



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

AT NAIROBI

CIVIL SUIT 365 OF 1999

BASHIR ARAB MOHAMMED &

FATUMA HAJI HASSAN

[suing as the administrators of the estate of]

ARAB MOHAMMED AHMED.....PLAINTIFF\RESPONDENT

VERSUS

JOHNNGANDU KINUTHIA.....1ST DEFENDANT

MALDE TRANSPORTERS LTD.2ND DEFENDANT/APPLICANT

RULING

The plaintiff's suit dated 2nd February, 1999 had been filed on 24th February, 1999 and it claimed damages for negligent driving of a motor vehicle causing the death of one Arab Mohammed Ahmed. Prosecution of the same, however, did not commence, and the 2nd defendant's application by Chamber Summons dated 26th January, 2001 and filed on 9th March, 2001 was made under Order VI, rules 11 and 13(1) (d) of the Civil Procedure Rules. The prayers of the 2nd defendant were:

(i) that, the plaintiffs' suit against the 2nd defendant be dismissed with costs for want of prosecution;

(ii) that, in the alternative, the plaintiffs' plaint as against the 2nd defendant be struck out and the suit be dismissed with costs, as it is otherwise an abuse of the process of the Court;

(iii) that, the costs of the application be borne in any event by the plaintiffs.

The grounds in support of the 2nd defendant's application were, firstly, that the pleadings had closed on 27th September, 1999 but more than one year later, the plaintiffs had taken no step to prosecute the suit. Secondly it was stated that it is an abuse of the process of the Court for the suit to be left pending for so long, without any steps in the form of prosecution.

Evidence in support of the application was in the affidavit of Michael Josphat Iseme, the advocate with the conduct of the case on behalf of the 2nd defendant. He depones that the 2nd defendant's statement of defence was duly served on the plaintiffs' advocates on record on 14th September, 1999; and thus the pleadings closed 14 days thereafter, on 27th September, 1999. It is deponed that more than one year since the close of pleadings, the plaintiffs have taken no step to prosecute the suit. The deponent avers that the

accident giving rise to the suit is said to have occurred in February, 1996 and such a protracted lapse of time will to lapsed memories and unavailability of witnesses, occasioned by death inter alia.

An affidavit of service by a Court process server, Dominic M. Ngoka, dated and filed on 13th June, 2002 shows that the 2nd defendant's Chamber Summons of 26th January, 2001 was served on the plaintiffs' advocates, the firm of M/s. Ahmednasir, Abdikadir & Co. Advocates, on 10th June, 2002.

The plaintiffs' grounds of opposition of 25th July, 2002 filed on even date, carried the following statements:

(i) that, the application is misconceived, incompetent and incurably defective;

(ii) that, the plaintiffs are desirous of proceeding with the suit;

(iii) that, the deceased who was the sole bread winner left behind a large family of three widows and sixteen children who were totally dependent on him, and it is in the interest of justice that the administrators be allowed to proceed with the case to its conclusion [this, obviously, ill-fits the description of 'ground of opposition'; it is substantially an evidentiary statement which could only properly come by affidavit];

(iv) that, there is no inordinate delay to warrant dismissal of the suit.

A partner in the firm of advocates acting for the plaintiff, Hassan Nunow Lakicha, filed a relying affidavit dated 26th July, 2002 on that same date. He averred that as the advocate having the conduct of the matter on behalf of the plaintiffs, he knew that the plaintiffs were interested in proceeding with the suit. It was deponed that there had been difficulty in setting the suit down for hearing because the administrators had relocated from Nairobi to Mandera and had become inaccessible, but recently they have managed to reach the deponent's practice firm. The deponent averred that the suit is a claim for general and special damages arising out of a road accident during which Arab Mohammed Ahmed died and, therefore, is not an abuse of the process of the Court. He deponed that the deceased who was the sole breadwinner, left behind a large family of three widows and 16 children who were totally dependent on him.

It has been noted above that the application was served upon counsel for the plaintiffs on 10th June, 2002. On 30th July, 2002 that application was heard by Mr. Justice Mbito who granted the 2nd defendant/applicant's prayers "as no action [had] been taken in the suit for over 3 months."

The plaintiffs then filed their Notice of Motion of 14th October, 2002 seeking the setting aside of the orders of 30th July, 2002. On 21st January, 2003 Mbito, J vacated his orders and allowed the plaintiffs to proceed with their suit.

