



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Civil Suit 72 of 2007

MAXINT'L & CO. LIMITED.....PLAINTIFF

VERSUS

BRUNO PEZIZOTTADEFENDANT

RULING

The application dated 30th July 2009 seeks that the plaintiff's application dated 16th July 2009 be struck out with costs to the plaintiff. It is made under section 3A of the Civil Procedure Act and section 3(1) of the High Court Vacation Rules.

It is premised on grounds that:-

1. The defendant's Notice of Motion dated 16-7-09 is scandalous, vexatious and otherwise a gross abuse of the court process.
2. The purported new evidence discoursed under which the Defendant has now involved the Review powers of the court, were within the knowledge and/or possession of the defendants and/or his Counsel, at the time the Ruling/Order was made and the prior period thereto as can be confirmed from the court record.
3. In any case, the defendant and his Counsel have not presented any new evidence discovered at the time of the Ruling/Order was made or subsequent thereto which after the exercise of due diligence, was not within the defendant's or his Counsel's knowledge or possession as can clearly be seen from the court record.
4. The issue of the validity of proceedings and judgment in CMCC No. 18 of 2004 was raised and adequately addressed during the hearing of the plaintiff's application dated 20th January 2009 and the court made a ruling on the 8th June 2009, so the matter is Res Judicata
5. There has been unreasonable delay on the defendant's part – coming to court almost three months after the ruling and is n afterthought full of malice and only meant to frustrate the plaintiff/applicant.

The application is supported by the affidavit of David Mwangi Muiruri (a director of the applicant company) in which he reiterates the grounds on which the application is based and that what Mr. Wameyo, Counsel for the Respondent is trying to do, is to invalidate this court's earlier ruling delivered on 8th June 2009. He repeats the issue of the matter being res judicata and being brought to court after undue delay.

The application is opposed, and the respondent in reply states that the application dated 6th July 2009 sought for a review of the orders made on 17th June 2009 and was made after receiving an affidavit sworn by the trial magistrate M/S JOYCE MANYASI MATU, in civil suit No. 18A of 2004 stating that the proceedings on which this court based its decisions were a forgery and that she was not the author of the said

proceedings.

I will not even go beyond this – what applicant’s counsel has done is attempt to anyone the application dated 30th July 2009 by filing another application – all the issues raised in the affidavit ought to be contained in a replying affidavit to the application dated 30th July 2009 and I will not delve into any of the arguments raised by either Counsel – to my mind, applicant is abusing he court process by filing a counter application and I decline to entertain the same.

The application dated 16th July 2009 must be heard on its own merits when issues like res judicata, due diligence, new evidence, can be considered in perspective.

The upshot is that the application dated 30th July 2009 is mischievous and is intended to null the rug right under respondent’s feet.

The application is dismissed with costs to the respondent.

Delivered and dated this 22nd day of **February 2010** at Malindi.

H. A. Omondi

JUDGE