



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 320 OF 2012

IN THE MATTER OF: THE ESTATE OF CHRISTOPHER JOHN ARCHER

IN THE MATTER OF: THE TRUSTEE ACT

**IN THE MATTER OF: THE RIGHTS OF THE PLAINTIFF AS
THE (CESTUI QUE TRUST) TO BENEFICIAL INTEREST IN THE
PROPERTIES KNOWN AS KWALE/DIANI BEACH BLOCK 806,
807 & 808.**

BETWEEN

JAMES H. ARCHER

JOANNA TRENT.....PLAINTIFFS

VERSUS

INGER CHRISTINE ARCHER

ANNELISE ARCHER CLARDK.....DEFENDANTS

HELLEN KAY HARTLEY

RULING

The Defendants by their Notice of Motion application dated 5th February 2013 and expressed to be brought under section 3A of the Civil Procedure Act and Order 37 Rule 16 of the Civil Procedure Rules seeks the following orders:-

1. That the originating summons dated 5th June 2012 and filed in court on same date be struck out and dismissed as against the Plaintiffs/Respondents.
2. That the costs of this suit be borne by the Plaintiffs/Respondents.

Inter alia the application is grounded on the following grounds:-

- i. *The Plaintiffs/Respondents have failed to fix the said originating summons for directions within 30 days period required from the date of filing the originating summons.*
- ii. *The Plaintiffs have lost interest in prosecuting the matter.*
- iii. *The Plaintiffs have failed persistently to attend court on the dates set for the mention by the Respondent.*
- iv. *That it is just and mete that this application is allowed.*

The Defendant's application is further supported by the affidavit sworn in support thereof by **Helen Kay Hartley** the 3rd Defendant on 5th February 2013. The Defendants have further filed written submissions articulating their position.

The plaintiffs oppose the application by the Defendants and James Archer the 1st Plaintiff has sworn a replying affidavit dated 9th May 2013 in opposition to the application. The Plaintiffs have further filed written submissions in response to the Defendants submissions. The respective parties counsel appeared before me on 19th September 2013 when they highlighted their filed submissions.

The brief facts of this matter are that the Plaintiffs on 5th June 2012 filed an originating summons seeking the following orders:-

1. A declaration that the beneficial interests in the properties known as Title Numbers **Kwale/Diani Beach Block/806, 807 and 808** registered in the names of the 1st, 2nd and 3rd Defendants are held on trust by the 1st, 2nd and 3rd Defendants in the followings shares:-
 - a. *For the 1st, 2nd and 3rd Defendants (jointly one undivided share).*
 - b. *For the 1st Plaintiff (one undivided share).*
 - c. *For the 2nd Plaintiff (One undivided share).*
 - d. *For Robert A Archer (One undivided share)*

All holders of undivided shares to hold as tenants in common, alternatively in such shares as the court shall determine.

2. An order that the 1st, 2nd and 3rd Defendants do execute transfers that effect registration of the 1st and 2nd Plaintiffs and two nominees of the Defendants as joint proprietors of the **leasehold/Diani Beach Block/806, 807 and 808**, and in default of such execution, the Registrar of the High Court be authorized to execute such transfers under section 98 of the Civil Procedure Act.
3. Costs of the suit.

Simultaneously with the originating summons the plaintiffs filed a chamber summons application seeking orders restraining them from in any manner dealing with the suit properties. The parties on 27th June 2012 filed in court a duly signed consent letter annexed to the Defendants supporting affidavit and marked "**HKH1**" by which the parties agreed to the maintenance of status quo in regard to the suit properties including an order of restraint against the 1st, 2nd and 3rd Defendants from transferring their interest in the suit properties to third parties pending the hearing and determination of the suit and/or further orders of the court. By consent the Defendants were to file a reply to the originating summons within 28 days from the date of the consent and further the parties were to fix a mention date for directions in the registry.

The Defendants/Applicants complaint is that the Plaintiffs having filed the originating summons under a certificate of urgency did not act with diligence to get the matter disposed in an expeditious manner. The Defendants state that although the Plaintiff took a mention date for the matter on 31st July, 2012 they did

not attend court to take directions and further did not attend court on 11th December 2012 for a mention taken at the instance of the Defendants for purposes of taking directions even though the plaintiffs had been served with the mention notice. The Defendants submit that the Plaintiffs conduct depicts the Plaintiffs as persons who have lost interest in the case and it is therefore only fair that the case be dismissed. The Defendants submit that under order 37 Rule 16 the Registrar is required to list the originating summons with notice to the parties for directions within 30 days of filing of the originating summons. The Defendants acknowledge that the Registrar hardly acts in this manner and submits that in practice the obligations to have the matter listed for directions before a judge rests with the Plaintiff which the plaintiff in this matter failed to do.

The Plaintiffs in response have attributed the delay in taking directions in the matter to the effort that they have been making to have the matter amicably resolved out of court taking cognizance of the fact that the matter involves land and members of one family and thus a resolution of the dispute through an alternative dispute resolution mechanism would no doubt be more preferable. In the replying affidavit by James Archer a string of email correspondences marked “**JA-1**” are enclosed which show that the subject of mediation between the family members had been under discussion from late 2012 to March 2013. Indeed one of the emails dated February 12, 2013 suggest that the Defendants advocate, Ms Virginia Shaw had been contacted and had indicated her clients were not averse to mediation of the dispute. The Plaintiffs thus submit that the failure to list the matter for directions was not because they lacked any interest in the suit but rather that the Plaintiffs were seeking an alternative avenue that would have been “**less painful**” to have the dispute resolved.

