRUSTEE OF CATHOLIC DIOCESE OF NAKURU.....2ND DEFENDANT/RESPONDENT

RULING

The application dated 17/5/2011 is brought by the Plaintiffs/Applicants through the firm of Ngoge & Company Advocates. They seek the following orders;

(1) That the ex-parte orders granted by this Honourable Court on 12/4/2011 dismissing the Plaintiffs' suit for want of prosecution be set aside plus all consequential orders;

(2) That interested parties herein joined in this matter illegally without the participation or knowledge of the Plaintiffs' counsel be expunged from the record;

(3) That the Plaintiffs' suit do proceed to hearing on merit upon the parties complying with pre-trial requirements.

The application is based on grounds found in the body of the application and an affidavit sworn by Peter Ngoge, the Plaintiffs' counsel. The application dated 22/2/2011 seeking the dismissal of this suit and filed by the 2nd Defendant came up for hearing on 12/4/2011. The Plaintiffs' counsel did not appear though he had been served. The court granted the prayer in the Notice of Motion and dismissed the suit for want of

prosecution. This application challenges the said court order. Counsel admits that he was served with the application dated 22/2/2011 on 1/3/2011 which was fixed for hearing on 12/4/2011 but he could not attend because he was attending Civil Appeal No. 284 of 2010 in the Court of Appeal and before *Justice Mbogholi* in **Nairobi Hcc No. 67 of 2007** and lastly that the long range distance between Nairobi and Nakuru contributed to his failure to attend because he was never invited to take convenient dates. It is also counsel's submission that he has not been served with a statement of defence, no discovery has been done nor have issues been settled. The Applicant also seeks the expunging of the interested parties from this suit because the CPA does not contemplate joinder of interested parties in a suit and their presence in the case breaches the Plaintiffs/Applicants' rights under Article 50 of the Constitution. Counsel blames the delay in prosecuting this case on another pending case relating to this matter in **Nairobi Miscellaneous Civil Case No. 413 of 2007** before *Justice Dulu* and that the Judgment therein was not delivered until 14/3/2011 **((PON 2)** when it was dismissed but the court ruled that the allegations of fraud be ventilated herein. He urged that the defence should have informed the court of *Justice Dulu's* Judgment. Counsel also submitted that this court lacked the jurisdiction to dismiss this suit without investigating the merits of the dispute.

The 1st Defendant opposed the application and Mr. Chebii, counsel for the 1st Defendant filed a replying affidavit dated 8/6/2011. He averred that the application lacks merit; is an abuse of the court process as no reason had been given why the suit should be reinstated; that distance is not a ground for reinstating a suit; that no reason has been given why counsel did not delegate; that the same suit had been dismissed or non attendance on 15/11/2006 but reinstated and the application should not be allowed. Counsel also urged that the suit filed in Nairobi which relates to this suit was dismissed and the Plaintiffs have not yet paid the 1st Respondent their costs.

Father Ngaruiya, a trustee of the 2nd Defendant swore an affidavit dated 15/6/2011 in opposition to the application. Mr. Orege, counsel for the 2nd Respondent submitted that the application is an abuse of the court process, frivolous and oppressive. He urged that Mr. Ngoge was aware of the hearing date but did not attend and there is no good explanation for failure to attend. That on 15/11/2006, the Plaintiff's suit had been dismissed for non attendance when the Plaintiffs and counsel failed to attend court for hearing; that the Plaintiffs are vexatious litigants having previously filed **Nakuru Hccc No. 120 of 2004 and Hc Misc. Civil Application No. 413 of 2007** which have been dismissed; that this court had jurisdiction to dismiss the suit and that if the court lacked jurisdiction, to dismiss the suit, then it cannot reinstate it and the Applicants should have gone to Court of Appeal. Counsel also urged that the Applicants will not suffer any prejudice and that there is no prayer for reinstatement of the application that was allowed on 22/2/2011.

Mr. Otieno, counsel for the Interested Parties urged the application on the behalf of Interested Parties and one of them, Frederick Kiloo swore an affidavit in opposition. Counsel urged that the applicants had not demonstrated what prejudice they would suffer by the joinder of the Interested Parties. He was in agreement with the submissions made by the Defendant/Respondent.

I have now considered all the rival arguments. Firstly, I wish to observe that there is no dispute that the Applicants' counsel was duly served with the hearing notice for 12/4/2011 but did not attend court, when the court allowed the application dated 22/2/2011 and ordered the dismissal of the suit.

