



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 5 OF 2016

SAFARICOM LIMITED.....PLAINTIFF

VERSUS

EMFIL LIMITED.....DEFENDANT

RULING

1. For determination is the notice of motion dated 13th April 2018 by the defendant/applicant seeking for orders;

- (a) Spent;
- (b) The suit be dismissed for want of prosecution;
- (c) The court does issue orders of demolition of the plaintiff's mast erected on plot no Kwale/Ramisi Konondo SSS/150;
- (d) The Kwale county commander or the officers in charge of the police station within the jurisdiction of the suit property be ordered to supervise and ensure compliance with the order;
- (e) The defendant be granted prayers sought in the counter-claim;
- (f) Costs of the application be provided for.

2. The application is opposed by the plaintiff/respondent vide the grounds of opposition which set out the followings;

- (i) The application is seeking draconian orders solely meant to blackmail the Respondent.
- (ii) The application is unconstitutional for seeking orders to destroy private property without due regard to costs, in convenience and colossal costs involved.
- (iii) The application is premature as the issues raised in the main suit have not been ventilated and fully disposed of on merit.

3. On 25th September 2018, parties notified the court that they were involved in out of court negotiations and in case no settlement was reached, they were to file written submission. The defendant filed their submissions on 5th December 2018. When the matter came before this court on 6th December 2018, Mr Ondeng holding a brief for Mr Wafula advocate for the plaintiff sought 21 days from this date to respond to the defendant's submissions. The court granted them the 21 days and fixed a ruling date for 16th April 2019. Unfortunately 16th April 2019 fell within the High Court Easter recess. However before the court took the break on 10th April 2019, no submissions had been filed in favour of the plaintiff. This court will thus consider the application on its merits and compare it with the grounds of opposition filed.

4. It is an acceptable principle of law that courts should be slow to strike out suits since the order for striking out is drastic. In the case of **D. T Dobie (K) Ltd versus Muchina (1982) KLR 1**, the Court of Appeal held that a suit should only be struck out if it is found to be so hopeless that it cannot be cured even by amendment. In the instant suit, the defendant wants the dismissal for want of prosecution. Secondly, the defendant in the grounds set on the face of the motion stated that it is the registered owner of the suit property. That the lease between Jua Maisha Ltd and the plaintiff are contrary to the judgements and orders of this court and the Court of Appeal which restrained all dealings with the suit property. Lastly that since 6th April 2017, the plaintiff has not taken steps to fix the matter for hearing.

5. In her plaint dated 15th January 2016, the plaintiff pleaded that it had entered a lease with Jua Maisha Ltd to erect masts on the property Kwale/Ramisi Kinondo SSS/150. The plaintiff annexed a copy of the contract and title deed between him and Jua Maisha Ltd in her application dated 15th January 2016. The said application was dismissed on account of this court's and the Court of Appeal's finding that the suit property belonged to the defendant. The plaintiff appears not to have challenged the ruling and order made on 6th April 2017. Neither have they moved to join Jua Maisha to this case.

6. In opposing the application, the plaintiff stated that the orders sought are unconstitutional in so far as they seeking to damage private property without taking into account the colossal costs involved. The plaintiff gave no reason why they have not set down the case for hearing for the past one year. In the present application, the defendant/applicant annexed as "SMK -2" a letter dated 12th September 2017 addressed to the plaintiff's advocate on record. The letter asked the plaintiff to dismantle the mast and return the property in the condition they found it within 10 days. In default, the defendant stated they would proceed to carry out the demolitions at the plaintiff's costs.

7. This application was filed in 13th April 2018 which is about 7 months from the date the demand letter was issued. The plaintiff from the pleadings in the application has not removed the mast or challenged the contents of that letter through the legal process. The plaintiff cannot therefore plead that the orders sought are unconstitutional when she has the option to remove their masts which option they are reluctant to exercise. At the same time, the plaintiff is not giving any reason for not taking steps to set down the case for hearing for its determination on merits. Order 17 rule 3, 3(3) provides that any party to the suit may apply for its dismissal as provided in sub rule 1. Sub rule 1 provides that where no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed and **if no cause** is shown to the satisfaction of the court the suit may be dismissed.

8. In this case no cause has been shown to the satisfaction of the court (as regards prayer 2) and no explanation has been given why the prayer 3 of the application should not issue. Prayer 4 & 5 are consequential prayers. Thus I find there is merit in the notice of motion dated 13.4.2018 and allow it as presented. The plaintiff is however granted 45 days to remove their equipment's from the defendant's land title no Kwale/Ramisi Kinondo SSS/150. Failure to do so, Order 3 and 4 to be executed. There was no prayer in the Counter Claim costs of the application awarded to the applicant.

Ruling DATED & SIGNED at Mombasa this 7th day of May, 2019.

A. OMOLLO

JUDGE.

DELIVERED at Mombasa this 16th day of May 2019.

C.YANO

JUDGE.