



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Environmental & Land Case 84 of 2008

CHRISTINE WANGARI GACHECHE.....PLAINTIFF/RESPONDENT

VERSUS

ELIZABETH WANJIRA EVANS.....1ST DEFENDANT/APPLICANT

MOBIL OIL (K) LIMITED.....2ND DEFENDANT/APPLICANT

ATTORNEY GENERAL.....3RD DEFENDANT/APPLICANT

RULING

The plaintiff moved to this court, vide a plaint dated 4th day of March 2008 and filed on the 6th day of March 2008. Summons to enter appearance are dated 7th day of March 2008. Memorandum of appearance for the 2nd defendant is dated 25th day of March 2008 and filed on the 26th day of March 2008. Whereas that of the 1st defendant is dated 31st day of March 2008 and filed the same date.

The defence of the 1st defendant is dated 31st day of March 2008 and filed on the same date. Whereas that of the 2nd defendant is dated 8th day of April 2008, and filed on 10th day of April 2008, followed by an amended one amended on the 15th day of April 2008 and filed on the 16th day of April 2008.

The 1st defendant has moved to this court, by way of a notice of motion dated 24th day of March 2009 and filed on the same date brought under order XVI rule 5(a) and d, order L rule 1 of the CPR and section 3A of the CPA seeking 2 reliefs namely:-

“(1) That this Honourable court be pleased to dismiss the instant suit for want of prosecution.

(2) That the costs of this application and the suit be borne by the plaintiff”

The grounds in support are set out in the body of the application, supporting affidavit and oral submissions in court. The sum total of the same is that:-

-The cause of action arose in Nakuru.

-There are other proceedings pending both in the high court and court of appeal in Nakuru.

-It is over 15 months since the suit was filed and yet the plaintiff has not taken any steps to set down the suit for hearing and final disposal.

-That the plaintiff has never sought any particulars from the 1st defendant.

-That by reason of what has been stated above the suit is an abuse of the process of the court, and it should be dismissed with costs.

In response the plaintiff filed a replying affidavit deponed on the 19th day of June 2009 and filed on the 22nd June 2009 and oral submissions in court, and the sum total of the same is as follows:-

-That they are the plaintiffs herein.

-They deny to have failed to prosecute the suit herein.

-They served request for particulars on the 1st defendant which have not been responded to by the 1st defendant/applicant evidenced by the return of service marked LWG1.

-After sending the said particulars, and failing to file a response from the 1st defendant, they plaintiffs' proceeded to invite the 1st defendant to take hearing dates but the file was missing because it already had a date for the application subject of this ruling.

-That the application is premature as the suit is not ripe for trial as discovery has not been done and completed.

-The discretion under rule 5 is wide and the court, is urged not to exercise the same in favour of the applicant.

-Striking out or dismissing a suit is a draconian measure which should only be used in exceptional circumstances which are absent herein.

-Maintain that they duly requested for particulars which were served and are supposed to be acted on outside the court, and which were not responded to by the applicant.

In further response to the application, counsel for respondents maintained that, the application has no merit as it was meant to forestall an application to strike out the 1st defendants defence due to her failure to file and or respond to the request for particulars.

-Maintain that preliminaries before that such as exchange and filing of documents have not been undertaken and as such the suit is not ripe for trial.

-That since the 3rd defendant has not filed a defence, then pleadings have not closed and as such the suit is not ripe for trial.

In response the applicants counsel stated, they are not to blame for failure of the 3rd defendant to enter appearance and file a defence within 15 days from the date of service upon them of the plaint in order for pleadings to close. They still maintain that the plaintiffs should have taken steps to regularize and ready the suit for trial.

-Maintain that it is their stand that their application is merited.

On the courts', assessment of the rival arguments herein, it is evident that a number of provisions relied upon by either side have featured in the submission and it is only proper that these be interrogated, in order to determine whether they are helpful to either argument or not, and if so why or how. These are

sections 3A CPR. Order 16 CPR, order 10 rule 4, order 6 rule 10, and order 10 rule 11”

These provide:-

“Section 3A CPA. States:- Nothing in this Act shall limit or otherwise affect the inherent power of the court, to make such order as may be necessary for the ends of justice or to prevent an abuse of the process of the court order 6 rule 10 CPR (1) states If there is no reply to a defence, there is a joinder of issue on that defence.

(2) Subject to sub rule (3 (a)).(3) there is at the close of pleadings a joinder of issue on the pleading last filed; and

(b) A party may in his pleading expressly join issue on the immediately preceding pleading.

(3) There can be no joinder of issue on a plaint or counterclaim.

(4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issue, unless in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted in which case the express joinder of issue operates as a denial of every other such allegation. Order 10 rule 4- interrogatories shall be in form No. 2 of Appendix B with such variation as circumstances may require.

(11) (1) Any party may request any other party to the suit to make discovery on oath of the documents which or have been in his possession or power relating to any matter in question in the suit.

