



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 407 OF 2012

JULIUS KIPKENY KOLIL.....1ST PLAINTIFF

RUTH JEMUTAI KAMAR.....2ND PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

NANCY WAITHIRA KIRURI.....2ND DEFENDANT

MUGANDA WAKULWA T/A KEYSIAN AUCTIONEERS.....3RD DEFENDANT

RULING

(1) Before this Court are three (3) applications for determination as follows-

(i) Notice of Motion dated 25th November 2019 by which the 1st Defendant KENYA COMMERCIAL BANK sought the following orders:-

(1) THAT this suit be dismissed for non-compliance with the order issued on 4th July 2019.

(2) THAT the costs of this application be borne by the Plaintiffs.

2) The application which was premised upon **Order 17 Rule 2(4), Order 51 Rule 1** of the **Civil Procedure Act Chapter 21, Laws of Kenya** the inherent jurisdiction of this Honourable Court and all other enabling provisions of the law, was supported by the Affidavit of even date sworn by **TOM A. OGOLA** the Senior Legal Counsel of the Bank.

3) (ii) Notice of Motion dated 15th January 2020 filed by the 2nd Defendant **NANCY WAITHIRA KIRURI MUGANDA T/A KEYSIAN AUCTIONEERS** seeking for orders:-

(1) THAT the Plaintiff's claim be dismissed for want of prosecution.

(2) THAT the 2nd Defendant's counterclaim be granted as prayed.

(3) THAT the costs of the application be in the cause.

4) This second application was premised upon **Article 159(2)(b)** of the **Constitution of Kenya, Section 1A, 1B and 3A** of the **Civil Procedure Act, Order 7 Rule 13, Order 17, Rule 2(4)** and **Order 51 Rule 1** of the **Civil Procedure Rules** and all other enabling provisions of the Law, and was supported by the Affidavit of even date sworn by the 2nd Defendant.

5) (iii) Notice of Motion dated 9th March 2020 in which **JULIUS KIPKENY KOLIL** (the 1st Plaintiff/Applicant) and **RUTH JEMUTAI KAMAR** (the 2nd Plaintiff/Applicant) sought for orders THAT:-

(i) This Honourable Court do vary and/or set aside its orders issued on 4th July 2019.

(ii) The Honourable Court be pleased to extend time within which to set down suit for hearing.

(iii) The Plaintiffs herein be granted leave to amend the Complaint herein in terms of the draft amended Complaint to enjoin the Chief Registrar as the 4th Defendant.

(iv) This Honourable Court do cancel the entry transferring the suit property being L.R. No. 9042/685 Maisonette No. B4, Simba Villas – Embakasi to the 2nd Defendant; and

(v) The costs of the application be provided for.”

6) This third application was premised upon Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 45 Rules 1, Order 8 Rule 3 and 5 of the Civil Procedure Rules and all enabling provisions of the law and was supported by the Affidavit of even date sworn by JOEL KIMUTAI BOSEK an Advocate of the High Court of Kenya.

7) All the three applications were opposed. The Court directed that the three applications be heard and determined together and that they be canvassed by way of written submissions. The Plaintiff / Applicants filed their written submissions dated 25th September 2020, the 1st Defendant filed its written submissions dated 28th September 2020 whilst the 2nd Defendant filed their written submissions dated 10th September 2020.

BACKGROUND

8) Vide the Complaint filed in Court on 25th June 2012 the Plaintiffs sought the following orders as against the 1st and 2nd Defendants-

a) Make a declaration that the purported sale of L.R. No. 9042/685 Maisonette No. B4 between the First Defendant and the Second Defendant is unlawful;

b) Order exemplary damages against the First Defendant for breach of fiduciary duty;

c) Issue a permanent injunction restraining the Defendants from interfering with the Plaintiff's suit property;

d) Grant any other relief that this Honourable Court may deem fit to grant; and

e) (Grants) Costs of this suit.

9) Contemporaneously with the suit the Plaintiffs filed an application seeking injunctive relief pending the hearing and final determination of the suit. The said application was heard and a Ruling was issued on 28th March 2013 by Hon. Justice J. B. Havelock (as he then was).

10) Thereafter the Plaintiffs failed and/or neglected to set down the suit for hearing and the Court issued Notices to Show Cause why the suit should not be dismissed for lack of prosecution under Order 17 Rule 2, Civil Procedure Rules. The suit was eventually dismissed on 26th September 2018 for want of prosecution.

