



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**CIVIL SUIT NO. 40 OF 2007**

**SERPINI CLARA & 7 OTHERS .....PLAINTIFFS**

**VERSUS**

**MAHICAN INVESTMENTS LTD & 3  
OTHERS.....DEFENDANTS**

**R U L I N G**

By a Notice of Motion dated 8<sup>th</sup> February 2010, made under section 3A and 80 of the Civil Procedure Act Order XLIV and Order L Rule 1 Civil Procedure Rules, the applicant seeks that this court do issue orders for stay of taxation of the Respondent's Bill of Costs and all consequential orders and proceedings thereto. Further that the court do review and set aside its ruling and all consequential orders delivered on 11<sup>th</sup> June 2009.

It is premised on grounds that this court dismissed the plaintiff/applicant's case with costs to the respondents yet there is an error apparent on the face of the record which necessitates review of those orders. It is stated that the taxation and consequential orders may be adverse to the applicant/applicant. The application is supported by the affidavit sworn by Desma Nungo, an advocate who has conduct of this matter on behalf of the applicant. She states that on 11<sup>th</sup> February 2009, the respondents filed an application seeking orders to dismiss the plaintiff's suit for want of prosecution under the provisions of Order XVI Rule 5 Civil Procedure Rules.

The same was successful and was premised on grounds that plaintiffs had deliberately failed to prosecute their application dated 29<sup>th</sup> May 2009 after obtaining interim orders.

Miss Nungo seeks to explain that the status quo was ordered and issued by the court on 14<sup>th</sup> June 2007 when the defendant/respondent counsel sought adjournment of the application dated 29<sup>th</sup> May 2009 which had been scheduled for hearing and when she was ready to proceed. It is her contention that the said interim orders were at no point calculated to achieve mischief at the expense of the dependants, as it was only necessary in the circumstances to presume the status quo and await decision of the court. She is convinced that the court failed to take notice of the fact that it is ordinarily impossible to fix a matter for hearing at the High Court Malindi within three months from the last time it was in court, in view of the number of cases filed in court, and so it was impossible in the circumstances to fix this suit for hearing, when there was an application pending hearing and determination. She faults the court's decision, arguing that the court should have first dismissed the application before directing that the entire suit is dismissed.

Miss Nungo also takes issue with the court's findings regarding the 8<sup>th</sup> plaintiff to represent the other plaintiffs arguing this was not a representative suit.

Whereas Miss Nungo acknowledges that there was delay in prosecuting this current application, she terms the same as a slight delay occasioned by the fact that although the matter was heard on 19-03-09, the court reserved ruling date to be given on notice yet her office was never served with any notice and she only learnt about the ruling when she was served with the defendant's bill of costs on 18<sup>th</sup> December 2009, but then again she forgot to enter the date in her diary because the office was closing for Christmas and she was also handing over to proceed on maternity leave.

The application is opposed, and in a replying affidavit filed by Mr. Gikandi Ngibuini who is acting for the defendant/respondent, he deposes that the plaintiff's application was filed exactly 8 months from the date this court delivered its ruling dismissing the plaintiff's suit for want of prosecution. He also points out that notice of taxation was served on 18-12-09 on the applicant's advocate's firm and the applicant has not explained the cause of the delays, pointing out that all the issues applicant is bringing up now were present and available before the court on 19-03-09. It amounts to a deliberate attempt to mislead the court just so that plaintiff may re-open the pleadings.

He terms the application as a disguise for an appeal where the same court is being asked to sit over its own decision, and this is just because the applicants failed to file a notice of appeal in time or at all and upon realizing the failure to act diligently, now uses this application to cover up.

He further urges this court to read mischief on the applicants' point, pointing out that this application was filed on the very same day that the Bill of costs was coming up for taxation.

Counsel filed written submissions by way of disposing of this matter. The applicant's counsel submitted that there is sufficient cause for review insisting that because there was a pending application dated 4<sup>th</sup> April 2007, then it was impracticable to set down the suit for hearing and the court made an error in finding that the applicant was using the existing status quo in bad faith yet plaintiff/applicant were not deliberately delaying the process purportedly on the basis of enjoying the interim orders.

She also submits that the existence of a letter inviting the defendants to fix a hearing date at least demonstrated the applicant's interest in having the matter proceed and these attempts should have been taken into consideration. Miss Nungo admits that although most of the grounds raised by the applicant are factual and may be proper for an appeal, they may also fall under the bracket of sufficient cause and be recognized as ground for review.

The respondent's counsel points out that the first omission is that the order sought to be reviewed has not been demonstrated as having aggrieved Miss Nungo in any manner.

Secondly, that applicants have not discovered any new and important matter which was not available to the applicant when the matter was being heard. He also submits that the applicant has not shown that there was an error apparent on the face of the record or any other sufficient cause.

He points to paragraph 7, 8, 9, and 10 of Miss Nungo's affidavit and says what Miss Nungo is really telling this court is that it made a wrong decision – in which case it cannot be the same court sitting over a decision to rectify its mistake, and if this approach is allowed, then it means that litigation will never end.

Mr. Gikandi also points out to the eight-month delay in filing this application and argues that equity does not aid the indolent. He urges this court to be guided by the Tanzanian decision of **Mapalala v British Broadcasting Corporation** (no citation given) which dealt with Order XLIII Rule 1 (Civil Procedure Code Tanzania), which is the equivalent of our Order XLIV rule 1 in finding that while there is no aggrieved party, then one of the primary ingredients of reviewing a decision of the court has not been satisfied and the application should be dismissed.

The ruling which has caused apparent grief arose from a Notice of Motion application dated 11-02-08 which was made under Order XVI Rule 5, seeking to DISMISS THE APPLICANT'S SUIT, for want of prosecution – meaning it was asking for the entire suit to be dismissed not just an application. And the

reasons were that it had taken more than a year since the suit was filed and no steps had been taken by plaintiff's to prosecute the suit and there was no explanation for that delay. The issues regarding non availability of dates in the court, regarding the issue of status of 8<sup>th</sup> plaintiff, the unprosecuted Chamber Summons of 4-4-07, the application of 29-05-07, the letter dated 23-08-08, inviting the defendants to taking a hearing date were all considered and taken into account by the court at that hearing and can't be said to be newly discovered matters – if the court made an error on its reason as to why it was not persuaded by those lines, then that is not a matter for review – it is a matter for appeal.

The contents of paragraph 7, 8, 9 and 10 of the affidavit find fault with the court's decision – I cannot put it better than the manner in which Mr. Gikandi has – that is asking this court to rectify its perceived mistake on merit of its decision – review is not the cure here. In fact what Miss Nungo is attempting to do is to patch up the earlier application by way of review, she is actually arguing issues which were within her knowledge and that of the court!!

The upshot is that there is no merit in this application and the same is dismissed with costs of the applicant.

Dated, read and delivered this 2<sup>nd</sup> day of **November, 2010** at Malindi.

**H. A. Omondi**  
**JUDGE**

Mr. ole Kina holding brief for Kanyi for respondent  
No appearance for applicant