



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 549 OF 2008

ZAVERCHAND RAMJI SHAH.....PLAINTIFF

VERSUS

UNIVERSAL BANK LIMITED.....1ST DEFENDANT

PARAMOUNT UNIVERSAL BANK LIMITED.....2ND DEFENDANT

KURWA LIMITED.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

RULING

1. The plaintiff filed this case in the year 2008. On 29th January 2009 he obtained interlocutory injunction restraining the defendants from selling or transferring his property LR No 209/6/13 (the property). That property was security for a loan facility advanced to the plaintiff by 1st defendant. This suit was dismissed for want of prosecution on 17th June 2015. The plaintiff by his Notice of Motion dated 10th May 2019 seeks the reinstatement of the suit.

2. The plaintiff relies on various ground in his application. He stated that his then advocate had to seek medical treatment in India and he was unaware when that advocate returned to Kenya. He annexed his then advocate's passport from where I note that there was an exit stamp at Jomo Kenyatta International Airport (JKI) on 9th November 2011 and an entry stamp dated 22nd November 2011. The plaintiff also gives the ground for reinstatement that he is elderly and sickly. The only medical note that I can understand, attached to his affidavit, since all the others are in medical jargon, shows he suffers from heart burn, epigastric and varicose veins. That report does not state the plaintiff is so incapacitated that he would not be able to follow up his every day affairs. And although the plaintiff stated that the property in this case is his only remaining property in his name, following mis-fortune in his business. I find he has another property namely LR NO 209/6/5 Parklands, which was the subject of judicial review order in Milimani case JR No 249 of 2014. That order is attached to the plaintiff's own affidavit.

3. I have considered the reasons given by the plaintiff as the grounds to set aside the dismissal of this suit and I concur with the defendants that the reasons given by the plaintiff do not justify the reinstatement of a suit dismissed in 2015 and as the defendants deponed in the replying affidavit the subject property has been transferred more than once and the present registered owner is not before court.

4. But I think the most serious concern I have with the plaintiff's application is that it is supported by an affidavit that probably was not signed by the plaintiff. Evidence has been brought before court, by the defendants of another affidavit, sworn by the plaintiff in another case, namely Environment and Land Court case Misc No 47 of 2014 (O.S) where the affidavit stated he was in London and has been there since 25th April 2019. It would follow the affidavit sworn in this matter, in support of the present application, sworn on 10th May 2019 and sworn in Nairobi was not sworn by the plaintiff. Indeed my comparison of the signature of that affidavit of 10th May 2019, I find that it does not resemble the signature in the affidavit in the Environment and Land Court Case. When this allegation was put forward by the defendants there was no response from the plaintiff. The plaintiff is therefore taken as having confirmed that he did not sign the affidavit of 10th May 2019. He was not in Nairobi.

5. There is no doubt in my mind that there has been inordinate and unexplained delay in the prosecution of this case. The case that aptly deals with the circumstances of this case is *Thika Coffee Mills Limited v Gakuyu Farmers Co-operative Society & 2 Others* (2019) eKLR :

“16. The delay occasioned in the prosecution of this case is similar to that which was considered in the case **BEVERAGE BOTTLERS (SA) LTD (IN LIQUIDATION) & ARVO – V- ABODE ENTERPRISES PTY LET (2009) SASC 272** a case of

South Australia, which case I find persuasive, where the judges stated:

“There must come a time when the party has so conducted the litigation that it would be appropriate to shut that party out of that party’s litigation even if the point is arguable. Justice delayed can be justice denied. Both the Plaintiff and the Defendant are entitled to justice.

If the Plaintiff has conducted his or her case so that the Defendant has suffered prejudice or will suffer injustice in defending the case then the Defendant is entitled to justice, and justice can only be achieved by shutting the Plaintiff out of his or her case.”

There comes a time when (the Defendant) is entitled to have some piece of mind and to regard the incident as closed.

The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.”

6. The plaintiff’s application must and does fail for the reason that there is unexplained delay, by the plaintiff and because the application was supported by what I can only refer to as a forged affidavit, since my finding is that it was signed by someone else other than the plaintiff. The application fails because the said forged affidavit is hereby struck out.

7. In the end the Notice of Motion dated 10th May 2019 is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **30th** day of **April, 2020**.

MARY KASANGO

JUDGE