



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

ORIGINATING SUMMONS 168 OF 2002

ABRAHAM KAMUYU M'IKIRIMA.....1ST PLAINTIFF

SAMWEL M'NGAI.....2ND PLAINTIFF

STANLEY THIKANYI.....3RD PLAINTIFF

(ON THEIR OWN BEHALF AND ON BEHALF OF OTHER 1000 MEMBERS)

V E R S U S

THE DIRECTORS KIEGOI TEA FACTORY CO. LIMITED.....RESPONDENT

CIVIL PROCEDURE AND PRACTICE

ü *Dismissal of suit for want of prosecution*

ü *Whether court has power to set aside order dismissing suit for want of prosecution, Order XVI rule 6 of the Civil Procedure Rules-*

ü *Civil procedure and practice inherent jurisdiction - exclusion of - whether excluded by express Rule – Civil Procedure Rules Order XVI rule 6 Civil Procedure Act, ss. 81 and 97*

RULING

By a Notice of Motion dated and filed on 4th December 2007, the plaintiffs sought orders of review of the Court's orders made on 14th June 2006 dismissing the Plaintiff's suit for want of prosecution. Importune +- +-

The application dismissed is not merely any interlocutory application but in fact the Plaintiff's Originating Summons dated 16th September 2002 in which the Plaintiff sought two orders that:

(a) The directors of the Defendant be compelled to call an annual general meeting immediately and allow the members to make the necessary resolutions and recommendations since the annual general meeting called on 15.04.2002 failed to take off; and

(b) Costs of this suit be paid for by the Defendant/Respondent.

That originating summons was supported by the Affidavit of the First Plaintiff sworn on 16th September 2007. There was a Replying Affidavit sworn on 28th October 2002 by Frederic Ntongai Miburi who stated that he was the Chairman of the Defendant company and that an annual general meeting was held on 15th April 2002 between the hours of 9.30 a.m. and 5.30 p.m. and minutes were recorded by C.M. GITHIGE the company secretary, and attached a copy of the unconfirmed minutes to the affidavit as exhibit marked FNM 1. A Further Replying Affidavit was also sworn by C. M. Githige on 28th October 2002 and filed on 29th October 2002 and he deponed that indeed the Annual General Meeting was held as scheduled on 15th April 2002.

By a Chamber Summons dated 20th January 2003 and filed on 27/01/2003 the Plaintiffs sought injunctive orders against the Directors of the Defendant on the grounds that they were holding office without authority of the shareholders.

That application was opposed by a way of Preliminary objection on a point of law dated 29th January 2005, and the Replying Affidavit of Fredrick Ntongai Mibwi sworn on 29th January 2003. That Chamber Summons was not however heard until much later as will be shown below. In the meantime Originating Summons of 16.09.2002 was heard by Hon. Mr. Justice Kasanga Mulwa on 5.02.2003 and in a Ruling delivered on 10th February 2002 the learned Judge directed that the allegations of mismanagement be investigated by a person agreed to by all the parties and make his report to the court and that the directors facilitate such a person to carry out the investigation, costs were to be in the cause. By a consent order made on 6.02.2003 the firm of Wachira Irungu & Company Accountants were appointed to audit the accounts of the Defendant Company, and that they were to start work immediately and make a report within one month.

In the event the said firm carried out its investigations into the Defendant's financial affairs for the financial year ended 30th June 2001 and concluded that the sum of Ksh.3,076,574/- alleged to have been misapplied by the Directors was not expenditure but was a component of the tax liability for the company for the year 2000/2001. They offered the opinion that the amount was correctly treated in the books of the Defendant company.

By an order made on 13.02.2004 the court (Hon. Mr. Justice Onyancha) directed that the auditors report be supplied to the parties on payment of fees. From the record no further action was taken by either the Plaintiffs or the Defendants, but each party sought to have the originating summons of 16.09.2002 heard. On 5.2.2003, Mr. Kirima learned counsel for the Plaintiffs had applied to court to have the Originating Summons be treated as a suit and the court ordered the Originating Summons be treated as a Plaint and the Replying Affidavit be treated as a Defence. Although there was no specific order to that effect the parties have moved on the basis that the Originating Summons is a Plaint, and the Replying Affidavit is regarded as a Defence.

