REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 61B of 1999

EVANSON LABOSO

JOHANA KIPCHUMBA……...……PLAINTIFF

V E R S U S

KASSAMALI MULJI GILANI……..…….DEFENDANT

WILBAY LIMITED ……..……..... INTERESTED PARTY

R U L I N G

The application before me was brought by the Interested Party, who seeks the dismissal of the suit, on the grounds that the plaintiff had failed to prosecute it.

As far as the applicant is concerned, the plaintiff had lost interest in the case. The defendant is also said to have lost interest in the case, resulting in a state of inertia since February, 2006.

It is the applicant's case that this is an old case, and that the plaintiff has been indolent. Therefore, the applicant submitted that this court ought not to assist the plaintiff notwithstanding his attempt to invoke equity.

The applicant also says that the allegation that the court file had been lost was without foundation. But even if the court file had been lost, the applicant believes that the plaintiff should then have made an appropriate application for the reconstruction thereof.

It is the applicant's view that the plaintiff had failed to explain the delay in prosecuting the suit, especially from February, 2006. Therefore, the court was invited to dismiss the suit against the Interested Party, for want of prosecution.

In answering the application, the plaintiff's first line of submission was that pursuant to ***Order 16 rule 5 (d***) of the Civil Procedure Rules, it was only a defendant who could apply for the dismissal of a suit. The plaintiff submitted that there was no provision for an interested party to apply for dismissal of a suit for want of prosecution.

Order 16 rule 5 provides as follows

"**If, within three months after-**

(a) the close of pleadings; or

(b) (deleted)

(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."

If taken literally, that rule would only give to a defendant the right to either set down a suit for hearing or alternatively apply for its dismissal, if he was convinced that one or more of the requirements set out under that rule had been met.

That would therefore beg the question as to whether or not any other party to court proceedings, if he was not the defendant, was obliged to suffer the inaction on the part of the plaintiff. For instance, if the applicant herein was a party to this suit, one would wonder why it could not apply to the court to strike out the suit, if it was convinced that the plaintiff or the defendant had lost interest in the said suit.

To my mind, if the answer was simply the fact that he was not a defendant, that would be a sad enslavement to the letter of the law rather than the spirit of justice.

But then again, I do appreciate that this court derives its very Jurisdiction from the law. It would therefore follow that on matters of jurisdiction the court must first ascertain that it had the requisite jurisdiction to entertain an application.

Strictly speaking, however, the plaintiff did not submit that this court lacked jurisdiction. As I understand his case, his submission is that the interested party did not have any legal foundation to bring this application, because it was not a defendant in the case.

The question that I must grapple with is whether or not the applicant has locus to bring this application. In order to determine that issue, I find that it is necessary to ascertain how and when the applicant was enjoined to the suit.

It is the plaintiff's case that the applicant did file an application dated 10/1/1998, through which it sought to be made a party to this suit.

According to the plaintiff, that application was still pending. Interestingly, the applicant did not deny the contention that it did file an application for leave to be enjoined to the suit, or that their said application was still pending.

In any event the applicant could not have denied that fact, as it's application is on record. The application was supported by the affidavit of Japheth Magut, who was a director of the applicant. By his supporting affidavit, Mr. Magut explained that the applicant was the registered proprietor of the suit property, **L. R. NO. ELDORET MUNICIPALITY/BLOCK 6/67.**

Mr. Magut further explained that the applicant was in possession of the suit property. Therefore, it was the applicant's position that if the title document issued to it was cancelled, yet the applicant had not been accorded a hearing, the applicant would be seriously prejudiced.

In an order issued on 12/1/1998, the **Hon. Okubasu J**. *(as he then was)* ordered that there be a stay of execution of the order for the cancellation of the;

"***interest of the intended interested party in title No. Eldoret Municipality/Block 6/67."***

That order was to remain in force until 21/1/1998, when the application dated 10/1/1998 was scheduled to be heard inter parties.

In effect, although the court did issue an order in favour of the applicant, so as to safeguard the title issued to them, the court had not yet determined whether or not the applicant had or had not been enjoined to the suit. Indeed, in his ruling, the learned judge also used the applicant's own description of itself, which was to the effect that it was;

"***the intended interested party."***

Having perused the record of the proceedings so far, I failed to find anything that would indicate that the applicant's application dated 10/1/1998 has been prosecuted.

