



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 1690 OF 2002**

UNITED INSURANCE COMPANY LIMITEDPLAINTIFF

VERSUS

A G N KAMAU ADVOCATES.....1ST

RESPONDENT

T/A AGN KAMAU ADVOCATES

ANNE WAMBUI KIMANI2ND

RESPONDENT

T/A ANNE W. KIMANI & CO. ADVOCATES

ALLAN GEORGE NJOGU KAMAU

AND ANNE WAMBUI KIMANI FORMERLY T/A

AA G N KAMAU & KIMANI ADVOCATES.....3RD RESPONDENT

RULING

The 1st Respondent in this originating summons has come to court by way of Chamber Summons dated 27th July 2004. The same is brought under Order 36 Rule 12, Order 16 Rule 5 and Order 6 Rule 13 (1) and (3).

The 1st Respondent seeks dismissal of this suit for want of prosecution, and because it does not disclose reasonable cause of action and for being an abuse of the process of court.

The Chamber Summons is not supported by any grounds on the face of it contrary to Order 50 Rule 3. It is however supported by the affidavit of *ALLAN GEORGE NJUGU KAMAU* .

The said affidavit starts by saying that the Plaintiff has been the client of the 1st Respondent at all material times. Contrary to this statement the 1st Respondent when submitting orally in favour of the present application stated that the Plaintiff's case is misplaced because his clients were the insured rather than the insurance company, United Insurance Company the plaintiff hereof.

1st Respondent submitted that the Plaintiff was granted orders by this court on 7th February 2003,

which orders essentially stayed the entire taxation exercise by the 1st Respondent. 1st Respondent then deponed that this matter was adjourned on 28th November 2003 because negotiations were going between him and the plaintiff; however after this adjournment the deponent stated in his affidavit that the plaintiff lost interest in those negotiations. He further deponed that the orders of 7th February 2003 were oppressive and prejudicial to the 1st Respondent since he could not execute for costs which have been taxed nor can he proceed with any taxation.

The Plaintiff, so said the 1st Respondent invited him to fix a hearing date of this matter on 8th June 2004, but on that date the Plaintiff's representative did not attend the court's registry. The 1st Respondent therefore said that the Plaintiff is guilty of inexcusable delay as it had not taken any action for 19 months and because it was refusing to agree the net amount owed to the 1st Respondent. In oral submissions the 1st Respondent argued that Originating Summons were intended to settle simple matter not matters that have complex issues of Law and fact such as this present matter.

In response to this argument Plaintiff's counsel rightly stated that under Order 36 Rule 10 the court can order that originating summon to proceed as though filed as a plaint.

1st Respondent objected to the Replying Affidavit and to the affidavit in support of the originating summons on the basis that: (i) They were not drawn in the first person contrary to Order 18 Rule 5. In response to this argument I confirm that I have considered both affidavits and I find that they do not contravene the aforesaid Order, there is no merit in that line of argument.

(ii) That the two deponents are not the principal officer of the Plaintiff as required by Section 68 of the Insurance Act Cap 487. Again I find no merit in this argument, the deponents clearly have stated that they are employees of the Plaintiff and for the purpose of Cap 487 particularly Section 4 they fall within that category.

The Plaintiff counsel relied on the Replying Affidavit sworn by Hudson Wafula and also submitted orally in response to various issues raised hereof. The only argument I wish to reproduce here is that the Plaintiff's counsel drew the court's attention to the wrangles between the 1st and 2nd respondent who previously were in a partnership called A.G.N. Kamau & Kimani Advocates. Plaintiff's counsel stated that as a result of the dissolution of that partnership the Plaintiff has been unable to engage in negotiation with the two parties who are unable to 'see eye to eye'.

That I think in this application is an important issue that the 1st Respondent failed to adequately address. He said that the Plaintiff has refused to negotiate, what on his part has he done to arrange a negotiation meeting. There was no documentary proof of such attempt; indeed one is more likely to believe the Plaintiff's contention that it is the parties that are unable to agree and as a consequence the Plaintiff was unable to negotiate. It ought to be remembered that this suit was adjourned to facilitate negotiations, now for one party to come to court and seek dismissal on basis of want of prosecution without showing what became of the proposed negotiations is I think dishonest. Order 16 Rule 5 gives the court discretion on such an application as this. In the exercise of that discretion I believe that one needs to look at all surrounding matters. In this case I do not believe that this suit should be dismissed for want of prosecution for the reasons I have alluded to this ruling.

However having said so I believe the plaintiff should also not seem to be seating on its laurels since it has obtained stay orders; and the court will order that this matter be set down for hearing within a limited period.

The court is of the view that the prayers for dismissal for non disclosure of reasonable cause of action was not proved at all by the 1st Respondent, indeed I was of the view that the 1st Respondent is feeling frustrated by the failure of the proceeding of this matter, indeed the 1st Respondent's argument could have much better suited an application to discharge the stay orders.

The orders of this court therefore are as follows: -

1. That the application dated 27th July 2004 is dismissed and the costs thereof shall be in the cause.

2. The Plaintiff shall within 3 months set this suit for hearing, failure to so do the 1st Respondent is hereby given liberty to re-apply for the dismissal of this suit for want or prosecution.

Dated and delivered this 8th November 2004.

MARY KASANGO

AG JUDGE