



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO 86 OF 2000

ELECTRICAL SERVICES LIMITED.....PLAINTIFF

-VERSUS-

KENYA WILDLIFE SERVICES.....DEFENDANT

RULING

1. This matter has a very long and tortuous history. For lack of time I will not go into it.
2. I am writing a ruling because on 6th March 2017 the matter came for hearing before me for the very first time.
3. Mr. Mahan appeared for the plaintiff. Mr. Gitibi appeared for the defendant. He sought an adjournment for two reasons: their Mr. Cheruiyot who was handling the matter had left the firm, their client was not available. Mr. Mahan indulged them save for costs to the plaintiff.
4. The matter was fixed by consent for hearing on 19th June 2017 with a rider that parties attempt an out of court settlement.
5. For some reason the matter did not proceed and on 3rd July 2018 a date was fixed by consent in the registry for hearing on 22nd October 2018.
6. On 22nd October 2018, by 10:15 am neither Mr. Mahan nor his client were in court. Mr. Ndichu appearing for the defendant made an application for dismissal for want of prosecution. That the plaintiff was disinterested in the case, and being a 2000 matter it needed to come to an end.
7. On the ground that the record spoke for itself with regard to the fact that date was fixed by consent, I allowed the application.
8. At 10:50 am Mr. Mahan appeared with his client. He explained that he was in court 2 and a Ms. Wangari was holding his brief. I noted that Ms. Wangari had been in court but did not hold his brief in that matter, Mr. Ndichu had already left. He sought for leave to file application to reinstate which I granted.
9. He filed Notice of Motion dated 23rd October 2018 under Order 45 rule 1(A), Rule 2(1) and Rule 3(2), section 80 of the Civil Procedure Act 2010 supported by his affidavit and that of Tarseem Singh Sembhi. He annexed the day's cause list showing that he had four matters before court two, and three matters before me, plus the piece of paper with instructions to hold brief.
10. The application was opposed vide grounds of opposition filed by Muthoga gaturu and Co, advocates, that the application was fatally and incurably defective in law having been brought under the wrong provisions of the law, and a replying affidavit sworn by Edwin Munga raising the issues of delay of the suit, counsel and client coming in two hours after the court sat, and there being no one to hold brief as alleged.
11. Mr. Munga while urging the court to dismiss the application with costs however, knowing that the court has some discretion in the matter asked that should the application be allowed the defendant be awarded thrown away costs.
12. Counsel argued the application orally on 4th December 2018.
13. Mr. Mahan reiterated the contents of the affidavits relied on Order 2 rule 4 CPR, **Nyamira & Anor vs. Archer Dramond Morgan Limited (2012) 1 KLR 193** on the issue of the application having been brought under the wrong provisions of the law. The court held that as

long as the citing of wrong provisions 'was not in bad faith, meant to mislead, or otherwise cause injury or prejudice to the other side' the court would not 'dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded'

14. Mr. Ndichu opposed the application. He distinguished both and cited **George Kigoya vs. the A.G of Uganda [1966] E.A 463** , **Salume Namukasa vs. Yozefu Bukya [1966] E.A 433** arguing that judicial discretion must be exercised within the confines of the law citing **Mbogo vs Shah**, that the said Ms. Wangari did not swear an affidavit. Both in the Kigoya and Namukasa cases the court dismissed the applications brought under the wrong provisions of the law on the ground that the applications were not properly before the court hence there was nothing upon which the court could base its discretion.

15. I have carefully considered the rival affidavits, arguments and authorities.

16. The issue is whether the application has any merit.

17. It is not disputed that the applicant cites the wrong provisions of the law. But is also clear to both parties what the applicant is seeking. While it is necessary to discourage advocates from embarrassing, hasty and careless drafting, because rules of procedure and the law exists for a reason, it is also important to remain conscious to why these laws and rules exist, not merely for providing restrictions but also as means to create order in the manner in which we do things towards the attainment of justice. The strict application of rules of procedure has been known to work injustice, hence the window created by our Constitution to allow courts to look at the ultimate goal, which is justice for each side.

18. The court of appeal in **Charles Karanja Kiiru v Charles Githinji Muigwa [2017] eKLR** cited itself from **Kamlesh Mansukhalal Damji Pattni vs. Director Of Public Prosecutions & 3 others [2015] eKLR** where the Judges exhorted that:

It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." Judicial Officers are also State officers, and consequently are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice."

19. The Court of Appeal's words fortify what I am minded to decide. The parties in this case have been here for close to two decades. The plaintiff and his counsel showed up 35 minutes after the suit was dismissed a clear indication that they were coming to proceed. The previous hearing date they had indulged the defendant where neither himself nor his counsel were ready to proceed. It is only fair and just that the issues herein be determined upon the hearing of each party, every preceding misdemeanor notwithstanding.

20. The respondent is willing to accept compensation for the inconvenience by way of costs.

21. I find there that the application succeeds. The suit is reinstated. The respondent will have thrown away costs.

Dated, delivered, and signed at Nyeri this 18th Day of January 2019.

Mumbua T Matheka

Judge

In the presence of:

Mahan for Applicant

Bwononga holding brief for Ndichu for Respondent.

Court Assistant-Emmanuel

Mumbua T Matheka

Judge

18/1/19