



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA**

Ciivil Case 543 of 1999

AFRICAN LINER AGENCIES LTD..... PLAINTIFF

- Versus -

1. MAR-FRONTIER KENYA LTD.

2. GREEN EARTH PROGRAMME DEFENDANTS

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

Mr. Swaleh for Applicant

Mr. Mokaya Ogutu for 2nd Respondent

N/A for 1st Respondent

RULING

This application seeks an order that the suit herein be dismissed for want of prosecution together with costs. It is made by an application by notice of motion dated 14th June, 2007 and brought under Order XVI rule 5(d) and Order L rule 1 of the Civil Procedure Rules; section 3A of the Civil Procedure; and all other enabling provisions of the law.

The application is said to be supported by the annexed affidavit of the defendant, and principally on the ground that since 19th February, 2001, the second defendant has neither set down the counterclaim for hearing nor taken any other step in the matter.

By a notice dated and filed in court on 5th December, 2007, the second defendant intimated that it would raise a preliminary objection to the application on the ground that the application is misconceived and bad in law in that the prayer sought has already been granted.

At the hearing of the application, Ms. Swaleh appeared for the applicant and Mr. Maosa for the respondent. Taking the preliminary objection, Mr. Maosa argued that the suit herein was dismissed on 13th June, 2007. He therefore submitted that the application was misconceived and bad in law, and asked the court to uphold the preliminary objection and strike out the application.

Referring to section 2 of the Civil Procedure Act, Ms. Swaleh submitted that a counterclaim is a suit in a wider sense. She conceded that the plaintiff's suit was indeed dismissed but maintained that what was before the court was the counterclaim as evidenced by paragraph (a) of the grounds upon which the

application was based. She also requested the court to amend the word “suit” in the application to read “counterclaim” if a suit was different from a counterclaim, and dismiss the preliminary objection with costs.

In reply, Mr. Maosa submitted that it was too late to seek the amendment as this should have been done before the preliminary objection was raised.

I have considered the application and the rival arguments of both counsel. The only issue is the interpretation of the word “suit” as used in the order sought in the application. The only prayer in the application seeks an order that –

“The suit herein be dismissed for want of prosecution together with costs.”

This wording gives the distinct impression that it is the whole suit which is sought to be dismissed. However, paragraph (a) of the grounds upon which the application is based refers expressly to the counterclaim and states that “the second defendant has neither set down the counterclaim for hearing nor taken any step in the matter.” This phraseology demonstrates adequately that it was the counterclaim which was the target of the application but not the main suit. This is fortified by paragraphs 2 and 4 of the supporting affidavit which read “that since the counterclaim was filed in 2001, the second defendant has not set it down for hearing nor taken another step in the matter” and “that it is apparent that the second defendant is no longer interested in proceeding any further in this matter,” respectively. Indeed, reading the application and the supporting affidavit, the respondents should have been left in no doubt that what the applicant sought was a dismissal of the counterclaim. The applicant’s suit had already been dismissed, anyway. And it would be an unprecedented and monumental folly for a plaintiff to apply for his own suit to be dismissed with costs to the other side!

While I agree with Ms. Swaleh that a counterclaim is a suit in its own way, it would be more accurate to describe it as a cross suit as it is pleaded in the plaintiff’s suit by a defendant who alleges that he has claim or is entitled to some relief or remedy against the plaintiff, instead of bringing a separate action.

For the above reasons, I think that the applicant should be given an opportunity to effect some amendments to the application. These would include the fact that the supporting affidavit is made by the plaintiff and not the defendant; and that the firm of Balala & Company is for the plaintiff and not the defendant. Pending these amendments, this application is struck out with costs.

It is so ordered.

Dated and delivered at Mombasa this ...19th .. day of March 2008.

L. NJAGI

JUDGE