Notwithstanding the fact that the said application was pending, the applicant thereafter continued participating in various applications which were filed in this case, as if the applicant had already become an "interested party."

Although the plaintiff and the applicant herein did not explain to me why the applicant has, for a considerable period now, been treated as if it was already an interested party, I believe that the explanation is to be found, at least in part, from the fact that the applicant was the registered proprietor of the suit property. Therefore, any action taken in having the title cancelled would impact directly on the applicant. And it is on that basis that the applicant sought and was granted an order staying the execution of the order canceling the title.

The plaintiff submitted that even though the title was registered in the applicant's name, the plaintiff did not have any claim against the said applicant.

Whilst not purporting to determine that issue at this stage, I nonetheless cannot help but ask myself how the plaintiff would go about getting the title which is registered in the applicant's name cancelled, without involving the applicant in the suit.

The plaintiff invited this court to strike out the affidavit in support of the application because the said affidavit had been sworn by an advocate.

As far as the plaintiff was concerned, the matters about which Isaac Simiyu Kuloba deposed, were contentious.

In the case of **EAST AFRICAN FOUNDRY WORKS (K) LTD. Vs KENYA COMMERCIAL BANK LTD. [2002] 1 KLR 443**, the **Hon. Ringera J.** (as he then was), expressed himself thus, at page 446;

"***I also accept the further submissions of Mr. Akiwumi that they do consist of contentious averments of fact which an advocate should not be allowed to depose to in a case where he is appearing as such. I have always deprecated depositions by advocates on contentious matters of fact in suits or applications which they canvass before the courts and I have never had any hesitation in striking out such depositions as a matter of good practice in our courts. The unseemly prospect of counsel being called upon to be cross-examined in matters in which they appear as counsel must be avoided by striking out such affidavits as a matter of good practice."***

In my understanding, the learned judge did not lay down a rule which would bar advocates from swearing affidavits altogether. The ratio of his decision was that advocates ought not to swear affidavits on contentious matters of fact if such affidavits are for use in cases in which the advocates are appearing in their capacity as advocates.

In this case, Mr. Isaac Simiyu Kuloba advocate has sworn an affidavit in which he basically sets out the dates when the plaintiff last took steps to prosecute the case. As those are matters which would be apparent from the face of the court records,, I do not consider them to be contentious. Indeed, the plaintiff has not challenged the facts deposed to by Mr. Kuloba advocate.

In the circumstances, I find no reason to strike out the affidavit in support of the application.

I have given serious consideration to the issues raised in the replying affidavit. Essentially, the plaintiff was explaining the reasons for the challenges he has faced in prosecuting the suit. Those challenges include the loss of the plaintiff's file, from the offices of his former advocates.

Whilst those facts may be reasonable, it cannot be denied that if it became impossible for the plaintiff to reconstitute his own file, he may well never be able to prosecute the suit. He therefore needs to devise all lawful means possible to ensure that he reconstitutes both his file and the portions of the court file which he says are currently incomplete.

Finally, I revert to the issue of locus. As I have already found, the applicant has not yet prosecuted its application dated 10/1/1998. Therefore, the applicant is not yet a party to this suit, notwithstanding the fact that it did obtain an order for stay of execution.

In my considered view, until and unless the applicant will have prosecuted that application; and unless it is enjoined to this suit, it would be premature for it to seek to dismiss the suit herein. I say so because at this stage, the plaintiff and defendant cannot prosecute the action against the applicant before the applicant becomes a party to the suit.

It is only as and when the court orders that the applicant is enjoined that the court would also be in a position to indicate the capacity in which the applicant is a party.

At present, it is conceivable that the court could well direct that the applicant, if it became a party to the suit, would have to bring its claim against the plaintiff, through a counter-claim.

In the result, the applicant lacks locus to sustain the application for the dismissal of the suit for want of prosecution. The application is therefore struck out, with costs to the plaintiff.

Dated, Signed and Delivered at Kakamega this 27th day of May, 2008

FRED A. OCHIENG

J U D G E