REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO.12 OF 2001

1. ITALO DALL ARMELLINA…….....…1ST APPLICANT

2. IRIS PASINI…….2ND APPLICANT

3. AURORA LIMITED…….3RD APPLICANT

V E R S U S

THE CHIEF MAGISTRATE MOMBASA……..…..RESPONDENT

R U L I N G

This is an application brought under Order VI rule 3 of the Civil Procedure Rules and S.3A of Civil Procedure Act. The main prayer is that this court strikes out a Notice of Motion dated 24.3.99. The said application inter alia sought:-

1) That an order of Prohibition directed to the Chief Magistrate, Mombasa prohibiting him and any other Magistrate in the Republic of Kenya from hearing or further hearing or determining Chief Magistrate's Court Criminal Case No.251 of 1999, **Republic –vs- Italo Dallarmetina, Irisi Pasini and Aurora Limited** or the charge thereon or any one of them.

2) That the said proceedings in question that is Chief Magistrate's Court Criminal Case No.251 of 1999, **Republic –vs- Italo Dillarmelina, Irisi Pasini and Aurora Limited** be stayed until the determination of the application for the above order of prohibition prayed for in prayer 1 hereinabove.

The said application was filed by the firm of Kanyi, Juma & Company Advocates on 25th March, 1999. It was supported by a Supporting Affidavit sworn by Irisi Pasini on 26th January, 1999 and by a verifying affidavit sworn by the same person on the 21st January, 1999. This application had been filed by leave of this court sought and obtained earlier in the same week. The Applicant had during the prosecution of the application for leave to file the above application also purportedly obtained an order that the leave which was granted, was also going to operate as a stay of any further or other proceedings of the said case. At that time the order of stay made a lot of sense at least until the application of the Order of Prohibition would be heard and finally determined.

By an application dated 27.9.1999 made by Mombasa, State Counsel, the latter sought to apply to set aside the orders of stay above mentioned arguing that the High Court in granting leave to the Applicant to file for the Order of Prohibition, had not made any stay orders and accused the firm of Kanyi, Juma &

Company, of deliberately misleading the lower court handling the Criminal Case No.251 of 1999, that such an order of stay had been made, when according to the State Counsel, none had been made. Indeed I have perused the final order of my brother Waki, J. dated 24.3.99, and it clearly stated that the leave granted shall not operate as a stay of proceeding.

By an application dated 13.9.2000 filed by Mouko & Company Advocates, the latter sought, inter alia, for an order that the affidavits supporting and/or verifying the application of 24.3.1999 aforesaid, be struck out for failing to comply with the provisions of Order 18 of the Civil Procedure Rules and in the alternative, that the same were sworn fraudulently by someone else other than the person thereon appearing as the deponent. In my view, the Applicant should have included a prayer striking out the Notice of Motion in case the above prayer were granted. But no such additional prayer was included.On 21.11.2001, this court heard the above application and having been persuaded that the supporting and verifying affidavit were not sustainable for ground therein given struck them out. This must have left the Applicant therein biting his fingers as to why he had not included the prayer to strike out the whole application as incompetent if the application to strike out the affidavits were allowed.

Be that as it may, the Applicant belatedly filed the application before the court to strike out the Notice of Motion. The Respondent was served with the application on 6.12.2001. They chose not to oppose the applicationThey filed neither the replying affidavit nor any statement of grounds of opposition. In January 8th, 2002, the Respondents herein learnt that this file and this application therefore had been transferred to Malindi for further hearing and action. They took no steps to do anything. They knew that under the provisions of the law they could file their replying affidavit or the statement of grounds of opposition any time before three days before the application is to be heard. They did not, in my view bother, nor has any grounds for such failure been indicated.

In my view and I so hold, Order 50 rule 16(3) presumes that if a Respondent who is properly served with an application does not file his replying affidavit or a statement of grounds of opposition within the prescribed time, then he may not be wishing to oppose the application. Under the said circumstances the Rules give this court discretion not to allow the Respondent to reply and the rule allows the court to hear the application ex parte.

Perusal of this file would confirm that what the Respondent was from the start interested in was the order of stay. He never moved to prosecute the original application until the affidavits in support thereof were struck out.Even after that date in time to-date the Respondent showed no further interest in rectifying the Notice of Motion until an application to strike out was due, not for its filing which was last year in November, but for its hearing. Then like a hawk ready to strike and scoop a chick, he swooped in, a day before the hearing of the application under a certificate of urgency and make sure he promptly tried to seek priority to have his application heard before the main application to strike out. The clear intention here was to try and prevent the Applicant herein getting the opportunity to strike out the Notice of Motion in question. These are careful, stealthy and calculated steps of a tactician.I do believe that a lawyer is a tactician in his trade. But it is my understanding that even tacticians can play their game with honesty and bona fides. Not so with the firm of Kanyi, Juma & Company in relation to this case. Here they have played a dishonest game from day one. They misrepresented the order obtained before Waki, J. to the Chief Magistrate's'Court. They filed and tried to obtain an order for stay with a view to using it to stop the case being heard. And to-day they tried to use sharp tactics to prevent the Applicant herein prosecuting his application and obtain orders, if possible, to which he may be entitled. My opinion is that an advocate is an officer of this court and like every other officer, he should carry out his duties fairly and honestly, in the final interest of justice.

Going back to the situation of this application, I find that once the affidavits in support of the application of 24.3.1999 were struck out, the application, in my view, was as good as dead. The Notice of Motion could not and cannot under the law stand on its own unless specifically so provided for. It remained standing as a skeleton totally bereft of any flesh. The Respondent took no measures to seek for this court's leave to file fresh affidavits when the original ones were struck out, and indeed took no measures to rectify it and prosecute it.

The application before me is to strike it out as incompetent. It is brought under Order VI rule 3, which I find totally irrelevant and not capable of dealing with the situation. However, under Order 50 rule 3, every Motion grounded on evidence, must be supported by an affidavit deponing the evidence relied on. In this case the Notice of Motion in question, had its supporting affidavit struck out. Thereafter the application remained no longer an application envisaged under that rule. It became incompetent and on the application of the Applicant, it should not be allowed to remain standing in the file. I have considered all the grounds put forward by Mr. Mouko.I am persuaded by the same. The upshot therefore is to allow this application. The Notice of Motion dated 24.3.1999 is hereby struck out with immediate effect.

Costs are to Applicant.

Dated and delivered at Malindi this 13thday of February, 2002.

D.A. ONYANCHA

J U D G E