11) The Plaintiffs then filed the Notice of Motion dated 12th November 2018 seeking to have the suit reinstated. In allowing the application for reinstatement of the suit this Court in its Ruling of 4th July 2019 stated as follows:-

“Accordingly I do allow this present application and direct that the suit be set down for hearing within sixty (60) days of the date of this Ruling failing which it will stand dismissed. In order to expedite the matter, parties will appear before the Hon. Deputy Registrar for Case Management within thirty (30) days of this Ruling. It is so ordered. Costs to the 1st Defendant.”
[emphasis supplied]

12) Counsel for the Plaintiffs did not attend Court on the Ruling date.

The Court then directed that the parties appear before the Hon. Deputy Registrar for Case Management on 25th July 2019. It was averred that Counsel for the 1st Defendant duly served the Plaintiffs Advocate with a mention notice to appear before the Hon. Deputy Registrar. This is evidenced by the Affidavit of Service dated 24th July 2019 (Annexure TAO '2') to the Supporting Affidavit dated 25th November 2019. However on the scheduled date for Case Management being 25th July 2019 only the 1st and 2nd Defendants were represented. The Plaintiffs failed to appear for Case Management.

13) The Hon. Deputy Registrar after noting that the pleadings were not complete directed all the parties to comply within 14 days. Parties again appeared before the Hon. Deputy Registrar on 25th September 2019 when the 1st and 2nd Defendants confirmed that they had filled their respective pleadings as directed. The Plaintiffs however sought for and were granted an additional fourteen (14) days to put in additional documents and witness statements. The matter was then scheduled for mention on 18th October 2019.

14) On **18th October 2019** when the matter came up before the Hon. Deputy Registrar the Plaintiffs again sought for additional time to comply with Case Management. The Hon. Deputy Registrar then referred the file back to the trial Court on **21st November 2019** for directions in light of the directions which had been made on **4th July 2019**. Before that date the Plaintiff filed its documents. On **21st November 2019** the trial Judge directed the 1st Respondent to put in a formal application to have the suit dismissed for non-compliance with the Courts orders on **4th July, 2019**. Hence the present applications.

ANALYSIS AND DETERMINATION

15) I have carefully considered the written submissions filed by the parties in this matter. The following are the issues that arise for determination:-

(i) Whether the Plaintiffs suit stands dismissed for non-compliance with the Courts orders of 4th July 2019.

(ii) Whether the Plaintiffs are entitled to the orders sought in the Notice of Motion dated 9th March 2020.

16) It is common ground that this suit was dismissed on **26th September 2018** for want of prosecution under **Order 17 Rule 2**. Thereafter upon application by the Plaintiffs vide the Ruling of **4th July 2019** the High Court reinstated the suit and in doing so made the following orders:-

(i) That the suit be set down for hearing within sixty days from the date of the Ruling failing which it will stand dismissed.

(ii) In order to expedite the matter, parties to appear before Deputy Registrar for Case Management within 30 days of this Ruling.

(iii) Costs shall be to the Defendant. [emphasis supplied]

17) The Applicants submit that despite clear direction that the suit be set down for hearing within **sixty (60) days**, the Plaintiffs failed to comply and failed to attend before the Hon. Deputy Registrar on **25th July 2019** for Case Management. Counsel for the 1st Defendant contended that in the circumstances the Plaintiffs suit automatically abated **sixty (60) days** after the order ie on **5th September 2019** and as such there existed no suit to be reinstated. That the 1st Defendants application of **25th November 2019** was bought merely to confirm the status of the suit as **'dismissed.'**

18) Similarly the 2nd Defendant submitted that the delay by the Plaintiff in setting down the suit for hearing within **sixty (60) days** as directed by Court had been inordinate, unexcusable and occasioned prejudice to the two Defendants. That no valid reason had been advanced why the suit should be reinstated and thus there existed no reason or the Court to exercise its discretion in favour of the Plaintiffs.

19) On their part the Plaintiffs pleaded that the delay in complying with the Courts directions of **4th July 2019** was due to factors beyond their control. It was submitted for the Plaintiff that the Defendants applications had been overtaken by events and ought to be dismissed.

20) It is trite that Courts do not issue orders in vain. Court orders are binding on the parties and must be obeyed. In **TEACHERS SERVICE COMMISSION –VS- KENYA NATIONAL UNION OF TEACHERS & 2 OTHERS [2013]eKLR** it was stated that:-

“A Court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the Court, the avenues for challenging it are also set out in the law. Defiance is not an option.” [emphasis added]

