



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE 40 OF 2007

SERPINI CLARA & 7 OTHERS.....PLAINTIFFS

VERSUS

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

RULING

The Notice of Motion application dated 11-2-08, is made under Order XVI Rule 5, Civil Procedure Rules and Section 3A Civil Procedure Act, seeking that the applicant's suit be dismissed for want of prosecution and costs be provided for by the plaintiff's.

It is based on grounds that plaintiffs filed a Chamber Summons application under certificate of urgency, a plaint and a verifying affidavit on 29-5-07.

The defendants filed a memorandum of appearance on 14-6-07 and a statement of defence on 04-07-08. It is more than a year since the suit was filed and no steps have been taken by plaintiffs to prosecute the suit, and there is no explanation whatsoever to warrant the continued idleness of this suit.

The application is supported by an affidavit sworn by the applicant's counsel in which he states that there has been a long delay in prosecuting this matter.

It is pointed out that plaintiffs filed this suit under certificate of urgency and obtained interim injunction orders and are no longer interested in prosecuting either their application or the main suit and the applicants have suffered prejudice in time, expenses and anxiety.

In arguing the application, Mr. Muranje for the applicants submits that since 18-2-08 when the matter came up for hearing of the application for an injunction, and the same was stood over generally, no other steps have been taken and there is nothing on the court record to show that plaintiffs have taken any steps. The application is opposed and Mr. Mayaka for the respondent has referred to the replying affidavit filed by D. Nungo. He concedes that the matter last came to court on 18-2-02 when it was stood over generally. He explains that subsequent to that, on 23rd June 2006, the defendant's counsel were invited to fix the matter for hearing on 16-7-08 – as per the invitation letter marked DN2 and a representative from the firm of advocate representing plaintiff's case to the court registry but was advised that the court diary was full for fixing dates for the desired period subsequently, the 8th defendant, who has authority to swear on behalf of the other plaintiffs notified their advocate that his wife had fallen such in Italy and he requested that fixing of hearing date be halted pending his wife's recovery. Meanwhile a bundle of documents was forwarded to the defence counsel for review and perusal – but defence never

responded.

Mr. Mayaka asked the court to take note that the plaintiffs are all Italian nationals and that there were intervening events which took place since it was filed and so this application is actually premature.

Now Mr. Mayaka admits that plaintiff filed suit along with a Chamber Summons dated 4-4-07, which has never been prosecuted because defendants on several occasions applied for adjournment, including a last adjournment sought so as to raise a Preliminary Objection. It is argued that the matter has not been listed due to circumstances beyond the respondent's control and so it should not be dismissed.

In the replying affidavit filed by Desma Nungo, counsel for the plaintiff, she states there hasn't been any unreasonable delay occasioned by the plaintiff. She points out that the plaintiff/respondent's application dated 29-5-07, plaintiff though not under certificate of urgency, as fixed for hearing on 14-6-07, but it did not proceed for hearing because the defendants sought an adjournment, and it was adjourned to 19-7-07.

On 19-7-07, the matter did not proceed because the judge was hosting the Chief Justice who had visited Malindi Law Court Station and it was thus stood over to 20th September 2007 – on that day there was no attendance by defendant

On 15-11-07, the plaintiff sought an adjournment for the first time and the matter was stood over to 18-2-08 but again it did not proceed and was stood over generally after 18th February, Miss Nungo sought instructions from plaintiff with regard to taking of hearing dates and got information that the client would next be in the country in mid November 2008 – a copy of letter to client is annexed as DN1.

When a representative was sent to take a hearing date, it turned out that the 8th Plaintiff (who purportedly had the authority to plead and act on behalf of the other plaintiffs) was leaving the country in mid November 2008 until end of January 2009.

The defendants were thus invited to take a hearing date vide letter dated 23-8-08. However upon getting to the registry it turned out that dates were no longer available as the court diary was full. The 8th plaintiff's wife subsequently fell ill and as a consequence the said plaintiff has not returned to Kenya and has requested that fixing of hearing date be halted awaiting his wife's recovery and his probable returned in 2009 – annexed is a copy of e-mail sent by 8th plaintiff. Meanwhile plaintiff's counsel drafted a list of document and forwarded them to the defendant's advocates by a letter dated 29-1-09 for their review, but there has been no response.