One of the reasons counsel gave for non attendance is that he had a matter in Court of appeal and a mention in the High Court. The hearing notice for the matter in the Court of Appeal was dated 26/1/2011 whilst he was served with the application dated 22/2/2011 on 1/3/2011. He never received it under protest. Counsel just decided to stay away without even sending another counsel to hold his brief. The third reason, counsel advances for failure to attend court is the distance between Nakuru and Nairobi. I do agree with the other counsel that distance has never and can never be a ground for setting aside of the court's order. It is counsel who accepted a brief from the Plaintiffs to represent them in Nakuru. It is upto him to ensure he arrives in court when required. Otherwise, he should have left it to counsel who can make it to court in time. In sum, there was no sufficient reason given why the counsel did not attend court on 12/4/2011.

Mr. Ngoge urged that this court had no jurisdiction to dismiss the suit without dealing with the merits of the case based on the fact that it is a public interest litigation under the provisions ,of the Constitution specifically Article 159 and the Civil Procedure Rules, 2010. Counsel also urged that the court lacked jurisdiction to dismiss the suit because pre-trial requirements had not been completed. If indeed this court lacked jurisdiction to dismiss the suit, likewise it would not have jurisdiction to order a reinstatement of the suit, and the Applicants should have preferred an appeal to the Court of Appeal. The Applicants cannot be allowed to aprobate and reprobate. As respects pre-trial requirements, there is no requirement that dismissal of a suit can only be done when pre-trial requirements and discovery are complete. This suit was filed in February, 2005. Discovery and the pre-trial requirements should have been done in 2005 over 5 years ago. If the Defendants did not comply with discovery there is no reason why the Plaintiffs could not go ahead and set down the suit for hearing?

As respects Article 159 of the Constitution, it provides for speedy disposal of cases without undue regard to procedural technicalities. This provision is replicated in Section 1A and B of the Civil Procedure Act, 2010, with the overriding objective of the Act taking precedence, which is, to do justice to the parties. Justice delayed is justice denied, and it does not lean on one side. It has to be balanced as between the parties before the court. The fact that the courts are discouraged from regarding procedural technicalities does not mean that the court aids indolent parties. The Plaintiffs'/Applicants' case had been dismissed for want of prosecution in 2006 and was reinstated. The same thing is being repeated in October 2011. It is obvious that the delay in determining this suit is prejudicial to the other parties to the dispute too.

I do agree that with the submission that the Applicants are vexatious litigants. The Applicants filed **Hcc No. 120 of 2004 – Pastor John Cheruiyot, Eliud Cheptoo and County Council of Baringo Catholic Diocese of Nakuru Commissioner of Lands and the Attorney General**, seeking to have the title to **Baringo/Kapchepkoro/725** cancelled for reasons that it was fraudulently allocated to the 2nd Defendant. That suit was struck out. They then filed this suit. During its pendency, they again filed **Judicial Review Hccc No. 413 of 2007** in Nairobi over same subject matter. The same was dismissed because the court became aware of the pendency of this case and also for reasons that the dispute could not be resolved by Judicial Review. The Applicants are obviously forum shopping and therefore abusing the court process. Counsel is quick to blame everybody else except himself or the Applicants. He blames the delay of the Judicial Review application on the Judge who heard it for taking long to deliver judgment yet it is due to the filing of multiple suits over the same issue that has caused the delay in this matter. The applicants' acts amount to an abuse of the court process.

Should the Interested parties be expunged from the proceedings? The applicants' contention is that the Civil Procedure Rules does not envisage the existence of Interested Parties in a civil case. The Interested Parties were joined to theses proceeding on 11/2/09. The application for joinder was served on the firm of Ngoge Advocates but counsel did not appear in court on 11/2/09 for the hearing. Three years later, the applicants now want the Interested Parties expunged from the record. The applicants have not demonstrated that the presence of the Interested Parties on record will prejudice their case in any way. Besides under the Civil Procedure Rules a suit cannot be defeated misjoinder or non joinder of parties. These Interested Parties can be transformed into either the plaintiffs or defendants depending on what their interest in the matter is. That application is baseless.

At paragraph 18 of Mr. Ngoge's affidavit, he sought to advice the court on how to handle the suits that came before it. This court takes great exception to the manner in which counsel purports to command the court on how to conduct the matter before it. I decline to take counsel's advice as it is uncalled for and made in bad taste.

Dismissal or striking out is indeed a draconian measure but it will be used when deserved. In this case, the court finds no good reason to interfere with the order made on 12/4/2011. I hereby dismiss the application dated 17/5/2011 with costs.

DATED and DELIVERED this 7th day of October, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

No appearance for the Applicants.

Mrs. Mugweru holding brief for Mr. Orege for the Respondents.

Kennedy – Court Clerk.