21) The Plaintiffs argument that certain developments necessitated the amendment of the Plaint is not persuasive. They submit that they required more time to establish the ownership status of the suit property. The Plaintiffs had **sixty (60) days** to clarify any issues and to effect any amendments. The claim that the delay in setting down the suit for hearing was necessitated by the need to establish the true owner of the suit property is merely an excuse. The Plaintiff was already aware that the suit property had been transferred and registered in favour of the 2nd Defendant. This is evident from the Plaintiffs own Further Affidavit dated **29th August 2012** (Annexure **JK-3** to the Replying affidavit dated **19th June 2020**). In this Affidavit the Plaintiff challenges the registration of the suit property to the 2nd Defendant claiming that such registration was null and void. Thus by **August 2012** the Plaintiff was already aware of the ownership status of the suit property. Therefore the allegation that the delay was caused by the need to determine who owned the suit property cannot be true. In any event the Plaintiffs were at liberty to seek an extension of the **sixty (60) days** time limit granted by the Court, if they felt that the time provided by the Court was not sufficient.

22) From the Court record it is quite evident that the Plaintiffs were very lax in the manner in which they approached the prosecution of this suit. They failed to attend for Case Management before the Hon. Deputy Registrar and also failed to comply with the time lines given by the Registrar for service of documents. It is quite clear that even after the suit had been dismissed and reinstated the Plaintiffs still took the matter casually. This is a very old suit. The Plaint was filed way back in the year **2012**. It is prejudicial to the Defendants to keep this suit hanging like a sword of Damocles over their heads for over nine (9) years. Litigation it is said must come to an end. In the case of **MWANGI S. KIMENYI –VS- ATTORNEY GENERAL AND ANOTHER, CIVIL SUIT MISC. No. 720 OF 2009**, the Court stated as follows:-

(1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the Court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the Court from doing justice to all the parties – the Plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

(2) Invariably, what should matter to the Court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the Court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the Court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.

23) Likewise **IN NILESH PREMCHAND MULJI SHAH & ANOTHER T/A KETAN EMPORIUM v M.D. POPAT AND OTHERS & ANOTHER** [2016]eKLR, R.E. Aburili J. held thus:-

“The delay in setting down the matter for hearing no doubt prejudices the 2nd defendant as justice delayed is justice denied. The plaintiff has not given any excuse for her inaction. The court is aware that the act of dismissing a suit is a draconian measure which should be exercised cautiously as it drives the party from the judgment seat of justice. Nonetheless the court is bound to do justice to both parties without undue delay, which delay occasions injustice to either party to the dispute and in this case, delay defeats equity.

... The court shall therefore not hesitate to have the suit dismissed because the continued delay no doubt infringes on the defendants’ rights and legitimate expectations that disputes against them should be resolved expeditiously. Albeit the defendants have a counter claim, they are not bound to prosecute the plaintiff’s suit.”

24) The orders made by the Court on **4th July 2019** were clear and unequivocal – that the suit be set down for hearing within **sixty (60) days “failing which it will stand dismissed.”** The duty / responsibility to prosecute a suit lies upon the Plaintiff. In **CANUK HOLDINGS LIMITED –VS- PRAMOD PATEL T/A PRAMOD PATEL ADVOCATE** [2020]eKLR, where **Kamau J.** noted that:-

“It is the primary duty of a Plaintiff to take steps to progress his matter since they are the ones who drag the Defendant to Court, a position that was held in the case of **UTALII TRANSPORT CO. LTD & 3 OTHERS –VS- NIC BANK & ANOTHER** [2014]eKLR...

Appreciably, a case belongs to a Plaintiff. It is his responsibility to progress his matter to ensure that the same is concluded expeditiously as is contemplated in Section 1A, 1B and 3A of the Civil Procedure Rules and Article 159(2) (b) of the Constitution of Kenya.”

25) The Plaintiffs here adopted a laissez-faire approach to the prosecution of their suit. They failed to make use of that 2nd lifeline thrown to them by the Court. The Plaintiffs have failed to give any valid reason and/or justification for their failure to have the suit listed with in **sixty (60) days** as directed by the Court. Accordingly, I find that the suit stood dismissed on the **60th day** after **4th July 2019** the order was made ie on **5th September 2019**.

26) Having found that the suit stood dismissed **sixty (60) days** after the Ruling of **4th July 2019**. I find that the Plaintiffs application has no legs to stand on and must be dismissed. Accordingly I do dismiss the Notice of Motion dated **9th March 2020** and award costs to the 1st and 2nd Defendants.

27) The application dated **25th November 2019** filed by the 1st Defendant is allowed as prayed with costs to the 1st Defendant. Further I do allow prayer (i) of the 2nd Defendants Notice of Motion dated **15th January 2020**. The 2nd Defendant to file an application to obtain physical possession of the suit property. Costs are awarded to the 2nd Defendant.

DATED IN NAIROBI THIS 21ST DAY OF MAY, 2021.

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MAUREEN A. ODERO

JUDGE