



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CIVIL CASE 790 OF 2006

SAMMY ACHUCHI ODUORI AND OTHERSPLAINTIFF

VERSUS

IBERAFRICA POWER (EA) LTDDEFENDANT

RULING

The plaintiff herein suing in their capacity as trustees of the Kenya power and lightning company limited- Retirement Benefits scheme, by virtue of their being duly registered as trustees under the trustees (perpetual succession Act cap 164) laws of Kenya came to this court vide a plaint dated 17th day of July 2006 and filed on 19th July 2006. It is verified by a verifying affidavit deponed to by one Henry Kinyua Kyanda on 17th day of July 2006, allegedly with the authority from the other trustees. The suit is filed against the defendant IBER Africa Power (EA) Limited. Summons to enter appearance were issued on 27th day of July 2006. It is not known when the same were served to the defendant, but the memo of appearance filed by the defendant is dated 14th day of September 2006 and filed on 19th September 2006. The defendant followed this by filing a defence dated 3rd October 2006 and filed on the same date of 3rd of October 2006.

No other action was taken in the matter until 4th June 2008 when the defendant applicant filed an application by way of notice of motion dated 19th may 2008 and filed on 4th June 2008. It is brought under order XVI rule 5 (a) CPR, section 3A of the CPA and all other enabling provision of the law. The prayers sought are two, namely:-

- (1) *That this suit be dismissed for want of prosecution.***
- (2) *That the cost of this application and the entire suit be awarded to the defendant/applicant.***

The grounds in support are set out in the body of the application supporting affidavit, and submissions in court as well as case law. The central theme running through them is that:-

- 1. The deponent of the supporting affidavit one Henry Mithanji is a general Manager of the applicant and has been duly authorized by board of Directors to swear the affidavit on his behalf.**
- 2. That the plaintiff /respondent suit was filed on 19th July 2006, where as the defence was filed on 3rd October 2006 and reply to defence filed on 16th November 2006.**

3. That from the information of his counsel, pleadings in a suit close fourteen days after service of the reply and for the purpose of this suit pleadings closed on 1st December 2006.
4. That from information gathered from his counsel, no action has been taken in the matter in a period of 15 months which have lapsed since the closure of the pleadings, which delay in their opinion is unexcusable.
5. That the said unexercisable delay in the prosecution of this matter is likely to cause serious prejudice to the applicant defendant.
6. It is their stand that facts displayed by them is proof that the plaintiff has lost interest in the prosecution of this matter hence it is a proper candidate for dismissal for want of prosecution .
7. They contend that the replying affidavit has not shown any justification for the delay that justify the withholding of the reliefs sought in the application presented to court.
8. That they, defendants, took the initiative to ask the plaintiff to give them the documents they plaintiffs intend to use in support of their case, but the plaintiff took no initiative to respond to the same.
9. They contend that for the disinterest on the part of the plaintiffs evidenced by the fact that none of them has sworn a replying affidavit. The replying affidavit on record has been sworn by the counsel which they urge the court to hold that the same is incompetent.
10. The court, is urged to hold that the delay is inordinate and not to condone the same.
11. Further, that it is the business of the plaintiff to prove its case and if they have lost interest in the same and as such its should be dismissed.

In response to that application, the plaintiffs' counsel filed a replying affidavit sworn on 4th July 2008 and filed the same date. The salient features of the same are as follows:-

- (i). That pleading closed on November 2006 when they filed their reply to defence.
- (ii). That since the pleadings closed in November 2006 the plaintiffs' counsel has severally invited the defence to fix the matter for hearing as shown by annexure 9.5.I dated 28th February 2007, 95.2 dated 5th June 2007, 9.5.3 erroneously dated 28.2.2007 but it is supposed to have been dated 8th November 2007 and 9.5.4 dated 14th January 2008. For this reason, they contend that the applicants' application is premature, bad in law and without merit as it is not true that the plaintiff took no steps to fix the matter for hearing.
- (iii). That at one time they had wanted to fix the matter for hearing in November 2007, but information from their clerk which they believe was that the clerk was told that the diary for 2007 was full.
- (iv). Another attempt to fix the matter for hearing was this year 2008 but the file was not traced.
- (v). There after they did not invite the defence to fix the matter for hearing because they were also informed that the diary for 2008 was also full
- (vi). That from the above they have demonstrated that they plaintiffs have all a long been anxious to finalize this matter.
- (vii). The replying affidavit is not incompetent as prohibition for counsel to depone an affidavit is limited to deponing of contentious matters but not matters of a procedural nature within the knowledge of counsel.