(2) If the party so requested refuses or neglects within fourteen days to make discovery as aforesaid, application may be made to the court, for an order directing such discovery, and at the hearing, the court may either refuse or adjourn the application if satisfied that such discovery is not necessary or not necessary at that stage of the suit, or make such order either generally or limited to certain classes of documents as it thinks fit provided that:-

(i).Discovery shall not be ordered when and so far as the court, is of the opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(ii). That on an application by one party, the court, may make an order for discovery against that party.

(iii).

“A (1) notwithstanding anything contained in rule II, within one months after the pleadings are closed in a suit in the high court, every party shall make discovery by filing and serving on the opposite party a list of the documents relating to any matter in question in the suit which are or have been in his possession or power.

(2) Any party on whom a list of documents is served under sub rule (1) may give notice to the party making discovery requiring the verification on affidavit of the list of documents and the affidavit shall be filed and served within fourteen days of the request.

(3) On the default of a party to comply with sub rule (2) application may be made to the court, for the fixing of a time limit within which the party must comply with sub rule (1).

Order 16 rule 5. If within three months after.

(a) Close of pleadings or

(b)

(c) *The removal of the suit from the hearing list; or*

(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 the suit down for hearing or apply for its dismissal”*

Due construction and consideration has been made of the above provision, and applied them to the rival arguments herein and the court, proceeds to make the following findings:-

1. There is no dispute that there are three defendants sued herein. Two of them namely the 1st and the 2nd defendant both have their appearance and defences filed on the record. Those of the 3rd defendant are not on the record. There is also no R/S for the service of the plaint. Counsel for the plaintiff attempted to state from the bar that the 3rd defendant has filed a defence but there is no proof of the same. In the absence of proof of service on to the state of the plaint, issue of default on the basis of which close of pleading can arise cannot arise.

2. There is allegation of request for particulars having been made. There is however only a Return of service of a process server who allegedly effected service, but the copy of the request for particulars is not annexed. It is alleged that the same was served in early 2009. Counsel for the plaintiff/respondent alleges that this was done outside the court. Due consideration has been made by the court of this assertion in the light of the relevant provision of law relied upon set out above and the court, is of the opinion that it is permissible to conduct them outside the court, before the suit is filed. Once the suit has been filed these should be exchanged on the record. It therefore follows that in the absence of a copy being filed on the record, an allegation of there having been served request for particulars so as to act as an intervening period to forestall the running of the period entitling an aggrieved party to move the court, for a dismissal order is lacking. Save that failure of the 1st defendant to request the process server who allegedly served both the request for particulars and invitation to attend court, to fix the matter for hearing creates a reasonable doubt as to whether the 1st defendant's assertion that the said assertion by the plaintiff of service of the request for particulars and the invitation to fix a hearing date was a serious contest. This default on their part leaves the matter on a 50-50 basis and is not sufficient to allow the court, to place the blame heavily on the plaintiff.

3. On the issue of discovery, indeed order 10 rule 11 gives liberty to either party to initiate discovery procedures. The time within which that initiation is to be made is left open. It is rule 11A which makes provision that this be done within one month after the close of the pleading. The control command in rule 11A found is the following words:-

“Every party shall make discovery by filing and serving on the opposite party a list of the documents relating to any matter in question in the suit.....”

It therefore follows that both the plaintiff and defendants herein are addresses of this provision. The requirement is mandatory.

A question may arise as to whether the 1st defendant could very well have taken this step of applying for dismissal before complying with order 10 rule 11, and 11A. In this court's opinion, this can only arise where it can be demonstrated that by the very nature of her pleadings discovery was unnecessary.

This court, has had occasion to revisit the first defendant's defence filed herein. It has formed an opinion that discovery is required for the averments in paragraph 2 and 3 of the said defence. In the absence of making such a discovery and not responded to by the plaintiff, it was premature to invoke the provisions of order 16 rule 5 CPR.

4. Indeed section 3A of the CPR can be invoked at any stage of the proceedings, and as such the 1st defendant rightly invoked the same. However applying its ingredients to the rival arguments herein, in the light of facts that the application was presented prematurely, allowing such an application to stand will

amount to an abuse of the process of the court, because justice to both parties requires that whoever seeks a relief from a court, of law, has to seek it with clean hands. The applicant herein has not sought the relief being sought with clean hands in that she had not complied with the mandatory provisions on discovery herself before seeking dismissal.

For the reasons given in the assessment, the 1st defendant's application dated 24th day of March 2009, and filed on the same date be and is hereby dismissed for the reason of the fact that the same was premature as discovery referred by the 1st defendant vide paragraph 2 and 3 of her defence had not been complied with.

(2) Interests of justice enshrined in section 3A of the CPA require that a party seeking a relief from the court, should seek it with clean hands. Herein, since the 1st defendant had not complied with discovery on her part, she cannot be said to have come to this court, with clean hands. That being the case upholding the said application would have amounted to an abuse of the due process of the court.

(3) Invocation of order 16 rule 5 procedures was therefore premature and this being the case, there was no need for this court, to go into the merits as to whether the courts', discretion was exercisable herein or not.

(5) The plaintiff/respondents will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2009.

R.N. NAMBUYE

JUDGE