



counsel, that the applicant's appeal came up for hearing on **16<sup>th</sup> January, 2008**: and a judgment was delivered on **25<sup>th</sup> January, 2008**. The deponent believes to be true the advice of her counsel, that the date **21<sup>st</sup> March, 2008** was taken for hearing the application for trial directions: and the parties were ordered to file their sets of trial issues, and lists of documents – but the plaintiffs, to-date, have not filed these documents.

The deponent avers that “save for appearing at [the stage of] directions, whose date was taken by the [applicant], the plaintiffs have taken no positive steps in furtherance of these proceedings, and that it would be safe to conclude that they have lost all interest in pursuing the same”.

The deponent deposes that the plaintiffs have not dealt responsibly with the suit property: they have encroached into areas in respect of which they had no claim originally.

The deponent avers that the delay in the conduct of the suit proceedings has occasioned prejudice to the applicant which has lost, through death, a key witness, **Hon. Darius Mbela**, on **6<sup>th</sup> October, 2007**.

Learned counsel for the applicant, **Mr. Mwakisha**, submitted that the plaintiffs had moved the Court in January, 2004 seeking, as against 1<sup>st</sup> defendant, an order that they be declared to be owners of parts of the suit land which were registered in the name of 1<sup>st</sup> defendant; and indeed, they had obtained *ex parte* restraining orders against 1<sup>st</sup> defendant on **21<sup>st</sup> January, 2004** – the same being confirmed after *inter partes* hearing.

Counsel urged that it had become clear, at the stage of seeking directions for an Originating Summons suit, under Order **XXXVI**, rule 8A of the Civil Procedure Rules, that the plaintiffs had no intention of prosecuting their case up to the end. Although 1<sup>st</sup> defendant filed an appeal against interlocutory orders made in favour of the plaintiffs, it did not seek stay orders; and therefore, counsel urged, there was no reason for the plaintiffs not to prosecute their suit, while the appeal remained pending. But instead, the plaintiffs “went to sleep from the moment this Court disposed of their application for interim relief, save for the brief period during which they filed, on **4<sup>th</sup> May, 2004**, the application for directions”. Once the plaintiffs lodged the application for directions, they failed to be represented in Court, for the same to be heard; and it was at the instance of 1<sup>st</sup> defendant that the matter was later relisted. On the occasion of disposing of the summons for directions, the Court made orders requiring framed trial-issues, and lists of documents: but the plaintiffs provided no such documentation until they were served with the instant application, when they now filed the same, on **11<sup>th</sup> December, 2009**. Such belated action, counsel urged, was but “a token act intended to provide an answer....to the applicant's application”.

**Mr. Mwakisha** exemplified the dilatoriness of the plaintiffs on the basis of the Court of Appeal Record: Civil Appeal No. 106 of 2004 – **Maruma Holdings Co. Ltd v. Juma Abdalla Mwazuzu and others**.

The following passage in that judgment may be noted (this was on 25<sup>th</sup> January, 2008):

**“We agree with the learned Judge's remarks. If the parties had taken the learned Judge's advice seriously, we think that the main suit would have been determined by the High Court by now. We would, perhaps, have been called upon to deal with the final appeal. As matters stand now, the end is not in sight.”**

Learned counsel submitted that even at the hearing of the said appeal, the plaintiffs failed to turn up, and for no stated reason; and after the Court of Appeal handed down its judgment, it took another two years to get the plaintiffs to take any further action; when they were served with the instant application, the plaintiffs, entirely on their own, fixed a hearing date, **to coincide with the date of the instant application for dismissal of the suit for want of prosecution**; and the plaintiffs now went further, and belatedly filed their set of trial issues and their list of documents.

Counsel urged that the plaintiffs' belated actions to prosecute their suit, be overlooked: for the instant application, which was filed on **18<sup>th</sup> November, 2009**, was filed on the basis of “an existing state of facts”. Counsel urged:

***“It is, we submit, the facts in existence as [at] that date [18<sup>th</sup> November, 2009], and only those facts, that the Court is bound to take into account in determining the propriety or otherwise of the application.”***

Counsel questioned the plaintiffs’ further actions “such as the abrupt fixing of a hearing date and [the] filing of a list of documents”, as acts which “cannot be the basis upon which the application is considered”, “for it would render meaningless the safeguards intended by the drafters of Order XVI, rule 5 if every time an indolent litigant was confronted with an application under the rule, however well founded, he was able to find an escape [route] by merely making token attempts to progress his suit”.

**Mr. Mwakisha** submitted that once an application, such as the instant one, is filed, “it must first be considered on the facts existing at the time of filing, before the offending litigant is allowed to make any moves”.

Counsel urged that failure on the part of the Court Registry, and mischief on the part of the plaintiffs, were evident, where the plaintiffs purport to be actively prosecuting their case only after gaining full knowledge that (i) there was an application for dismissal of the suit, and (ii) the said application already had a hearing date; and counsel urged it to be wrong practice that the plaintiffs should, in those circumstances, superimpose their hearing date upon the date already fixed for hearing the application.

After dealing with apparent “wrongs” in the plaintiffs’ initiative; the inordinate delay in prosecuting the case; the lack of explanation for the same; and the recorded anxiety of the Court of Appeal, about such dilatoriness, learned counsel considered the more practical question of **resulting prejudice to the applicant**: (i) the delay has coincided with the death of the director and principal witness of 1<sup>st</sup> defendant; (ii) the temporary injunction which the plaintiffs enjoyed for the several years of delay, has been treated as “a trespass charter”, enabling the plaintiffs to “move into new areas of the suit property,....contrary to orders of both the [High] Court and the [Court of Appeal]”.