(viii). They contend that the suit is a young suit, filed in 2006 and yet since close of pleadings efforts to fix the matter have been made at list on 4 occasions.

(ix). They contend that order 10 rule 11 CPR on discovery enjoins both parties to do discovery and so it is not true that it was only the plaintiff who should have taken upon themselves to do the discovery in order to set down the case for hearing. The same obligation applies to the defence to do the same.

(x). If the defence felt that the plaintiff was taking time in complying with the rule on discovery, they should have applied to the court under order 10 rule 11 of CPR for the court to fix the time within which discovery was to be complied with.

(xi). They urge the court to exercise its direction in their favour because they have demonstrated that at least every 2 months the plaintiff was sending a letter of invitation to the defence to fix a hearing date.

(xii). The court is enjoined to note that striking out of a pleading is draconian and it should be used sparingly, in cases where the default has not been explained.

(xiii). They contend that the case law relied upon is distinguishable because in one 2 years had passed before taking any action, in the matter, and yet in another the proceedings were 10 years old and in another the plaintiff obtained an injunctive relief and sat on it indefinitely .

For the reasons given the court, was urged to rule that justice herein demands that the matter be saved and a priority date be taken.

In response counsel for the applicant maintained that, the onus was on the plaintiff to demonstrate interest to prosecute the suit and not the defendant.

On case law, the applicant referred the court, to the case of Power Technics limited versus Transami (k) ltd Nairobi HCCC No 2613 of 1998 decided by Waweru J. on the 15th day of June 2007. at page 2 of the said ruling there of, at line 8 from the bottom made the following remarks:-

“Dismissal of a case for want of prosecution is a matter for the discretion of the court. This discretion will normally not be exercised in favour of the applicant unless the court is satisfied:-

- 1. That the default has been intentional and contumelious.*
- 2. That there has been prolonged or inordinate and in excusable delay on the part of the plaintiff or his advocate.*

At page 4 line 7 from the top the learned judge went on to state;

“ for a suit that is nearly 10 years old, the plaintiff has not demonstrated much interest in prosecuting the same”

The case of Joseph A.M. Magembe versus Innocent Obiri Momanyi Nairobi HCCC No 1692 of 1998 decided by K.H. Rawal on 16th day of January 2001. at page 3 of the ruling line 6 from the bottom the learned judge made the following observation:-

“The plaintiff thus in my view has not sufficiently explained the delay which is solely due to his part since the filing of the plaint herein. It is a drastic remedy but the plaintiff who has been sleeping over the right does not deserve the equitable consideration in his favour. Also cannot help in a glancing that the plaintiff claims the assets of a limited company against its directors.

Be that as it may I am satisfied that the plaintiff has intentionally delayed the prosecution of the suit and I have no other option under the circumstance a foresaid, to grant the application and strike out the plaint with cost.”

The case of Diamond in a Mapara versus Abdul Gaturkana Nairobi HCCC No 939 of 1996 decided by Angawa J. on 18th October 2000. The learned judge dismissed the suit because no action had been taken in it for 2 years since dismissal of an application for summary judgement.

A court of appeal decision in the case of Kimani versus Bakatas J. (1988) LLR 1912 (CAK) in which the CA upheld the superior courts' decision to dismiss the suit, because, although it was not possible that the defendant may not have suffered any prejudice by the delay but the plaintiff was certainly only guilty of flagrant and culpable in activity in failing to bring the suit to trial at any rate between 10th may 1985 and 9th February 1987”

The case of Nyoike Mathu and 2 others versus Attorney General and 2 others Nairobi HCCC of 824 of 2004 decided by Mutungi J. on 12th July 2006 where at page 2 line 11 from the bottom the learned judge made the following observation:-

“Further, the issue of not setting the suit down for hearing because the issues had not been agreed upon is a hollow defence. Issues can and are often drawn in court, even where the parties have failed to agree on issues”

The respondent, on the other hand referred the court, to the case of Century Oil Trading Company Limited versus Gerald Mwaniki Mbogo and another Nairobi Milimani Commercial Court HCCC Number 367 of 2001 decided by Mutungi J. on 20th day of July 2004. at page 4 of the ruling line 5 from the top, the learned judge quoted with approval the decision of Nyamu J. in the case of HCCC no 74 of 2000 Michael Mwangi Gichohi versus Intra Africa Assurance company Limited where at page 3 the learned judge quoted judge Nyamu as having made the following observation:-

“I See no reason why either party should not initiate the immediate steps and there after set the case down for hearing:

At line 7 from the bottom on the same page Mutungi J went on to observe:-

“It is the duty of the plaintiff to get on with the case. Public policy demands that the business of the courts should be conducted within expedition” This action has gone to sleep for nearly two years (over one year in the current suit).....it should now be dismissed for want of prosecution”

At page 5 line 6 from the top, the learned judge went on to state thus;-

“It is also important to underline the fact that under order 16 rule 5 (d) the defendant is given an option to either set the suit down for hearing or apply for its dismissal. Any prudent defendant would obviously go for dismissal. After all, if the plaintiff has demonstrated laxity in prosecuting his own suit what guarantee is there that he would respond to a hearing date fixed by the defendant?”

