



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 226 OF 2015

TITUS GITAU NGUGI.....PLAINTIFF

- V E R S U S -

CHASE BANK LIMITED.....1ST DEFENDANT

ANN WANJIRU KANANDA.....2ND DEFENDANT

RULING

1) Titus Gitau Ngugi, the plaintiff herein, filed this action against Chase Bank Limited, and Ann Wanjiru Kananda, the 1st and 2nd defendants herein. In this aforesaid suit, the respondent sought for a permanent injunction to restrain the 1st defendant, its agents and or employees from repossessing , or otherwise dealing with motor vehicle registration number KBW 254J. The aforesaid motor vehicle is alleged by the plaintiff to have been bought from the 2nd defendant. The motor vehicle was seized by Auctioneers from the reason that there was an outstanding balance of a debt owed by the 2nd defendant to the 1st defendant. This prompted the plaintiff to file the suit.

2) The 1st defendant has now taken out the motion dated 08.06.2017, the subject matter of this ruling, in which it sought for the following orders:

- 1. The entire suit be struck off for want of extraction of summons to enter appearance and service upon the 1st defendant.**
- 2. In the alternative, the suit be dismissed for want of prosecution.**
- 3. Costs of the application and of the suit be borne by the plaintiff.**

The motion is supported by the affidavit of Kevin Kimani. The plaintiff never filed any response to oppose the motion. When the motion came up for inter-partes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support of the application. I have also considered the applicant's written submissions.

4) The applicant avers that the plaintiff filed the aforesaid suit on 17.06.2015 and extracted the summons to enter appearance for service upon the 1st defendant, which summons have not been served upon it,

therefore the suit is a non starter. The applicant further avers that the delay in serving the same lasted for one year and seven months, demonstrating that the plaintiff has lost interest in prosecuting the suit. The delay in prosecuting this suit is inordinate and inexcusable on the part of the plaintiff and is likely to cause serious prejudice to the applicant.

5) The issues that fall for determination are whether to dismiss the suit for want of prosecution or in the alternative strike out the suit for failure by the Plaintiff to take out and serve summons to enter appearance. I propose to start with the prayer for dismissal of the suit for want of prosecution.

6) Under Order 17 Rule 2 (3) of the Civil Procedure Rules, a suit is liable for dismissal for want of prosecution if no step is taken for a period of one year since the last time the case was in Court for hearing. The principles governing an application for dismissal for want of prosecution is that, the Applicant must show that the delay complained of are inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. Those principles were restated in the case of **Allan -v- Sir Aflred McAlpine and sons Ltd [1968] 1 ALL E.R.543**. The power of the Court to dismiss a suit for want of prosecution is discretionary but, the same should not be exercised fancifully. In addition, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.

7) It is alleged that the Plaintiff has failed to take any step to have the suit fixed for hearing for more than one year. I have perused the record and it is clear that the Plaintiff did not take any step after the injunction application was dismissed on 27th January, 2016. Nothing appears on record to have taken place until 8th June, 2017 when the Defendant filed the current motion. Thus, the delay for more than one year has been established. Where an explanation for the delay is offered, the Court will always allow the Plaintiff an opportunity to have his case determined on merit as was reiterated in the case of **Agip (Kenya) Limited -v- Highlands Tyres Limited [2001] KLR 630**.

8) In view of the foregoing, I find that the conduct of the Plaintiff can be said to be that of someone who has lost interest in pursuing his case. For these reasons, I dismiss the suit for want of prosecution and the said prayer is hereby allowed.

9) I now turn to the prayer for the striking out of the suit for failure by the Plaintiff to extract and/or serve the summons to enter appearance. The applicant submits that the Plaintiff has not extracted summons for service on the 1st Defendant for more than two years after filing the suit.

10) Order 5 Rules (1) and (5) states as follows:

5 (1) (1) When a suit has been filed a summons shall issue to the Defendant ordering him in appear within the time specified therein.

(2).....

(3)

(4).....

((5) Every summons shall be prepared by the Plaintiff or his Advocate and filed with the Plaintiff to be signed in accordance with subrule (2) of this rule.”

(6) every summons, except where the court is to effect service, shall be collected for service within 30 days of issue of notification, whichever is later, failing which the suit shall abate.

11) The applicant submits that since the suit was filed on 17th June, 2015, the plaintiff’s advocate failed to take out the summons to enter appearance or serve the same upon the defendant. This long delay is inconsistent with the mandatory provisions of Order 5 Rule 1 (1) and (5) of the Civil Procedure Rules and

in my view, is unfathomable. The same calls for sanctions against the Plaintiff to remind him of the mandatory provisions of the law requiring timely filing and service of summons to enter appearance so as a suit once filed can be prosecuted. The failure to serve process cannot be wished away as a mere technicality. Failure to serve process where process is required is a failure which goes to the root of the conceptions of proper procedure in litigation. Given the mandatory terms in which Order 5 Rule 1 (5) is coached, I do not think the Court has discretion on this. The failure to observe the rules of procedure as set out in Order 5 Rule 1 (5) is in my view fatal. The suit never commenced. It remained still born.

12) I agree with the 1st Defendant's submission that the failure by the Plaintiff to issue summons made it impossible for the Defendant to respond to the suit through a Defence. Without summons being issued to command a Defendant to appear and defend a Plaintiff's claim, a suit remains still born. The delay in complying with Order 5 in this case is unacceptably inordinate.

13) In the circumstances, I allow prayer number 1 in the Notice of Motion. The suit as against the 1st defendant is found to be incompetent and is hereby ordered dismissed and struck out with costs to 1st defendant.

Dated, Signed and Delivered in open court this 26th day of January, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent