REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 305 OF 2012

FRANCIS NGARAMA KIRATU........................PLAINTIFF

-VERSUS-

CO-OPERATIVE BANK OF KENYA LTD....DEFENDANT

RULING

Brief Background to the Notice of Motion dated 22nd May 2018

1. For purposes of the above application filed by the plaintiff in this case, and, in **Nakuru HCCC No.306 of 2012,** which are related, raising similar issues, and by consent of parties' advocates on the 28th June 2018 and with the court's concurrence, it was agreed that the ruling in this application shall apply to both cases.

2. The plaintiff's suit was filed by a plaint dated 14th August 2012 and Amended on the 10th September 2012. The plaintiff sought a permanent order of injunction against the defendant's agents and auctioneers to restrain them from repossessing or selling his farm equipment, and sought damages for breach of contract. That was the plaintiff in HCCC 305 of 2012.

In **Nakuru HCCC No.306 of 2012,** a different plaintiff sued the same defendant and sought similar orders, the course of action being similar.

3 On the 18th September 2014, Emukule J upon hearing an application filed on 14th August 2012 for an order of temporary injunction pending hearing and determination of the two suits dismissed the application with costs.

4. The plaintiffs(in both suits) seem to have gone to sleep and were only awokened by an application by the defendant dated 18th June 2015 when the defendant sought an order of dismissal of the suit for want of prosecution under **Order 17 of the Civil of the Civil Procedure Rules.**

The court upon hearing the application inter parties allowed the plaintiff 60 days to fix the case for hearing, upon which the suit was fixed for hearing on the 27th July 2016, the date having been taken by consent of the parties.

5. On the said hearing date, both the plaintiff and his advocates failed to attend court. The defendants urged for a dismissal and there being no explanation why the plaintiff and his advocates were absent, the suit was dismissed with costs. That order was given in HCCC 306/2012, which also applied to HCCC 305/2012. The order of dismissal is dated 27th July 2016.

6. By this application dated **28th July 2016,** and filed in HCCC 305/2012, the plaintiff sought an order to set aside the dismissal order of the suit made on the 27th July 2016. Once again, when the application came up for interpartes hearing before Hon. Riech J on the 30th June 2016, the plaintiff and his advocates failed to attend court. It was dismissed for want of prosecution.

7. It is then that the present application dated 22nd May 2018 was filed, yet again by the plaintiff. It is premised on the provisions of **Order 12 Rule 2, 7, of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63 (e) of the Act.**

In prayer No.2 the plaintiff sought an order to set aside its orders dismissing the plaintiff's application dated 28th July 2016, and in prayer 3, he sought that the application dated 28th July 2016 be reinstated for hearing.

The supporting affidavit was sworn by Francis Ngarama the plaintiff, who averred that the dismissal was due to his advocates failure to arrive in court on time.

8. The defendant opposed the application by grounds of opposition filed on the 30th May 2018, to the effect that the application was bad in law, incompetent and an abuse of court process, that the plaintiff is vexatious and has no interest in pursuing the suit, and has filed multiple applications that he never prosecutes, and therefore undeserving of the court's discretion.

9. I heard both parties advocates on the 28th June 2018.

The applicant's advocate Mr. Imbwaga holding brief for Mr. Onido attempted to explain from the bar why Mr. Onido Advocate failed to attend court on the various dates when the suit and the applications to set aside dismissal orders were issued. He did not explain why the advocate did not swear his own affidavit to state his reasons.

Other than urging the court that mistakes of Advocates ought not be visited on their clients, no plausible or any satisfactory reasons were provided. He did not state what irreparable loss the plaintiff would suffer if the orders he sought were denied.

10. Mr. Kisila Advocate for the defendant submitted that the applicant by his numerous applications showed nothing but abuse of court process, that since 2016 no action had been taken by the plaintiff to fix the case for hearing and once the date was taken upon the defendants application for dismissal, the plaintiff failed to attend court to prosecute the suit nor the numerous applications.

11. I have carefully considered submissions by counsel. I agree with the defendant that no interest at all has been demonstrated by the plaintiff' to progress his case since the initial application filed with the plaint in 2012.

It is trite that a case belongs to the plaintiff and it is upon the plaintiff to effectively engage his advocates to progress the case.

The conduct of the plaintiff going by the background of the cases show that the plaintiff has no interest in the case, and the court is obligated, under provisions of **Order 17 of the Civil Procedure Rules** to dismiss the suit for want of prosecution.

12. The applicant/plaintiff has totally failed to discharge his duty to offer and provide good reasons not only for his and his advocate's failure to attend court for the hearing of the suit as well as during the interpartes hearing of the applications to set aside the dismissal orders enumerated above.

Had the advocates who were allegedly failed to attend court sworn affidavits to explain their failures, I would have considered the reasons – See **International Air Transport Association & Another -vs- Akarim Agencies Ltd (20140 e KLR and 2 Others -vs- CFC Stanbic Bank (2012) e KLR.**

13. It is the plaintiff who, in the two primary suits and in the appeals dragged the defendant to court. It is therefore his duty to take steps to have the suits heard expeditiously. Failure to do so speaks of nothing but lack of interest in the cases. In the process, the defendant stands prejudiced.

In **Ivita -vs- Kyumbu (1984) KLR 441,** the court held that it ought to consider whether justice would be done by the numerous applications after the suit was dismissed for want of prosecution for prolonged and unexecusable delay.

14. In the present application, there is no doubt that the continued dragging of the defendant to court by the numerous applications after the suit was dismissed and which applications the plaintiff never prosecutes is prejudicial to its interests – See also **Nakuru HCCA No. 166 of 2014 Simon Githui Kibuchi & Another -vs- Hannah Wanjiku Njenga** when I expressed the same sediments.

15. **Section 1A, 1B and 3A of the Civil Procedure Rules** enjoins all parties to litigation as well as the court to administer Justice to all parties expeditiously.

Article 25(c) and 50 of the Constitution gives every party a right to a fair hearing which includes disposal of cases expeditiously. In my mind, this does not give parties latitude to cause prejudice and injustice to their opponents nor does **Article 159 (2) (d) of the Constitution** enjoin the courts to condone abuse of court process by shutting its eyes to procedural deficiencies which are not explained.

16. For the foregoing I find no merit in the application dated 22nd May 2018. I proceed to dismiss it with costs.

17. This order shall apply t**o HCCC No. 306 of 2012**

Dated, signed and delivered this 27th Day of September 2018.

J.N. MULWA

JUDGE