The Plaintiffs contend that alternative dispute resolution (ADR) mechanisms are an accepted form of resolving disputes and that **Article 159(c)** of the Constitution enjoins the court to encourage and promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional disputes resolution mechanisms. Order 46 Rule 20 of the Civil Procedure Rules equally acknowledges the place of alternative dispute resolution mechanisms as being complimentary to the role played by the court. In the premises the Plaintiffs submit they cannot be accused of having lost interest in the suit when it is clear they were actively seeking a resolution of the dispute through other means.

The Defendants in their filed submissions have further contended that the plaintiff’s suit was filed in contravention of Rule 12 of the Advocate (practice) Rules under the Advocates Act Cap 16 of the Laws of Kenya. The said rule 12 states “**No advocate should practice under the name other than his own name or the name of a past or present members of the firm**”. The Plaintiffs pleadings were drawn by Timothy I. A. Bryant, Azania Legal consultants. The Defendants submit that “Azania Legal Consultants is not a name of an Advocate and cite a decision by **G.B.M Kariuki J in Misc. Application No. 30 of 2012** in the matter of the Estate of Stephen Kariuki Ndung’u where the same Advocates were involved and the judge struck out the suit holding that the suit was filed in breach of Rule 12 of the Advocates Practice Rules. The Defendants extend their argument and aver that the Plaintiff’s failure to abide with Rule 12 meant that they were also in breach of section 35 of the Advocates Act which provides thus:-

35(1) Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in section “34 (1) shall at the same time endorse or cause to be endorsed thereon name and address of the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a time.....”

The Defendant further referred the court to a Ruling by Mary Kasango J in the case of **Travel shoppe Ltd –vs- Indigo harms EPZ Ltd. & 2 Others (2004) eKLR** where the court held that the firms that drew the debenture needed to endorse and/or indicate they were the drawers.

The Plaintiffs in response to the issues raised in regard to contravention of Rule 12 of the Advocates Practice Rules protests that this was not one of the grounds on which the Defendants application was founded and further states the pleadings were drawn by Timothy Bryant Advocate a fact that is admitted by the applicants and that at all material times Timothy Bryant Advocate was a fit and proper person to draw the pleadings as he was a fully paid up member of the Law Society of Kenya and held a practicing certificate. The Plaintiffs contend that the case of “**in the matter of Estate of Stephen Kariuki Ndung’u**”

supra cannot be an appropriate precedent in this matter as in that said case the court raised the issue sou moto and did not invite any address on the issue from the affected parties.

I have perused the originating summons and I note the same was signed and/or endorsed “**T.A. Bryant**” as was the certificate of urgency and the chamber summons dated 5th June, 2012. The Plaintiffs counsel and the Defendants counsel filed a jointly signed letter of consent dated 27th June 2012 which was signed by Timothy I. A Bryant on behalf of the Plaintiffs and V. Wangui shaw on behalf of the Defendants.

In my view the essence of Rule 12 of the Advocates Practice Rules is to ensure that the Advocates who draws pleadings and/or documents own them and that there is no doubt as to the authorships of the specific documents. In the instant case there is no doubt as to who drew the pleadings on behalf of the Plaintiffs and indeed the respective counsel even did engage to draw the consent letter that the parties filed in court.

The situation however would be totally different if Timothy I.A Bryant was not qualified under section 9 of the Advocates Act to draw the pleadings as their any purported pleadings would have been incompetent. It is not contested that Mr. Bryant held a current practicing certificate and that he was therefore competent to draw the pleadings envisaged under section 34 of the Advocates Act. Indeed the firm name “**Azania legal consultants – Advocates**” carries the name of one of the current partners of the firm “**Azania**” and in my view would satisfy the requirement of Rule 12 of the Advocates Practice Rules. To hold otherwise in my view would be to fall victim to the trap of being captive to the strict rules of procedural technicalities which I do not intend to be a victim of owing to the wide latitude that Article 159 2(d) has afforded the court. However, the rise of name “Legal Consultants” in the firm name may be inappropriate although the firm may have a consultant within its ranks.

The court has reviewed and considered the Defendants application the affidavit support and the submissions and the plaintiffs replying affidavit and is satisfied there was no inordinate delay on the part of the plaintiffs to move the court for originating summons. The plaintiffs have offered a reasonable explanation for the apparent delay in that they sought to engage the Defendants in alternative dispute resolution mechanisms considering that they (both Plaintiffs and defendants) are members of one family. The court is enjoined to give parties a chance to solve their disputes through ADR and hence does not consider that the Plaintiffs overtures to the Defendants were out of place and/or irresponsible. The court would gladly appreciate if the parties could resolve their disputes amicably.

The Court in the premises disallows the Defendants application to dismiss the Plaintiffs suit ostensibly for want of prosecution. The Defendants submitted substantively under Order 17(3) of the Civil Procedure Rules which deals with dismissal of suits for want of prosecution. Order 37 Rule 16 does not provides for dismissal of the suit for non compliance and the reliance on order 3A to support the application was inappropriate in the face of the clear provisions of the law under which the application ought to have been founded. I hold the view that parties as much as possible should be afforded the opportunity to have their matters adjudicated upon on their merits. It is that view that will carry the day in the circumstances of this matter. Any delay on the part of the plaintiffs was not such as was in ordinate or inexcusable.

The Defendant application dated 5th February 2013 is accordingly dismissed but having regard to the circumstances and facts of this matter, I make no order as to costs and each party will bear their own costs of the application.

Ruling dated and delivered this 15th day of November 2013.

J. M. MUTUNGI

JUDGE