



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 64 OF 2006

VIJAY KUMAR DAVALJI KANJI GOHIL.....PLAINTIFF

-VERSUS -

SURESH MOHANLAL FATANIA1ST DEFENDANT
SHANTILAL KARSANDAS VARIA.....2ND DEFENDANT
TREO APARTMENTS LTD.....3RD DEFENDANT
SUNILKUMAR POPATLAL DAVDA.....4TH DEFENDANT
AMEET DIPAK BHATTESSA.....5TH DEFENDANT
CHUNILAL SHANTILAL KHIMASIA.....6TH DEFENDANT
JAYANTILAL JETHA HARJI PARMAR.....7TH DEFENDANT
JAYANTILAL K. HARIA.....8TH DEFENDANT
MAHENDRA K. PATHAK.....9TH DEFENDANT

RULING NO.2

1. This application dated 29th August 2016, seeks the setting aside of the orders made on 6th June 2010, when the suit was dismissed for want of prosecution.
2. The plaintiff also sought orders for stay of execution of the Decree dated 25th May 2016, as well as of the Order for costs dated 28th January 2013.
3. The application was prompted by the fact that the Court had issued Warrants for the sale of the plaintiff's property, in execution of the Decree.
4. After the said Warrants were issued, messrs Daystar Auctioneers moved onto the plaintiff's property and issued a Proclamation in respect to the plaintiff's assets.
5. According to the plaintiff, he had never been served with any Notice requiring him to Show Cause why

the suit should not be dismissed for want of prosecution.

7. A perusal of the court file revealed to the plaintiff that on 6th June 2010, the suit was dismissed for want of prosecution, at the instance of the Court.

8. However, it was the understanding of the plaintiff that on the material date, none of the parties was present in court.

9. As he had never been served with a Notice To Show Cause before his suit was dismissed, the plaintiff submitted that he had been condemned unheard.

10. The plaintiff asserted that on 28th January 2013, Odunga J. had held that none of the parties had been served with the Notice to Show Cause.

11. But the defendants said that Odunga J. did not make any such finding.

12. I have perused the Ruling dated 28th January 2013 and noted that the learned Judge did not make any reference to the absence of service upon the plaintiff. This is what Odunga J. said;

“I have perused the record and I am unable to find evidence that the defendants were served with the notice. Accordingly, the reason given for the delay is in my view satisfactory”.

13. The issue before the learned Judge was about the alleged delay in bringing the application dated 20th June 2011, seeking costs in respect to the dismissed suit.

14. Therefore, the Judge had not been called upon to determine whether or not the plaintiff had been served. And in determining whether or not the defendants had moved the court late, the court did not need to make any finding on the question of service upon the plaintiff.

15. The other issue canvassed by the plaintiff was with regard to the alleged delay in bringing this current application. According to the plaintiff, he brought the application immediately after he had become aware that the suit had been dismissed.

16. As the application is dated 29th August 2016, that implies that it was in or about August 2016 when the plaintiff first became aware of the order for the dismissal of the suit.

17. Of course, if the plaintiff had not been aware that his case had been dismissed, he would never have had any reason to seek to revive it.

18. But the defendants have pointed out that it cannot be correct that it was not until 2016 when the plaintiff first became aware of the dismissal of the suit. That contention is supported by the “*fact*” that the plaintiff had sworn an affidavit on 7th November 2011, in answer to the defendants’ application for the review of the order for dismissal.

19. The defendants had asked the court to award to them, the costs of the suit which had been dismissed.

20. The plaintiff categorically denied ever having sworn the Replying Affidavit attributed to him. To support his position, the plaintiff exhibited the Report of **Mr. EMMANUEL KARISA KENGA**, a career Document Examiner.

21. By the Report dated 26th August 2016, the Document Examiner stated that the signature on the impugned Replying Affidavit was not that of the plaintiff.