In the meantime, the plaintiffs drew up a further application by Chamber Summons dated 19th December, 2002; but it was filed only on 3rd March, 2003 — after Mbito, J had given his ruling of 21st January, 2003 allowing the plaintiffs to proceed with their suit of 2nd February, 1999. This further application of 19th December, 2002 filed on 3rd March, 2003 was heard before a different Judge, Mr. Justice Kuloba on 28th March, 2003. A period of some two months separated the orders made by Mbito, J from those made by Kuloba, J. In the plaintiffs' Chamber Summons heard on 28th March, 2003, the main prayer was:

"That the Court do grant leave for purposes of section 26, 27 and 28 of the Limitation of Actions Act [this] being an action for damages arising out of the careless and negligent road accident occasioned by the defendants in which Arab Mohammed Ahmed died from fatal injuries sustained while travelling in the second defendant's vehicle as a passenger."

It is not clear to me that the decision made by Mr. Justice Mbito on 21st January, 2003 had been brought to the attention of Mr. Justice Kuloba when he made the later ruling of 28th March, 2003. He ruled as follows:

“Looking at the affidavit in support of the application [i.e. the plaintiff’s Chamber Summons dated 19th December, 2002], there is no basis for this application. Inability to raise Court fees alleged is not supported by evidence, and if there was such inability it is not explained why the in forma pauperis procedure was not attempted. The application is dismissed. Leave is refused.”

In the aftermath of the orders made by Mr. Justice Kuloba, the 2nd defendant made an application, by Chamber Summons dated 6th June, 2003 and filed on 11th June, 2003. The prayer was that the plaint dated 2nd February, 1999 be struck out and the plaintiff’s suit against the 2nd defendant be dismissed with costs — on the grounds inter alia that (i) the plaintiff’s action was statute-barred under s. 4(2) of the Limitation of Actions Act (Cap. 22); (ii) the plaintiff’s application for extension of limitation period had been refused by Kuloba, J on 28th March, 2003; and (iii) that the plaint was an abuse of the process of the Court. The Deputy Registrar fixed this application for hearing on 24th September, 2003 but as service upon the plaintiff’s counsel had by then not been effected, Lady Justice Aluoch adjourned the matter indefinitely. Later on, on 25th October, 2004 counsel appeared before the Deputy Registrar and obtained the date 20th January, 2005 — but this was for the hearing of the 2nd defendant’s Chamber Summons of 26th January, 2001. It is this application that came up before me on 20th January, 2005 when the plaintiffs’/applicants were represented by Mr. Hassan Lakicha, while the 2nd defendant/respondent was represented by Mrs. Shaw.

It is already quite clear that confusion has in the past marred the filing and disposal of applications falling under the main suit. Such confusion was no less apparent when this matter came up before me on 20th January, 2005. As already noted, the old application of 26th January, 2001 was the one listed for hearing before me, and not the 2nd defendant’s Chamber Summons of 6th June, 2003 the hearing of which had been contemplated in the directions of Lady Justice Aluoch given on 24th September, 2003. So, to-date the 2nd defendant’s Chamber Summons of 6th June, 2003 has not yet been heard, and no date has been taken for its hearing. Yet, come 26th January, 2005 the 2nd defendant filed another Chamber Summons, dated 25th January, 2005. In this later application the 2nd defendant is making the very same prayers against the plaintiff which had been made in the earlier Chamber Summons of 6th June, 2003.

I have to state that such an overlay of applications, and the duplicity involved, has no justification and has no basis in the law of procedure; it amounts to misleading the Court; it is a definite abuse of the process of the Court. I will, therefore, further-on make appropriate orders regarding this patent abuse of Court process.

I should note that while the 2nd defendant’s Chamber Summons of 6th June, 2003 was pending in Court, and without regard to the directions of Aluoch, J given on 24th September, 2003 the 2nd defendant took the initiative, by its advocate’s letter to the Deputy Registrar dated 18th October, 2004, to secure a hearing date for its earlier Chamber Summons of 26th January, 2001.

