



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang J.)

CIVIL SUIT NO. 221 OF 2003

EMANUELE EMILLIO VILLA.....PLAINTIFF/RESPONDENT

-VERSUS-

1. VALERIO BUCCIARELI
2. OMNI MEGA LIMITEDDEFENDANTS/APPLICANTS
3. GABBOANO LIMITEDDEFENDANT

RULING

The applicants brought their Notice of Motion of **7th May, 2009** under Orders XVI [Rule 5(d)] and L [Rule 1] of the old edition of the Civil Procedure Rules and s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya).

The application carries one main prayer, ***“that this suit be dismissed with costs for want of prosecution”***; and of course, the secondary prayer for costs of the application.

The application rests on the ground that ***“the plaintiff has neglected and/or otherwise failed to set down the suit and/or otherwise failed to take any steps to prosecute the same for a period of two and a half years.”***

Maurice Kilonzo the Advocate of the applicants, swore an affidavit to provide the supporting evidence. He avers that upon the suit being filed, he entered appearance for 1st and 2nd defendants, and on **6th October, 2003** filed a statement of defence, to which the plaintiff filed a reply-to-defence on **15th October, 2003**. Since then, ***“the suit has never been set down for full hearing by the plaintiff who keeps on bringing application after application in this suit.”*** On **9th June, 2004** the plaintiff brought an application seeking extension of time to file a verifying affidavit and withdraw another application of **11th September, 2003**; but to-date, the application of **9th June, 2004** has never been heard; the last time this application was before the Court was on **23rd November, 2006** when it was stood over generally on account of non-attendance by the plaintiff’s Advocate. The deponent deposed that, ***“more than two and a half years down the line, the plaintiff has refused, neglected and/or otherwise failed to take out [a] fresh hearing [date] and has since refused, neglected and/or otherwise failed to take any steps to set down the suit for hearing and/or take any steps to prosecute the same.”*** The deponent avers that he believes that ***“this neglect and/or failure to set down the suit and/or application for hearing [amounts] to an abuse of the process of this...Court.”*** The deponent deposes that he believes it to be ***“just and expedient that this suit be dismissed with costs for want of prosecution.”***

The plaintiff's Advocate, **Mr. Yusuf M. Aboubakar**, swore a replying affidavit on **18th February, 2011** deponing that **“this suit could not have been fixed for hearing because there were interlocutory applications to be disposed [of], filed by both...parties....”** The deponent lists the matters in question:

- (i) plaintiff's Chamber Summons of **11th September, 2003** – which was withdrawn pursuant to the Ruling of **Khaminwa, J** on **20th February, 2004**;
- (ii) defendant's Chamber Summons of **29th March, 2004** which was heard and dismissed on **19th September, 2005**;
- (iii) plaintiff's Notice of Motion of **9th June, 2004** – still pending in Court;
- (iv) defendants' instant application, by Notice of Motion of **7th May, 2009** – pending in Court until now.

The deponent made averments setting out explanations for the failure to set down the suit for hearing:

- (a) an Advocate involved in the case, **Mr. Mabeya**, left the firm;
- (b) **Mr. Buti**, the Advocate who took over the conduct of the matter, also left the firm;
- (c) **Mr. Aboubakar** who now has the conduct of the matter required a certain amount of time to acquaint himself with the file;
- (d) the pendency of the instant application rendered it impossible for the suit to be set down for hearing.

Mr. Kilonzo for the applicant, submitted that after he filed the statement of defence on **6th October, 2003**, he filed objections to the verifying affidavit emanating from the plaintiff; and indeed, by the Ruling of **20th February, 2004 Lady Justice Khaminwa** declared the verifying affidavit a nullity. Counsel urged that the applicants have not contributed to delay in the hearing of the suit; and that the plaintiff's application of **9th June, 2004** has been pending in Court for over five years.

Counsel submitted that the instant application **“does not violate the overriding objectives of the civil process which are [aimed] at facilitating a just, expeditious, proportionate and affordable resolution of civil disputes.”**

For the plaintiff/respondent, learned counsel, **Mr. Aboubakar** submitted that the application was for dismissal: for it was made under Order XVI [Rule 5(d)] of the old Civil Procedure Rules **“which no longer operate.”** Counsel urged that Order XVI aforesaid has now been replaced by Order 17 [Rule 2(3)] which provides that **“a party may apply for dismissal of a suit if no application has been made or step taken by either party for one year”**; and that at the moment, a number of applications have been filed and are still pending.

Counsel urged that the application is “incompetent and/or bad in law” – and that this would remain so even under the old Order XVI, Rule 5(d) of the Civil Procedure Rules, **“as the application was made during the pendency of an application;”** it was submitted that **“the applicant ought to have applied first to dismiss the application before applying to dismiss the suit.”**

Counsel also relied on the terms of Article 159(2)(d) of **the Constitution** to urge that dismissal of the suit on a technicality would be **“against the principle [governing the] exercise of judicial authority.”**

So far, the main suit, as well as an application, have been pending before the Court. The critical objection to the application raised by the respondent is that the applicant should have moved to have the pending application, rather than the main suit, terminated for want of prosecution.

Although, in my opinion, the bare fact that the old Civil Procedure Rules have been significantly replaced by the new ones, should not be the reason for dismissing the 1st and 2nd defendants' application, the argument that the object of the instant application should have been the pending application and not the suit itself is a convincing one. The pending application had been made as a move to resolve an interlocutory situation; and, so long as the application remained pending, the stage was not yet set for the hearing and determination of the suit. Consequently, the censure upon the plaintiff's seriousness of intent

in the litigation, ought first to have fallen upon the **application**, and only subsequently, upon the suit. The Court's consistent policy and practice has been to recognize that litigants, when they file suit, are moved by a sensation sounding in **justiciable claims**, which it is the obligation of the Court to resolve; and thus, *prima facie*, a suit once filed, is to be, so far as possible, sustained up to the point of determination.

I therefore dismiss the 1st and 2nd defendants' application by Notice of Motion of **7th May, 2009**. The applicants shall bear the respondent's costs.

Orders accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 29th day of November, 2011.

**H.M. OKWENGU
JUDGE**