Further that no prejudice shall be occasioned to the defendants since the interim orders that existed have since been overtaken by events.

It is also averred that the application together with the supporting affidavit is defective and bad in law for want of compliance with the mandatory provisions of Order XVI and Order XVIII Civil Procedure Rules.

Mr. Mayaka argued that the plaintiffs herein had taken several steps and that it was only due to circumstances beyond their control, that the matter did not proceed.

These issues are not in dispute.

- a) The suit filed on 29-5-07 has never been prosecuted
- b) The application dated 29-5-07 has never been prosecuted once the applicant obtained interim orders in 2007
- c) From 18-2-08, there has been virtually no activity in this matter at the instance of the plaintiff until defendants filed this application for dismissal.

Under Order XVI Rule 5(d)

“If, within three months after –

(d) the adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set suit down for hearing or apply for its dismissal”.

The applicant took the latter option – Mr. Muranje who argued the application on behalf of the applicant submitted that the gist of the affidavit was really what transpired between the advocate and the 8th plaintiff – that is true. It is now being said that 8th plaintiff had authority to proceed with this suit on behalf of the other applicants.

The court record does not show that any authority was filed for the 8th plaintiff to represent the others in this suit. What is more, the 8th plaintiff has not annexed a single document written by any of the other plaintiffs instructing him to act on their behalf. 8th respondent claims he had to travel out of Kenya in November 2008 – there is not a single document, either photocopy of passport, visa or air ticket to even suggest that in 2008 the 8th plaintiff was in the country at all, or that subsequently, he traveled out of Kenya in November 2008 – a letter by him to that effect proves absolutely nothing.

Then there is the explanation that the court diary for 2008 was full by August 2008 – while this might be true, there is nothing on record to show that was the position (no affidavit by any court official). If the plaintiffs were really keen on taking a date before November 2008, nothing could have been easier than simply writing to the Deputy Registrar requesting that the matter be listed for mention before the judge with view to obtaining early hearing date on priority basis – this just goes to demonstrate indolence and outright lack of diligence.

As for the 8th plaintiff having a sick wife, it is not clear to me why that would affect the hearing of the application in the suit – she is not indicated as being a party in this matter, and even if she was, then it is not shown that all the plaintiffs would be offering her nursing care or indeed that the 8th plaintiff is required to constantly offer her nursing care. But even presuming that 8th plaintiff needed to be near her for emotional support, then where is the evidence that 8th applicant’s unnamed wife as actually ailing – not a single medical document is presented to this court. But worse still is the attitude the plaintiffs seem to have towards matters pending in court – that they should only move at their own whims and convenience hence the indication that 8th Respondent has sought that the matter be halted until his wife recovers and that the will PROBABLY come to Kenya at the end of 2009 – why should this matter come to a shrieking halt just so as to fit in with the plaintiff’s itinerary?

Mr. Mayaka did not argue the technical defect alluded to in the replying affidavit. However I have looked at the provisions of Order XVI and Order XVIII – counsel did not specify which rule under either of the orders has been violated – order XVI has six Rules – and it generally deals with prosecution of suits and adjournments.

Order XVIII has nine rules and deals with affidavits- again it is not indicated which one of the rules has been violated. It is certainly not the duty of this court to go on a wild goose chase hoping to tap onto the wing of a perceived fault.

The upshot is that no valid explanation has been given by the plaintiffs as to why they have never taken any steps towards prosecuting the suit, at the lapse of three months after it was stood over generally.

Consequently, I find that the application has merit and I allow it. The plaintiff’s suit is hereby dismissed under the provisions of Order XVI Rule 5(d) of the Civil Procedure Rules, with costs to the defendants.

Costs of this application shall be borne by the plaintiff/respondents.

Delivered and dated this **11th** day of **June 2009** at Malindi.

H. A. OMONDI

JUDGE

No appearance for parties at 2.50pm.

Delivered in absence of parties.