



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 94 of 2008

ANWAR MAHENDRA PANDYA PLAINTIFF

VERSUS

ALOWIYAH MAHENDRA PANDYA 1ST DEFENDANT

BUSINESS FORMS AND SYSTEMS LTD. 2ND DEFENDANT

RULING

The Plaintiff instituted this suit against the defendants in February 2008. Simultaneously with the filing of the suit, the plaintiffs also filed an application under a certificate of urgency seeking for a temporary order of injunction to restrain the defendants from operating Bank Account No.0150022002 at Commercial Bank of Africa in Westlands or to operate any other bank within the jurisdiction of this court until the suit is determined. That application was determined in a considered ruling by Kimaru J made on 30th January 2009.

On 31st March 2009, the defendants filed a chamber summons application under order X Rule 11 of the Civil Procedure Rules, seeking for an order for the plaintiff to file a list of documents by way of an affidavit. That application came for hearing on 29th April 2009, before Kimaru J and it was allowed. In essence the plaintiff was given 14 days to file the list of documents on oath and provide discovery. The plaintiff failed to file the documents. This prompted the defendants counsel to file the chamber summons under order

X Rule 20 and order XV1 Rule5 of the Civil Procedure Rules. The defendant is seeking for an order to strike out the plaintiff's suit for non-compliance with court order of 29th April 2009. In the alternative, the plaintiff's case be dismissed for want of prosecution.

This application is premised on the grounds that the plaintiff failed to comply with the order of 29th April 2009. It is now over 14 days since the plaintiff was ordered to file the documents, moreover, no steps have been taken to prosecute the matter. Counsel for the defendant argued that the ruling of 29th April 2009 was sent to the plaintiff's Advocates who were in any event present in court when the order was made. On 30th April 2009 the order I was sent for approval but to date, they have never approved of the same. The plaintiffs have all along been aware of the order requiring them to file the documents on oath and since no application for extension of time has been made, further no steps have been taken towards prosecuting the case; counsel urged the court to dismiss the plaintiff's suit for want of

prosecution.

Regarding a replying affidavit filed by Robert Oyiembo counsel for the plaintiff, which was filed in court on 4th June 2009, counsel for the defendants urged the court to ignore the same because the order of 29th April 2009 specifically directed the plaintiff to file the documents on oath and within 14 days. The affidavit was sworn by the Advocate for the plaintiff which is irregular because matters pertaining to the plaintiff should have been responded to, by the plaintiff himself. In any event the affidavit was filed out of time and no extension of time was sought. Pleadings closed on 28th September 2008 after the defence was filled and to date summons to enter appearance have never been served upon the defendants although they opted to file their defence even without being served with the summons.

This application was opposed by Mr. Odhiambo who relied on the replying affidavit sworn by Robert Oyiembo counsel for the plaintiff. Mr. Oyiembo has deponed that the plaintiff was away in Tanzania when the order of discovery was made. He has now prepared a list of documents which is outside the time ordered by the court. Counsel urged the court not to dismiss the suit in the interest of justice but allow the plaintiff to prosecute the matter.

Having set out the brief background of this matter, it is provided for under order X Rule 20 of the Civil Procedure Rules that where any party fails to comply with an order to answer interrogatories or discovery of documents, if a plaintiff will be liable to have his suit dismissed for want of prosecution. The plaintiff filed this suit in February 2008 and did not even apply for summonses to enter appearance. Nevertheless the defendants filed their defence and also filed their list of documents on 12th March 2009. The plaintiff did not file his documents thus the defendants filed the chamber summons seeking for an order to compel the plaintiff to comply with discovery on oath.

By an order made on 29th April 2009, the plaintiff was ordered to provide the list of documents on oath to the defendants within 14 days. They did not do so, thus the defendants filed this application under order X Rule 20, seeking for the suit to be struck out for non compliance with the order of 29th April 2009 and in the alternative the plaintiff's suit be dismissed with costs for want of prosecution. The plaintiff failed to comply with the order and it would appear he was woken from slumber by this application which prompted his counsel to swear an affidavit. I find the matters deposed to by counsel could appropriately have been answered by the plaintiff. This affidavit thus offends the provisions of order XV111 Rule 3 of the Civil Procedure Rules.

The principle purpose for providing discovery is so that the litigation between the parties and particularly the trial is conducted fairly, openly and without surprises. Discovery is also meant to inform the defendants, of the nature of the case that they have to meet, and to prevent surprises at the trial. Failure to provide the documents is to tie the hands of the defendants and to hold them at the mercy of the plaintiff. When a plaintiff files a case before a court of law, it must be based on evidence. That evidence need not be asked for; if the plaintiff's intention of filing the suit was in pursuit of a genuine claim and for the ends of justice.

It is the plaintiff who should in normal circumstances, pursue his matter and comply with discovery even before the defendant applies for an order of discovery to be issued by the court. The plaintiff seems not interested in the prosecution of this matter, let alone to comply with the court order. The suit was filed nearly 15 months ago, summons to enter appearance have not been served. However the defendants filed defence, the court ordered the plaintiff to comply with discovery this was not done.

I am alive to the principle enunciated in the celebrated case of: **D T. Dobbie & Company Ltd vs. Joseph Mbaria Muchina CA No. 37 of 1979** Where the Court of Appeal held as follows;

"That that no suit ought to be summarily dismissed unless it appears so hopeless..."

However, this is not the case in this matter, this is a plaintiff who filed a suit under certificate of urgency and perhaps when he failed to obtain the interlocutory orders he lost interest in further pursuing the

matter. Should the defendant be vexed by a claim against them indefinitely? I am of the view the suit should be dismissed as prayed. The plaintiff is an unwilling litigant. It is against public policy to keep a suit pending, not to mention the inconvenience caused to defendants who have to worry about their defence evidence which hangs on their necks like the sword of Damocles. The court will relieve them of the sword of Damocles by dismissing the suit for want of prosecution with costs as prayed.

RULING READ AND SIGNED AT NAIROBI THIS 3RD DAY OF JULY 2009.

M.K. KOOME

JUDGE