On the courts, assessment of the facts herein, after hearing the rival arguments of both sides, it is clear that the arguments have presented two aspects for determination herein, namely, the technical aspect and the merit aspect. The technical aspect arises from the following arguments:-

1. The applicants arguments that the replying affidavit is in valid and or in competent because it was deponed by counsel as opposed to the plaintiff or any one of them on behalf of the others.
2. The competence of the supporting affidavit to the application allegedly sworn with the authority of the `board of Director Authority.
3. The competence of the verifying affidavit observed by the court, on its own motion.

On the other hand the merits aspect deals with the issue as to;-

(1) Whether the applicants' arguments have gone a long way to satisfy the ingredients set out in order XVI rule 5 (a), the main core a rule in respect of which the application has been presented.

(2) Whether the plaintiff/respondent has demonstrated sufficient grounds to oust the applicants, move to have the suit dismissed for want of prosecution.

As regards the competence of the replying affidavit, it is common ground that it has been deponed by counsel on record. It is now trite law that this court, has judicial notice of, that case law both from decisions of the superior court, and the court of appeal of this jurisdiction, are to the effect that, counsels, should avoid deponing to contentious issues which should be deponed to by his/her client. Because by doing so he/she risks being pulled from his privileged position of counsel into, the witness box to under go cross-examination on the contentious issues. Counsels for the applicant simply stated that the replying affidavit is incompetent but a part from saying that it should not have been deponed by counsel, he did not specify, whether the deponement are contentious or not and if contentious which portions of them or paragraphs are contentious. The response of the respondent is that the deponment simply relate to routine matters within his knowledge and had his client been called upon to depon to them, they would have amounted to hearsay:-

This court, has revisited the said replying affidavit, and perused paragraphs 3,4,5,6,7,8,9 and finds that all the contents of these paragraphs relate to routine action taken by counsels office towards the fixing of the matter for hearing. In this court; view what transpires in a counsel office can only be deponed to by counsel himself. The only contentious paragraph would be paragraph 10 and 11 which reads:-

“ 10 that the plaintiff is anxious to conclude the matter but is unable to do so due to unavailability of date for years”

“11 That as soon as the court, diary for 2009 is opened, the plaintiff shall endeavour to fix hearing date”
A reading of the same reveals that the deponement has not specified that he was informed by the client which information he believed to be true. These two paragraphs appear offensive. The case use for any offensive paragraph in an affidavit is striking out. When struck out the other paragraphs remain intact, and can sustain the respondents stand, that efforts were being made to set down the matter for hearing despite discovery not having been done..

Further justification of the courts' stand on the remaining paragraphs comes from the fact that, the applicant did not respond to the said replying affidavit, to dispute the annexures relied upon. Failure to controvert means that the content` of those paragraphs are true. If true then they confirm the respondents assertion of steps taken by them towards the prosecution of the matter. The court, therefore finds this objection to the replying affidavit unfounded and the same is disallowed.

As for the supporting affidavit paragraphs 1 thereof reads:-

“(1) that I am the general manager of the applicant and I am duly authorize by its board of directors, to swear this affidavit on its behalf” the authority mentioned has not been annexed to the said paragraphs. Order 1 rule 12 (2) CPR provides:-

“Order 1 rule 12 (2), the authority shall be in writing signed by the party giving it, and shall be filed in the case” The court, of appeal in the case of Research International East Africa Ltd versus Julius Arisi and 213 others Nairobi CA has stated that this is the correct position at page 8 line 16 from the bottom.

Applying the provision of order 1 rule 12 (2) CPR, and the court of appeal decision cited above, to the applicants supporting affidavit, it means that in the absence of the deponent, of the said affidavit annexing the authority to so depon to the affidavit, or having one generally filed in the case file, the authority to so depon becomes non existent. If non existent, then the supporting affidavit becomes incompetent. Being incompetent it cannot support the application. And without its support the application become invalid as well as incompetent by reason of the fact that it becomes none compliant with the relevant provision of

order 50 rule 3 which require such an application to be supported not only by grounds in the body of the application but is also by affidavit. Order 50 rule 3 reads:-

“ every notice of motion shall state in generally terms, the grounds, of the application and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.” such non compliance invites the penalty of having the supporting affidavit struck out. Once the affidavit is struck out the application would not be in compliance with the rules and if incompetent it means it cannot be considered as it is a proper candidate for striking out.