So when the matter (OS) came for hearing before the Hon. Lady Justice R. N. Sitati on 14.06.2006 the same was, in the absence of Mr. Kirima learned counsel for the Plaintiffs, dismissed for want of prosecution and non-attendance.

According to the record of that date, the matter had been fixed for hearing by the Defendant's counsel in the absence of the Plaintiffs' counsel but had served them (plaintiffs' counsel) with a notice on 27.02.2006 and which notice he was said to have been acknowledged. The record further shows that the Plaintiffs' Advocates also applied for adjournment when the matter was last in court on 9.11.2005. In the absence of the Plaintiffs' Advocate, two of the Plaintiffs, Jeremiah Mutuma and Susan Ntongai owned up and said they did not know where their Advocate was.

Thereafter the court noted that the Plaintiffs' Counsel's absence was unexplained and that **“if indeed he was at Maua Law Courts this morning and wants the court to believe that he is involved in personal matters the court cannot grant the orders sought. The Application to proceed.”**

Again, according to the record of that date (14.06.2006), Mr. Arimba, learned counsel for the Defendant said:-

“In the circumstances, I pray that the application dated 16.09.2002 be dismissed with costs to the Respondent for non prosecution and non-attendance”

And the court said-

“The application before me was filed back in September 2002. The same has not been prosecuted to date”.

And ordered:

ORDER: “Application dated 16.09.2002 be and is hereby dismissed for want of prosecution with costs to the Respondent”.

It is that order which the Plaintiffs now seek to have reviewed or in the alternative set aside.

The Application was premised on the grounds that the order dismissing the application of 14.09.2002 was made ex-parte despite the presence of two of the applicants, that there is some mistake and error apparent on the face of the record, that the court should not have dismissed the application for want of prosecution without following the laid down procedure, that the Applicants should have been allowed to proceed with the application, that the Advocate who is an officer of the court betrayed the Applicants, and that it is wrong for the court to punish the applicants for the wrong and unprofessional conduct of their Advocate. Those were the Applicant’s arguments.

The application is expressed to be brought under the provisions of Sections 3, 3A, 63 and 80 of the Civil Procedure Act (Cap 21, Laws of Kenya) and Section 60 of the Constitution of Kenya), Order XLIV, Rule 1, Order IXB rule 8 and Order XXI rule 22 of the Civil procedure Rules.

I will analyze each of those provisions commencing with prayer for stay of execution of taxation costs, premised upon the provisions of order XXI Rule 22 of the Civil Procedure Rules.

I think that prayer is incompetent. Order XXI rule 22 of the Civil Procedure Rules only applies in cases where a decree has been sent from the issuing court to another court for execution. This is not the case in this matter. The prayer for a stay of execution of the taxed costs is therefore declined and any orders of stay are vacated forthwith.

Section 60 of the Constitution is the **fons et origo** of the court’s unlimited and original jurisdiction in the civil and criminal matters. Section 3 and 3A of the Civil Procedure Act reiterate this power. Section 63 of the said Act provides for situations for the exercise of the courts power of review to meet the ends of justice. Section 80 of the Act is a provision which enables the court to make corrections to minor errors such as in names or minor calculations. There is no question that the court has awesome powers to review, set aside, and make such other orders as may meet the ends of justice. The question here is therefore whether the court should exercise those powers, under either the provisions of Order IXB rule 8 or Order XVI rule 6 of the Civil Procedure Rules.

Order IXB of the Civil Procedure Rules is entitled ‘Hearing and **Consequences of Non Attendance**. Rule 8 of the said Order provides for **Consequences of Non-Attendance of Hearing**. If only one party attends he may apply to have the case dismissed. If the case is so dismissed the court may set aside the order of dismissal under rule 8 thereof and on terms to be set or determined by the court.