Counsel for the plaintiffs complained that he had not received the hearing notice for the application; he only saw the matter on the cause list, and so he turned up in Court. Mrs. Shaw who represented the 2nd defendant on the first occasion of hearing (on 20th January, 2005) did not raise the point about dismissal of the plaintiff’s application for extension of limitation period on 28th March, 2003; her gravamen was, instead, the fact that the orders made by Mbiti, J on 21st March 2003 allowing the plaintiffs to proceed with their suit, had directed that the suit be set down for hearing within 90 days — but the plaintiffs had failed to comply. Mrs. Shaw stated that the 2nd defendant’s advocates would move the Court on that issue. The matter was adjourned with costs to the plaintiff.

On 18th April, 2005 what came up before me was no longer the Chamber Summons of 26th January, 2001 which the 2nd defendant had earlier fixed for hearing on 20th January, 2005, nor the 2nd defendant’s application of 6th June, 2003; but it was the 2nd defendant’s new Chamber Summons of 25th January, 2005.

Why did the 2nd defendant fix a date for the hearing of its application of 26th January, 2001 and then it did not proceed with that matter? Why is it that the 2nd defendant, on the next occasion of hearing, did not return to that application; and did not even seek to secure a hearing of its earlier application of 6th

June, 2003? Why was the 2nd defendant intent on leap-frogging those two applications and instead having a much later application, of 25th January, 2005, heard? I can see no logical explanation for these attempts to move the Court; and I must conclude that they were improper. It shows lack of communication between counsel for the 2nd defendant and counsel for the plaintiffs; it shows a disturbing unilateralism on the part of the 2nd defendant; and it shows a state of affairs set to lead this Court to a misdirection. It is replete with elements of abuse of the process of the Court.

On 18th April, 2005 I heard counsel in relation to the 2nd defendants Chamber Summons application of 25th January, 2005. The presentation of that application was sketchy, and important facts relating to the antecedents of the suit and the earlier applications were not brought to the attention of the Court. It has now become abundantly clear to me that to decide on the application of 25th January, 2005 without taking into account what has taken place earlier, especially the applications and the orders and directions of the Court, is to be misguided — which I must not allow.

Let me restate the basic facts which will lead me to the making of appropriate orders. Mr. Justice Mbiti had on 30th July, 2002 dismissed the plaintiff's suit, after hearing the 2nd defendant's Chamber Summons application of 26th January, 2001. The learned Judge later, on 21st March, 2003 vacated his orders after hearing the plaintiffs' Notice of Motion of 14th October, 2002. The effect was to open the way for the plaintiffs to set down for hearing their suit which had been filed on 24th February, 1999, albeit without leave. On 28th March, 2003, apparently without the benefit of information that Justice Mbiti had vacated his earlier orders, Justice Kuloba refused the plaintiffs' application for extension of the limitation period; and the effect was to take away the dispensation which Mr. Justice Mbiti had already granted. I hold that this Court, in the process of dispensing justice, is not to be seen as contradicting itself in the orders it makes, as contradictions would take away the certainty which must be the mark of the law, and would cause undue anxiety to parties. Therefore I will take it in favour of the plaintiffs, that the High Court had considered the merits of their case and allowed them to take appropriate actions to prosecute their suit.

It is not clear why the 2nd defendant has not sought to fix a hearing date for its Chamber Summons application of 6th June, 2003. It is, in my view, an abuse of the process of the Court to skip that application and then seek a hearing date for a more recent one, of 25th January, 2005 which, in effect, replicates the content of the application of 6th June, 2003.

Once I take that position, as I have done, then I must strike out the 2nd defendant's Chamber Summons application of 25th January, 2005.

I will make the following specific orders:

1. The 2nd defendant's Chamber Summons application of 25th January, 2005 is struck out with costs to the plaintiffs.
2. I hereby re-state the Orders made by Mr. Justice Mbiti on 21st March, 2003, with the qualification that the 90 days therein specified, within which the plaintiffs are to comply with the rules of procedure and set down their suit for hearing, will run from the date hereof.
3. If the plaintiffs shall fail to comply with the second order herein, the 2nd defendant will be at liberty either to set down for hearing its Chamber Summons of 6th June, 2003 or to file a more suitable application as may be necessary.
4. The earlier orders made on 28th March, 2003 are hereby vacated.

DATED and DELIVERED at Nairobi this 3rd day of June, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

**For the Plaintiffs/Respondents: Mr. Hassan Lakicha, instructed by M/s. Ahmednasir,
Abdikadir & Co. Advocates**

**For the 2nd Defendant/Respondent: Mrs. Shaw; Mr. Kamau, instructed by M/s.
Iseme, Kamau & Maema, Advocates.**