The Court of Appeal, in Civil Application No. Nai 236 of 2004, **Maruma Holdings Company Limited v. Juma Abdalla Mwazuzu & Others** had favourably responded to an application by 1<sup>st</sup> defendant, as follows:

***“In the result, we think that the applicant has demonstrated merit in its application and is entitled to the orders sought in the first limb of the prayers – that the respondents, their agents, servants or employees shall be restrained from trespassing or entering upon, erecting or continuing to erect new homes or residences or any other structures or dealing in any manner with the suit land, L.R. No. 4752/2, Kwale, pending the hearing and determination of the appeal.”***

Counsel submitted that notwithstanding the said orders by the Court of Appeal, it is clear from the supporting affidavit that the plaintiffs have continued to encroach into new areas of the suit property; the actions of the plaintiffs were in departure from the orders of both the Court of Appeal and the High Court (**Khaminwa, J**, on 26<sup>th</sup> April, 2004). In so far as the plaintiffs have proceeded with such infractions of Court orders, counsel urged, they apparently satisfied themselves with the temporary injunction which they had won, and saw no further need to prosecute their suit: hence the instant application for dismissal of the suit.

**Mr. Mwakisha** urged that the unexplained delay in prosecuting the suit has occasioned undue prejudice to 1<sup>st</sup> defendant: and that in these circumstances, the suit should be dismissed for want of prosecution.

The plaintiffs’ response comes in a two-paragraph document in which the contention is that –

***“the mistakes of their counsel in delaying [compliance] with the discovery process ought not to be visited upon them as they have always been desirous of ventilating their case in a full hearing.....”***

Through the firm of M/S. M. S. Shariff & Co. Advocates, the plaintiffs contend that –

***“it is in the interest of justice that all parties be accorded the opportunity to ventilate their case and they.....urge this Honourable Court not to shut them from accessing the seat of justice”.***

The plaintiffs ask the Court to dismiss 1<sup>st</sup> defendant’s application with costs.

The brief written submission comes packaged with suit papers already referred to, which ought to have been filed at least two years ago: a set of trial issues; a list of documents; the replying affidavit of **Jumaa Abdalla Mwazuzu**; a hearing notice which coincides with the date given for hearing 1<sup>st</sup> defendant's application.

In a cursory affidavit (sworn on **9<sup>th</sup> December, 2009**) the principal plaintiff, **Jumaa Abdalla Mwazuzu** thus avers:

**"3. THAT my co-plaintiffs and I have always been keen on prosecuting our case herein and I am advised by [my advocate] that the suit herein has been listed for hearing on 1<sup>st</sup> March, 2010....."**

**"4. THAT in [the] light of the matters aforesaid it is only fair and just that this Honourable Court allow us to ventilate our case in a full hearing and I therefore beseech this Honourable Court to accord us that opportunity by disallowing this application with costs."**

It is a matter of record, remarked notably by the Court of Appeal in January, 2008, that the course of trial was typified by dilatoriness; and, quite clearly, this was a call in the first place, to **the plaintiffs**, to prosecute their case in a business-like manner. Already there had been lethargy in prosecuting the suit, and this by itself would have justified an application for dismissal by 1<sup>st</sup> defendant; but when the highest Court now remarked the impropriety of delay, the **duty to prosecute** was raised in level: yet, still, the plaintiffs took no action. There was no justification for inaction, as the plaintiffs certainly realise. The plaintiffs have filed no real evidence, to meet the depositions from the applicant's side. All the plaintiffs say is that they blame their advocate for not taking the necessary prosecution steps timeously; but their statement does not, in my view, carry any conviction.

This Court is still more anxious about the conduct of the plaintiffs in this matter; they have come to Court, in relation to the instant matter, for the main purpose of nullifying 1<sup>st</sup> defendant's legitimate initiative to have the suit dismissed for want of prosecution. Moreover, the plaintiffs have been enjoying certain advantages conferred by interlocutory orders; and it was remiss of them to wallow in those orders without regard to the just claims of 1<sup>st</sup> defendant.

Clearly the stage is set in which a dismissal of the suit for want of prosecution would not lack a proper basis in law.

However, upon examining the Court file as a whole, I have come to the conclusion that this is a lengthy and **complex case**. Such a case, in its litigious elements, should in principle be heard, and disposed of through an expansive ventilation of the evidence. Only in this way would there be a perception of fairness in the mode of disposal. This factor gives the Court a vital **discretion** in determining whether or not a suit is to be preserved and allowed to run the full course. I will apply this discretion to sustain the course of this suit, on certain conditions which I now set out in specific orders: –

- (1) The parties shall take a hearing date for the main suit, and hearing shall begin within thirty (30) days of the date hereof.**
- (2) The plaintiffs shall bear 1<sup>st</sup> defendant's costs in this application.**
- (3) In the event of non-compliance with the first order herein, 1<sup>st</sup> defendant shall have the liberty to make a suitable application.**

**DATED and DELIVERED at MOMBASA this 25<sup>th</sup> day of June, 2010.**

**J. B. OJWANG**

**JUDGE**

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Plaintiff/Respondent: *Ms. Shariff*

For 1<sup>st</sup> Defendant/Applicant: *Mr. Mwakisha*