In this case however, the court also dismissed the case for non prosecution under Order XVI, rule 6. Where a suit is dismissed for non prosecution, the remedy available to a party, or plaintiff, is to file a fresh suit. However in the case of **RAHWAL VS. THE MOMBASA HARDWARE [1968] E.A. 392**, the Court of Appeal for Eastern Africa held that the remedy provided for in Order XVI rule 6, (that is of

bringing a fresh suit) was not intended to be exhaustive and the inherent jurisdiction vested in the court by section 7 (now 3A) of the Civil Procedure Act was for that reason not excluded.

Sir Charles Newbold P while agreeing with the lead judgment of Law J. A. and with which Sir Clement De Lestang V.P. also agreed referred to Section 97 (now s.3A) of the Act aforesaid which reads:-

“3A Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice and to prevent the abuse of the process of the court”.

The learned President of the court then continued at page 394.

“It is I think important to consider carefully the obvious intention that nothing in the Act should prevent a court from exercising its inherent powers in such manner as would be necessary to prevent injustice. What is sought to do in this case is to say that a provision in the Rules precluded the courts from taking action which may result in preventing injustice; and it is to say that this position arises by reason of rules made under the same Act in which s.97 (s.3A) appears. Section 81 which is the section giving power to make rules says that those rules shall not be inconsistent with the provisions of the Act. Surely if one were satisfied that the effect of the Rules construed in a particular way would be to result in injustice then the provisions of Sections 81 and 97 (3A) clearly show that the Rules should not be construed in a such a manner”.

The Court of Appeal for Kenya came to the same conclusion in the case of **BANDALI t/a SHIMONI ENTERPRISES VS WILLS** [1991]K.L.R. 469 when it held **inter alia** that **“there is inherent power to restore a case after it has been dismissed under case Order XVI rule 6.”**

Those are the authorities, or cases upon which Rtd Justice Rimita learned counsel for the Plaintiffs relied while canvassing the Plaintiffs application for restoration of the case under Order XVI Rule 6.

Whereas it is clear from both the provisions of Section 60 of the Constitution, Section 3A of the Civil Procedure Act, and the cases cited that the court does indeed enjoy unlimited original jurisdiction, and inherent power to make orders so as to prevent injustice to any party, in the circumstances of this case I decline to exercise such power. **Firstly** because this was a matter commenced in September 2002, and for five years down memory lane to 4.06.2006 counsel for the so called 1000 plaintiffs have taken no steps to prosecute the case and even when the Defendant’s counsel takes steps and sets down the case for hearing and serves him with a hearing notice he does not even extend the normal and expected Advocate to Advocate courtesy, and say he would be in difficulty, and would be unable to attend court. He virtually misleads his clerk to tell his colleague that he was attending to personal matters whereas in fact he was attending to clients in the lower court at Maua Law courts. **Secondly** no injustice will be caused upon the Plaintiffs except for the taxed costs which they can recover from their erstwhile Advocate if they think as they seem to, that the Advocate wronged them.

I would for similar reasons not set aside the court’s order dismissing the suit for non attendance under Order IXB Rule 8 of the Civil Procedure Rules.

Lastly I would also not review the case, as there is no error apparent on the face of the record. If by error on the face of the record is meant the presence of two persons who alleged to be parties to the suit, then the dismissal of the suit in their presence, and in absence of their advocate, goes to the exercise of the court’s discretion. If that be so and as Ringera J. as he then was, held in the case of **Eastern and Southern African Development Bank Vs African Green Fields and Others** [2002]2 E.A. 371.

“...the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless (as stated above) the error is apparent on the face of the record and therefore requires no elaborate argument.

An order will not be reviewed because it is shown that he judge decided the matter on a foundation of incorrect procedure and/or that the decision revealed a misapprehension of the law or that he exercised his discretion wrongly in the case”.

Similarly it cannot also be reviewed on the ground that other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed has subsequently arrived at different decisions on the issue, as it was held in the case of **NATIONAL BANK OF KENYA LTD VS NDUNGU NJAU [1996] LLR 469.**

For all those I find no merit in the Plaintiffs’ omnibus – catch all application dated and filed on 4th December 2007 and dismiss the same with costs to the Defendant/Respondent.

Dated, signed and delivered at Meru this 19th day of June 2009.

M. J. ANYARA EMUKULE

JUDGE