



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

Civil Case 145 of 2005

ZACCHEUS SURE MBOYA PLAINTIFF/APPLICANT

- Versus -

ALCOP LIMITED DEFENDANT/RESPONDENT

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

Mr. Gichana for Applicant

Mr. Wameyo for Respondent

R U L I N G

This application is made by an amended notice of motion dated 24th October, 2007, and brought under Order XV rule 5(d); Order XXXIX rule 4 and Order L rule 1 of the Civil Procedure Rules; section 3A of the Civil Procedure Act and all other enabling provisions of the law. After being certified urgent as prayed, the prayers that remained were for the following orders –

1. THAT this Honourable Court be pleased to discharge or vary and or set aside the orders granted on the 14th day of September, 2005 and, alternatively
2. THAT this Honourable Court be pleased to dismiss the suit for failure to disclose any cause of action known in law or having subsequently become anfractuous or superfluous
3. THAT the costs of this application be provided for.

The application is said to be supported by the annexed affidavit of MAYUR MALDE, and on the grounds, inter alia –

- (i) THAT “the entire suit premises” (sic) on the existence of the judgment of the application, Misc. No. 213 of 1998 which was dismissed for want of prosecution on the 14th day of July 2006.
- (ii) THAT the miscellaneous application No. 213 of 1998 having been dismissed, its limbs have weakened, its foundations shaken and or collapsed irredeemably.
- (iii) THAT the counterclaim herein be allowed to proceed to its logical conclusion.

(iv) THAT the defendant/applicant has suffered immense loss and damage whose preparation by the plaintiff “may be uphill task” (sic).

(v) THAT it is fair, just and equitable in the circumstances of this case.

At the hearing of the application, Mr. Gichana for the applicant applied to amend reference to Order XV at the head of the application to read Order XVI. He thereafter relied entirely on the grounds set out on the face of the record and the supporting affidavit.

Mr. Wameyo for the respondent opposed the application and submitted that the application should be dismissed as there was no supporting affidavit. Replying to this opposition, Mr. Gichana argued that Mr. Wameyo had not filed any documents in opposition to the application.

After considering this application, I find that it is riddled with several technical problems which do not facilitate its sustainability. By amending Order XV to read Order XVI rule 5(d) of the Civil Procedure Rules, learned counsel for the applicant brought the matter within the ambit of dismissal for want of prosecution. However, there is no prayer for dismissal of the suit on that ground. All we have is a prayer for dismissal of the suit for failure to disclose any cause of action known in law. Sadly, the rule under which the court’s jurisdiction to do so is invoked is not cited.

The most disappointing aspect of the application is that the same is said to be based, inter alia, “on the annexed supporting affidavit of MAYUR MALDE”. No such affidavit is annexed, and this renders the entire application incompetent.

For the above reasons, the application is hereby dismissed with costs.

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

L. NJAGI

JUDGE