



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 599 OF 2008

TERESIA WAMBUI KESI.....PLAINTIFF/APPLICANT

VS.

K-REP BANK LTD.....1ST DEFENDANT/RESPONDENT

STEPHEN K. KANG'ETHE T/ A DALALI TRADERS.....2ND DEFENDANT/RESPONDENT

MS NEEMCO HOLDINGS LIMITED.....3RD DEFENDANT/RESPONDENT

RULING

1. On 2nd November 2018, the Plaintiff's suit was dismissed with costs following the issuance of a Notice to Show Cause by Court. The Plaintiff has in a Notice of Motion dated 13th February 2019 sought to have the suit reinstated.

2. In an affidavit sworn on 13th February 2019 in support of the Motion, the Plaintiff explains that she had previously instructed the firm of Kithi & Company Advocates to act for her. That sometime in 2018, as she tried to follow up on the case, she could not trace the Advocate either on phone, email or at his offices. She recently instructed the firm of Mandala & Co. Advocates to file and follow up the case only to be told that the case had been dismissed for want of prosecution on 2nd November 2018. She avers that her previous advocates did not inform her of the existence of a Notice to Show Cause. She states her desire to prosecute her claim.

3. The Application is opposed. Beverline Chweya swore a replying affidavit on 17th May 2019 on behalf of the 1st Defendant Bank. She avers that the firm of Nyamu & Nyamu Co. Advocates who were on record for the Plaintiff ceased acting for the Plaintiff on 22nd February 2018 and no other firm has come on record on her behalf. That, as there was a Notice to Show Cause pending, the Bank's advocates were forced to file a formal Motion for substituted service dated 11th October 2018 when efforts to trace the Plaintiffs were unsuccessful.

4. That pursuant to leave being granted, the Bank's Advocates served by advertisement in the Daily Nation of 22nd October 2018 at Page 39.

5. The Respondent further makes the point that prior to the Notice to Show Cause, the last action taken by the Plaintiff in this matter was fixing the matter for Mention on 19th June 2005. This, it is argued, shows indiligence on the part of the Plaintiff's in prosecuting this case. Noting that the case has remained unprosecuted for 11 years after it was filed.

6. In grounds of opposition filed on behalf of the 3rd Defendant, it raises the following matters:-

1. The application is totally devoid of merit and is an atrocious waste of precious judicial time;
2. The application is brought after an inordinate delay since the Court made an order for dismissal of the suit on 2nd November 2019;
3. The Applicant is a frivolous litigant since she does not even know which firm of Advocates represented her in these proceedings since its inception;
4. This Honourable Court does not have power to make the orders sought for by the Plaintiff under Order 17 Rule 2 of the Civil Procedure Rules upon which the application is predicated;

5. The application is only a suitable candidate for dismissal with an award of costs to the 3rd Defendant/Respondent.

7. In giving a response to issues raised in the answer to her application, the Plaintiff filed a replying affidavit sworn on 15th August 2019. She says that she has always been available for personal service. Secondly, that she had relied on Kithi & Co. Advocates whom she instructed unknowingly to take over from Nyamu Advocates.

8. I have considered all the material before the Court. Dismissal of a suit for want of prosecution is a drastic order to make. I doubt that the Plaintiff has made sufficient effort to prosecute this old matter which has now been in existence for 11 years. Indeed when her previous advocate on record filed an application to cease acting he deponed;-

1. That this suit was instituted in the year 2008 with instructions from the Plaintiff.

2. That thereafter we have received no further instructions from the Plaintiff now making it difficult to continue representing the Plaintiff without proper instructions.

3. That the Plaintiff has made no effort to contact us and we have also not been successful in tracing her.

9. I also note that in her application seeking reinstatement the Plaintiff blames her previous advocates for not informing her of the progress in this matter. Those advocates are said to be Kithi & Co. Advocates. Yet the Court record shows that Kithi & Co. Advocates have never come on record on her behalf.

10. There is therefore sufficient reason if this Court would not accede to the Plaintiff's request for reinstatement. However, in my discretion I will allow it because the Plaintiff states that she is now ready to get on with her matter. In doing so I note that ,while the Defendants complain about the delay ,they do not state that the passage of time has compromised or otherwise handicapped their ability to defend the suit.

11. I will allow the application of 13th February 2019 but only on the following terms:-

1. The Plaintiff shall within 30 days herein pay costs of the Notice to Show Cause proceedings including the costs of substituted service to the Defendants. The Court shall presently assess those costs.

2. The Plaintiffs shall within 30 days take steps towards prosecution of this matter failing which the suit shall stand dismissed without need for further Court orders.

Dated, Signed and Delivered in Court at Nairobi this 24th Day of January 2020

F. TUIYOTT

JUDGE

PRESENT:

Gathoni for Mungai for 1st Defendant

Gichoi for Njenga for 3rd Defendant

Mureithi for Mandala for Plaintiff

Court Assistant: Nixon