



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Suit 53 of 2007

GODFREY KATANA.....PLAINTIFF
VERSUS
SURINDER SINGH BIA NTDEFENDANT

RULING

The application for consideration is dated 24th September 2009, made under the provisions of Order X Rules 11A and 20 and Order L Rule 1 of the Civil Procedure Rules; seeking that the suit be dismissed with costs for want of prosecution and costs be awarded to the defendant in any event.

It is premised on grounds that:

- a) The plaintiff has failed to comply with Order X Rule 11A (1) of the Civil Procedure Rules.
- b) The plaintiff has failed to comply with the order of the court made on 9th June 2009 in respect of discovery of documents.

The application is supported by the affidavit sworn by Abdulhazeez Nooran, who is the applicant's counsel that the plaintiff filed this suit against defendant, seeking:

- a) vacant possession of plot No. Chembe/Kibambamshe/271
- b) general damages
- c) costs and interest

On instructions of the defendant, counsel entered a appearance on his behalf and filed a defence and counterclaim on 30th October 2007 – which was served on the plaintiff's counsel on the same day.

The plaintiff did not reply to the defence and counterclaim; whereupon, pleadings closed on 14th November 2007.

In the circumstances, the plaintiff was under an obligation to file and serve a list of documents on or before 14th December 2007 in accordance with Order X Rule 11A of the Civil Procedure Rules – the plaintiff failed to serve that list of documents to date.

Notwithstanding this, the applicant's counsel wrote to plaintiff's counsel inviting him to fix a mutually convenient date for the hearing of the suit in the registry – which invitation the plaintiff's counsel received under protest on grounds that

issues and documents had not been settled. Nevertheless, the suit was fixed for hearing on 9th June 2009 and a hearing notice was served.

On 9th June 2009, when the suit was called out in court, a representative of the plaintiff's counsel indicated that the hearing could not proceed since discovery had not been carried out. The court then ordered parties to exchange lists of documents within 21 days from that date. So in compliance with that order, the defence counsel filed and served the defendant's list of documents on 24th June 2009 and the same is produced and marked AN4.

The plaintiff still did not file and serve his list of documents to date, which applicant terms as amounting to willful default and causing the defendant commence prejudice and undue hardship as the suit and counterclaim cannot proceed to hearing. He therefore urges the court to dismiss the suit as defendant is not been on prosecuting the case and defendant will suffer prejudice if the suit is not dismissed.

There was no response filed to the application which proceeded after a concerted effort by the respondent's counsel to have the same adjourned, had failed.

Mr. Noorani, on behalf of the applicant submitted that, due to the respondent's failure to comply with the provisions for interrogations/inspection of documents, then the suit should be dismissed.

He urges this court to consider the provisions of Order X Rule 11A and cites the case of **Chipchase v Rosemond (1965) All ELR Vo. 1 at pg 7** which held that a party has a right to obtain an order for discovery and the provisions for dismissal was available on default in making the automatic discovery provided in the rules.

Mr. Noorani urges this court to adopt the holding in this English decision, saying that although it is within the English jurisdiction, the provisions of the English law are similar to the Kenyan one and the principles considered apply in our situation and could be adopted in ordering for dismiss of the suit.

Secondly the fact that the respondent failed to comply with the court order which required him to file list of documents and proceed to discover within 21 (twenty one) days entitles applicant to prayers sought. He has cited the decision in **HCCC 1455 of 1997 (Milimani) – Coastal Agriculture Ltd v National Bank of Kenya and others**, to support his argument.

To bolster the position herein, Counsel has cited the decision in **C.A 176 of 2007 (Msa, Omar Sharriff t/a Kemco Auto v Freight Forwarders Ltd and Console Base Ltd** which held that a formal application is necessary when seeking for dismissal for failure by a party to act – which is why applicant has filed a Notice of Motion, and no justification has been given nor has plaintiff sought extension of time within which to file the documents.

Mr. Mouko who appeared for the respondent opted not to say anything in response, having been restricted by the court to responding only on issues of law.

There is no dispute that the pleadings closed on 14-1-07 and that todate, the respondent has not filed any list of documents and no discovery has been made.

It is also apparent that when the matter came up for hearing on 9th June respondent was opposed to court proceeding on

the self same reason that discovery had not been done. It is also on record that the court gave a limited period within which parties were to comply and file documents and carry out discovery – the period was limited to 21 days. As at the date of hearing the application, respondent had not complied with the orders. Could this warrant dismissal of the suit for want of prosecution?

The provisions of Order X Rule 11A(1) of the Civil Procedure Rules reads as follows:

“Notwithstanding anything contained in rule 11, within one month after the pleadings are close din a suit in the High Court, every party shall make discovery by filing and serving the opposite party, a list of documents relating to any matter to any matter in question in the suit which are or have been in his possession or power”

This is the provision that the respondent has failed to honour and despite applicant taking steps to file and serve his list of documents thereby fulfilling the provision under Order X Rule 11 A (2), this has not elicited any positive response, hence the subsequent orders by the court under rule 11A(3) that;

“On the default of a party to comply with subrule (2) application may be made to the court for the fixing of a time limit within which the party must comply with subrule (1)”

This court set a time limit, but even this did not jolt the respondent into action.

What should the result of this seeming indifference be – should the entire suit be dismissed – is there such a provision.

Mr. Noor Ali suggests that the court adopts the approach used in the English decision in **Chipchase** (infra) and dismiss the entire suit! A reading of that case discloses that under the English Statute there is specific provision under RSC Order 24 Rule 17(1) for a party to apply for dismissal of the suit where a party fails to comply with the automatic obligation to make discovery.

However closer home, there is the case of **Coastal Agriculture Ltd** (infra) here the defendant sought to have the plaintiff’s suit dismissed for failing to comply with an order for discovery and inspection of documents, and also for failing to make full discovery of all the documents in its list.

The court allowed for dismissal of the suit, pointing out that court orders must be obeyed, and also taking note that the respondent did not even apply for extension of time limited by the order given, which caused the learned judge Hon. Waweru J, to infer that it indicated that plaintiff did not intend to comply with an order of the court. In so dismissing the suit, the court referred to Order 10 rule 20 Civil Procedure Rules which states:-

“Where any party fails to comply with an order to answer interrogations or discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if defendant, to have his defence struck out and be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect, and an order may be made accordingly.”

That indeed captures the situation here and the applicant sought such orders under Order X Rule 20 Civil Procedure Rules.

I will only borrow from my brother Justice Waweru and say as follows – dismissing a suit is a very drastic step, if the respondent had sought for extension of time within which to comply, I would have granted the same, albeit with a penalty of costs – but this hasn't been done and I cannot award what has not been sought. There has been no attempt whatsoever, by the respondent to explain what may have led to the non-compliance, and I can only infer that the loud silence demonstrates an unwillingness to comply and I am appropriately guided by the provisions of Order X rule 20 – there is merit in the application and the same is allowed, the result being that plaintiff's suit as against the defendant/applicant is hereby dismissed with costs to the applicant/defendant.

The plaintiff/respondent shall bear costs of this application.

Delivered and dated this **4th** day of **March 2010** at Malindi.

H. A. Omondi

JUDGE