As for the verifying affidavit, the defect was noted by the court, on its own motion, in the cause of perusing the file. Paragraph 1 thereof reads:-

“That I am a male adult of sound mind, and the general manager of the plaintiff herein and have the authority to sign this affidavit on behalf of all the trustees.” This authority has not been annexed to the verifying affidavit or filed generally in the file.

Provisions relating to the verifying affidavit are found in order VII rule 1 (2) and (3) which reads:-

“ order VII rule 1 (2), the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averment contained in the plaint (3) the court may of its own motion or in the application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of this rule”

Validity of verifying affidavit which purports to have verified the content of the plaint by the verifier with the authority of the other litigants are also discussed in the *Research International East Africa Ltd case (SUPRA)* at page 10 line 14 from the bottom where the court made the following observation:-

“ in our view, the construction of rule 1 (2) of order VII civil procedure rules, is that even in cases where there are numerous plaintiffs each plaintiff is required to verify the correctness of the averment a , by verifying affidavit unless and until he expressly authorizes any of the complainants or some of them, in writing and files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule. Moreover Grace Ndegwas case (supra) and rule 12 (1) of order ICPR rule leave no doubt that one or more of the co-plaintiff can validity file an affidavit verifying the correctness of the averments of the plaint on behalf of the other co-plaintiffs with their authority in writing.

Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents, have not complied with the mandatory provisions of rule 1 (2) of order VII civil procedure rules and that their suit was liable to be struck out by the superior court under rule 1 (3) of order VII CP rules.

The superior court however had a discretion. It had jurisdiction instead of striking out the plaint, to make any other appropriate order such as giving the plaintiff another opportunity to comply with the rule”

Applying the afore set out CA observations, the construction of the order 7 rule (2) and 3 of the CPR on verifying affidavits to the facts herein, it means that the verifying affidavit filed herein is in competent. Its incompetence arises from the fact that the authority, to depone the same given in writing by all the plaintiffs has neither been annexed to the said verifying affidavit, nor has it been filed generally in the case file.

However, a more serious defect is that it has been sworn by a busy body in total disregard of the provisions of order 6 rule 1 (2) CPR which provides:-

“Order 7 rule 1 (2), the plaint should be a companied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint” .Henry Kinyua Kianda is not named as one of the

plaintiffs and as such he had no capacity to verify the content of the plaint. The verifying affidavit too is a proper candidate for striking out and it's accordingly struck out.

The striking out of the verifying affidavit herein does, not affect the plaint. The court will exercise its direction to save the plaint and allow the plaintiff time within which to comply by each filing a verifying affidavit or any one of them is authorized by all or any of them in writing to file a verifying affidavit.

For the reasons given in the assessment, the court, proceeds to make the following orders:-

1. The defendants/applicants' application dated 19th May 2008 and filed on 4th June 2008 be and is hereby struck out by virtue of it being incompetent. The incompetence arises from the fact that the authority to depone the supporting affidavit has not been annexed to paragraph 1 of the said affidavit or filed generally in the case. The supporting affidavit therefore offends the provisions of order 1 rule 12 (2) CPR.

2. Since the application is incompetent and it has been struck out there is no need to go into its merits.

3. The court on its own motion perused the record in the process of assessing facts, and found that the verifying affidavit is also defective on two fronts.

(i). The authority to depone the same has not been annexed.

(ii). It contravenes the provision of order 7 rule 1 (2) in that, it has been deponed by a party who is not a plaintiff where as the rules stipulates that it is the plaintiff to verify the content of the plaint. The verifying affidavit is also struck out.

(4) However the striking out of the verifying affidavit will not affect the validity of the plaint, as the court, has found it fit to exercise its direction under order 7 rule 1 (3) CPR to allow the defaulting time to comply.

(5) The plaintiff have 30 (thirty) days from the date of the reading of this ruling to file their verifying affidavit either individually or to authorize one of them to verify on their behalf. The authority has to be in writing, and the same is to be filed in the case. It may be limited or general in nature.

(6) In view of the holding in number 1,2,3,4 and 5 above, each party will bear own costs.

Dated, read and delivered at Nairobi this 7th day of November 2008.

R.N. NAMBUYE

JUDGE