



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NUMBER 458 OF 1992**

THE REGISTERED TRUSTEES OF MOMBASA  
PARSI ANJUMAN.....PLAINTIFF/APPELLANT

VERSUS

MUHSIN ABDULKARIM ALI.....DEFENDANT/  
RESPONDENT

**R U L I N G**

This matter was listed for full hearing on 8<sup>th</sup> September, 2011. The plaintiff however, sought an adjournment through counsel holding brief for the plaintiff's counsel. There are two grounds. First, that counsel has been unable to trace his clients for proper instructions, which has a bearing on his conduct of the case. Second, that the counsel on record, Mr. Hamza, seeks to apply to withdraw from acting for the plaintiff.

Counsel for the Defendant opposes the adjournment application on grounds that this is not the first time that a counsel for the plaintiff is seeking to withdraw from acting. Further, that this was an old matter filed in 1992 and in respect of which there have been numerous delays. The Defendant had filed a motion for dismissal for want of prosecution, which prompted Mr. Suchak, then acting for the plaintiff, to file an application to cease acting.

Counsel for Defendant recited a litany of circumstances that have delayed the hearing of this suit. He pointed out that on 24<sup>th</sup> February, 2011, the matter was listed for hearing and plaintiff's counsel was again absent. Another counsel holding his brief that day sought an adjournment. Hon. Justice Ojwang then made the following orders:

**“1. the suit be listed for hearing on 14<sup>th</sup> April, 2011**

**2. If the Plaintiffs shall fail to prosecute their suit on that occasion the court may exercise its discretion to terminate the same, by dismissal in favour of the defendant.**

**3. The Plaintiffs shall pay the defendant's costs of the day.**

Counsel argued that any grant of an adjournment now, would amount to reviewing the order of Hon. Justice Ojwang. Further, no good reasons had been given for failure to prosecute or proceed with hearing. The Defendant, he said, was ready to proceed and their witnesses were available.

Upon due consideration of the submissions of counsel, and after perusing the record, I have the following observations.

The first ground concerning counsel's inability to trace his client is a surprising admission, because from the record, I was able to see that on a previous occasion the same reason had been used for inability to proceed. That ground, was also cited as a reason for the second ground. On that ground, counsel's desire to withdraw, for lack of instructions, is in itself an indication and confirmation that the plaintiff is unable or unwilling to proceed with prosecution of its claim. It may be a ground for dismissal of a suit, or for withdrawal of an advocate. It may explain dilatoriness, inaction and undue despatch. That ground must, however, fail as a ground for an adjournment.

The courts are obliged, under Article 159(2) of the Constitution, to exercise judicial authority guided by the principle that justice shall not be delayed. Since judicial authority is constitutionally derived from the people, its exercise in courts must be through a collaborative effort between judicial officers, including counsel, and necessarily also, the parties.

So, there is an underlying rule of complementarity, so to speak, in respect to expedition in the justice system: the courts, parties and counsel, must work together to expedite justice, and forestall delay.

On the second ground of the application, Order 9 Rule 6 provides for a party, in this case the plaintiff in the matter, to give a notice of change of advocates and to serve every other party, in this case the defendant.

Where counsel wishes to withdraw for lack of instructions or otherwise, there is no legal provision that constrains him from withdrawing, or that requires him to seek leave to file an application for withdrawal. All that is required under Order 9 Rule 13 is that, if the party for whom he acts has not given notice of change of advocate, then he should do so. He must notify that party, on application to the court by summons in chambers, for an order to the effect that he has ceased to act for that party. The proviso to Order 9 Rule 13(i) states that the counsel will continue to be considered an as advocate for the party unless and until the advocate complies with the following conditions:

- **that he serves on every party to the cause the order**
- **that he has caused the order to be entered in the appropriate court**
- **That he has left at the court a certificate signed by him that the order has been duly served.**

Subject to the foregoing, the counsel is considered the advocate of the party until conclusion of the cause.

From the foregoing, there is no requirement for counsel to apply to the court to withdraw. What counsel should have done was to file the chamber summons application, obtain the requisite order serve it on the client and file a return of service of the same. Accordingly, the second ground for adjournment also does not hold, and is hereby dismissed.

On the foregoing application, I was minded to exercise my discretion to summarily dismiss this suit on failure of the plaintiff's application for adjournment. I am of view that my learned Senior brother Hon. Justice Ojwang (now JSC) had in mind Order 17 rule 2 when he made the Orders of 24<sup>th</sup> February, 2011. They are not here for review, nor were those orders issued as decorations for the file. No suit should run amok for years on end, without getting to the core and substance of the real issues in dispute for resolution.

As I said, I was minded to dismiss this suit. However, upon perusal of the earlier judgments dated 18<sup>th</sup> June, 1997 and 15<sup>th</sup> February, 2000 of my Senior learned sisters Ladies Justices Angawa and Khaminwa, respectively, I see that they found both parties guilty of delay and of resorting to technicalities. Further, I note that, after Justice Ojwang's said orders of 24<sup>th</sup> February, 2011, the parties attended on 14<sup>th</sup> April,

2011 and the matter was listed for hearing on 13<sup>th</sup> June, 2011.

On that day both parties attended, but one of the plaintiffs was unwell with a fractured hip. It is not clear from the record whether that person was a witness or is the only witness for the plaintiff. But the matter did not proceed and was listed for mention on 17<sup>th</sup> June, 2011. On that day counsel for the Defendant was absent and the matter was stood over generally. The matter was again fixed for hearing on 17<sup>th</sup> September, 2011. On 30<sup>th</sup> August, 2011 the matter was taken out of the cause list for 17<sup>th</sup> September, 2011 because my learned Senior Sister Lady Justice Odero was assigned leadership in the newly established Criminal Division. On 13<sup>th</sup> September, 2011 the matter was listed for hearing on 8<sup>th</sup> November, 2011, and is now before me. I have recited the foregoing movements on the file to reinforce the fact that it is not only one party that has been guilty of delay. Hence my hesitation to immediately dismiss the suit.

Accordingly, and in order to ensure that judicial time is in future properly spent, I will order that a meeting is held in my chambers with both counsel and/or the parties on a date to be agreed with counsel, to take proposals on, and determine how this case shall move forward and henceforth be managed.

Costs in the cause.

**Dated and Delivered this...16<sup>th</sup> Day of ...November... 2011.**

**R.M. MWONGO**

**JUDGE**

Read in open court

**Coram:**

1. Judge: Hon. R.M. Mwongo

2. Court clerk: R. Mwadime

In presence of parties/Representative as follows:

- a) .....
- b) .....
- c) .....
- d) .....