

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 461 of 2008

**GOVERNORS BALLOON SAFARIS LTD. PLAINTIFF
VERSUS**

SKYSHIP COMPANY LIMITED 1ST DEFENDANT

COUNTY COUNCIL OF TRANSMARA 2ND DEFENDANT

RULING

There are two applications before the Court. The first one is the 1st Defendant's application by notice of motion dated 31st March, 2010, seeking the dismissal of the Plaintiff's suit under **Order XVI Rule 5** of the **Civil Procedure Rules** for want of prosecution. The second application is made by the Plaintiff by notice of motion dated 17th June, 2010, and is made under **Section 3A** of the **Civil Procedure Act**; the inherent powers of the Court; **Order XII Rule 6**; **Order VI Rule 13 (1) (d)**; **Order XLIV Rule 1**; and **Order L Rule 1** of the **Civil Procedure Rules**. It seeks orders that the defence filed by the 1st Defendant be struck out; that the defence and counter-claim filed by the 2nd Defendant be struck out; that judgment on admission be entered in favour of the Plaintiff as prayed in the amended plaint; and that, alternatively, the ruling and order made by this Court on 11th September, 2008, be reviewed and a temporary order of injunction be granted to the Plaintiff as prayed in the Plaintiff's application dated 14th August, 2008.

On 20th April, 2010, the 1st Defendant's application was fixed for hearing on 20th May, 2010. When it was called for hearing, Ms. Oburu appeared for the 2nd Defendant and held brief for Mr. Amoko for the 1st Defendant/Applicant. Ms. Mulwa held brief for Mr. Oyatsi for the Plaintiff/Respondent. Ms. Oburu informed the Court that they had been informed by the Plaintiffs that the latter were not ready to proceed and that the Defendants had agreed to indulge them. By consent, the matter was stood over generally and the parties directed to take a fresh hearing date at the Registry. On 28th May, 2010, the matter was given a date for hearing on 19th July, 2010. It was while the matter was pending for this hearing that the Plaintiff filed its notice of motion dated 17th June, 2010 and was given a hearing date for 14th July, 2010. On the latter date, the Presiding Judge directed that the Plaintiff's application be placed before this Court on 19th July, 2010, presumably because this Court was scheduled to hear the Defendant's application for dismissal of the suit on the said date.

When the two applications came for hearing on 19th July, 2010, Mr. Oyatsi appeared for the Plaintiffs while Mr. Amoko appeared for the 1st Defendant and Ms. Ojiambo appeared for the 2nd Defendant. Mr. Oyatsi suggested to the Court that it would be more convenient for the two applications to be heard together in order to save the Court's time. In his view, it was more economical to take such a route in order to avoid having to hear the same facts twice. This proposal, however, did not endear itself to Mr. Amoko. He argued very strongly that his application had been fixed for hearing in May but did not take off and that Mr. Oyatsi's application was fixed for hearing only the previous week. He contended that the grounds for grant of injunctions and for striking out pleadings were radically different and he therefore urged the Court to hear his application first. Ms. Ojiambo shared Mr. Amoko's sentiments and supported the position that the application which was filed first should be heard first.

I have considered the views of all the Counsel involved. Having done so, I take the view that if the 1st Defendant's application is

successful, it will dispose of the entire suit and there will be nothing left to hear. Consequently, the Plaintiff's application will thereby become redundant. The latter can only be heard if the 1st Defendant's application fails and is safely out of the way. If the two applications are heard together, two problems are likely to arise. Firstly, this may give rise to the wrong perception that by hearing the two applications together, the Court has already predetermined that the 1st Defendant's application is not meritorious since that is the only way by which the Plaintiff's application can stand to be heard. Secondly, and more importantly, I note that in addition to its replying affidavit to the Defendant's application, the Plaintiff has also filed a notice of Preliminary Objection alleging that the 1st Defendant is in contempt of Court and should not be heard in any further proceedings in this suit unless it purges its contempt. Logically, this suggests that the 1st Defendant cannot be heard on the Plaintiff's application until the issue of contempt of Court is resolved. If so, the two applications cannot be heard together.

Arising from these considerations, I find it more prudent to hear the two applications separately. The first in time will take to the stage first. This will not prejudice any of the parties except that the process of hearing the two applications separately will take longer to complete. The parties should accordingly take a hearing date for the 1st Defendant's application by notice of motion dated 31st March, 2010

It is so ordered.

Dated and delivered at Nairobi this 21st day of July, 2010.

L.

NJAGI

JUDGE