



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1096 of 2004

CAPTAIN GAKWELI M. WARRAKAH.....1ST PLAINTIFF/RESPONDENT

KENYA AILINE PILOTS ASSOCIATION.....2ND PLAINTIFF/RESPONDENT

Versus

PAUL GICHINGA.....1ST DEFENDANT/APPLICANT

TIMOTHY NJOROGE.....2ND DEFENDANT/APPLICANT

DAVID MAGWA.....3RD DEFENDANT/APPLICANT

PROCEEDINGS

9/2/2010

Coram: Khamoni J.

Court Clerk: Kabiru

M/s Odari for the Defendants/Applicants

No appearance for the Plaintiffs/Respondents

M/s Odari

Hearing of the Notice of Motion dated 8/6/09. Hearing Notice served dated 17/11/2009 served on 19/11/2009 upon M/s M.M. Uvyu & Company, Advocates, as seen from the process server's affidavit of service dated 30/1/2009. I would like to proceed with hearing of that application. The Counsel Mr. Musila from that firm of Advocates who was coming to court for the Plaintiff became sick and subsequently passed away. Since then no Advocate has been appearing for the Plaintiffs who have also not been coming.

Court:

From what learned Counsel M/s Odari is telling me, it could be that there is now no communication between the Plaintiffs or their family and their Advocates in this matter. In the circumstances, I will not hear this Notice of Motion to-day.

Instead, I do hereby direct that hearing Notice be served upon the firm of M.M. UVYU & CO. Advocates as well as upon the Plaintiffs personally where possible including members of the family of the Plaintiff who is alleged to have died.

Accordingly hearing of the Notice of Motion be on 22/3/2010. Hearing Notice to issue.

J.M. KHAMONI

JUDGE

9/2/2010

22/3/10

Coram: Khamoni J.

Court Clerk: Kabiru

M/s Mate for the Defendant/Applicant

No appearance for the Plaintiffs/Respondents

M/s Mate

It is hearing of the Notice of Motion dated 8/6/2009 Grounds of the application seen on the face of the Notice of Motion supported by the Supporting Affidavit, of Paul Gachinga dated 8/6/2009.

I rely on the grounds and the affidavit.

The application apart from seeking orders that suit by the 1st Plaintiff is abated also seeks to have the whole suit dismissed for want of prosecution.

Last hearing dated 15/3/2006. 1st Plaintiff passed away in August 2006. A period of more than one year elapsed and therefore this suit has abated.

We are entitled to costs.

That is all.

J.M. KHAMONI
JUDGE

Court:

Ruling on 26/3/2010

RULING

This is a Notice of Motion filed by the Defendants praying for orders

- “1. THAT this Honourable Court do find that the 1st Plaintiff’s suit against the Defendants has abated.**
- 2. THAT the 1st Plaintiff’s estate do pay the Defendants/Applicants the costs incurred in defending the suit.**
- 3. THAT the suit herein be dismissed with costs for want of prosecution.”**

The Applicants also want costs of the suit.

The Notice of Motion is brought under Order XXIII Rules 1, 2 and 3 (2) and Order XVI Rule 5 of the Civil Procedure Rules as well as Section 3 A of the Civil Procedure Act.

Prosecuted by M/s Odari and M/s Mate, the Notice of Motion is based on grounds seen on its face as supported by the affidavit deponed by Paul Gichinga on 8th June 2009.

The matter first came before me for hearing on 9th February 2010 but since there was no appearance for the Plaintiffs/Respondents where service was said to have been effected, I declined to hear the Notice of Motion on that day in the absence of the Plaintiffs/Respondents and directed what I thought would be better service to get at least, someone appear for the Plaintiffs/Respondents. What I said is seen in the court record dated 9th February 2010 above when I moved the hearing date forward to 22nd March 2010 to allow time for service to be effected as directed.

When the matter was returned to me on 22nd March 2010, there was no change with regard to the Plaintiffs because again nobody appeared for the Plaintiffs/Respondents. On that day, learned Counsel M/s Mate replaced learned Counsel M/s Odari, for the Defendant's Applicants, saying the two were from the same firm of Advocates M/S ISEME, KAMAU & MUEMA, Advocates.

A new affidavit of service dated 15th March 2010 had been filed on 16th March 2010 and there was also a copy of an un replied letter from M/s Iseme, Kamau and Muema Advocates dated 1st March, 2010 addressed to Hon. Chirau Mwakwere as a family member to the 1st Plaintiff. Service of the hearing Notice had been effected upon M/s M.M. UVYU & CO. Advocates and the Kenya Airline Pilots Association.

All that having been done, I had to listen and hear the Applicant's Counsel on the Notice of Motion in the absence of the Respondents and from what the learned Counsel brought to my attention, I find no good reason why the Notice of Motion should not be granted: if no steps have been taken to set the suit down for hearing since 15th March 2006 and the 1st Plaintiff passed away in August 2006 and no application has been filed for the Deceased's personal representative to proceed with the suit. It is in the best interest of justice to have this matter concluded.

Accordingly, the Notice of Motion dated 8th June 2009 is hereby granted as prayed with costs.

Dated this 26th day of March 2010.

J.M. KHAMONI

JUDGE

Present:

Iseme, Kamau & Muema, Advocates

Court Clerk: Kabiru.