22. On the strength of that Report, I find, on a *prima facie* basis, that the signature on the Replying Affidavit was not that of the plaintiff. Therefore, the existence of the Replying Affidavit was not

evidence that by 7th November 2011, the plaintiff knew that his suit had already been dismissed in 2010.

23. Miss Wachanga, the learned advocate for the 4th to 9th defendants, submitted that;

a. There was no order dated 25th June 2010; through which the suit was dismissed; and

b. The dismissal was on 26th June 2010. But, in any event, the order made on that date had been reviewed by Odunga J. on 28th January 2013.

23. It was the submission of Miss Wachanga that the plaintiff was essentially seeking the review of the decision which Odunga J. had made on 28th January 2013.

24. And because the Ruling by the learned Judge was made on an application for review, it was not open to the plaintiff to apply for review.

25. Pursuant to Order 45 Rule 6 of the Civil Procedure Rules;

“No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained”.

26. Therefore, if I were to come to the conclusion that the present application was seeking the review of an order made on review, I would have to reject it.

27. Meanwhile, Miss Koki, the learned advocate for the 1st to 3rd defendants, submitted that the plaintiff was guilty of laches.

28. It was her considered view that the plaintiff was un-interested in pursuing his case.

29. Miss Wachanga advocate shared that view, adding that the plaintiff had failed to provide any explanation for his failure to take any action for six (6) years.

30. In reply to the defendants’ submissions, Mr. Mureithi, the learned advocate for the plaintiff, submitted that there had been no prior determination on the attempt to revive the suit.

31. Having perused the Ruling by Odunga J., I find that the learned Judge did not render any verdict on the question of the revival of the suit. He awarded costs to the defendants, after finding that Njagi J. had failed to address his mind to the issue of the costs of the suit, at the time when he dismissed the said suit. This is what Odunga J. said;

“Section 27 of the Civil Procedure Act mandates the Court to expressly address its mind to the issue of costs, and where the Court decides not to follow the general rule, the Court is required to give its reasons for not doing so”.

33. As the Court had not given reasons for not following the general rule, which stipulates that costs follow the event, the learned Judge concluded the costs should therefore be awarded to the defendants.

34. That was the sum total of his decision. He did not delve into questions concerning the revival of the suit. Therefore, there is nothing to suggest that this application constituted an attempt to review the order which Odunga J. had made earlier. Accordingly, the plaintiff was not barred, by Order 45 Rule 6 of the Civil Procedure Rules, from canvassing the application.

35. In the circumstances, I have come to the conclusion that there is no evidence that the plaintiff had, in August 2011, become aware that the suit had been dismissed in 2010.

36. I also find that although Odunga J. reviewed the orders made by Njagi J., by awarding costs of the

dismissed suit, that did not expunge or otherwise remove the orders of Njagi J. from the record. The suit remained dismissed; and Odunga J. only added to it, by awarding costs.

37. Having accepted the plaintiff's contention that he did not become aware of the dismissal of the suit in 2011, that implies that between June 2010 (*when the suit was dismissed*), and August 2016 (*when the current application was filed*), the plaintiff did not take any steps in the suit.

38. If he had attempted to move the court during that period, he would have become aware that the suit had already been dismissed.

39. The failure to take steps in the case, for a period exceeding six (6) years, is a clear demonstration of the plaintiff's disinterest in the suit.

40. The plaintiff deponed that he was still keen to prosecute the case, if it is revived. But it appears that the irony of that statement is lost on him considering his following words, in paragraph 22 of the supporting affidavit;

"...I have since changed my advocates and I am now extremely alert and cautious..."

41. If the plaintiff has become extremely alert and cautious after changing advocates, that implies that he did not have the same zeal before.

42. At any rate, the alleged keen desire to prosecute the case, did not manifest itself in the court records.

43. I therefore find that the plaintiff has failed to offer any satisfactory explanation for the inordinate delay in taking steps in the case. Accordingly, the application for the revival of the suit is rejected.

44. I also reject the application for stay of execution.

45. The costs of the application dated 29th August 2016 are awarded to the defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of March 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mureithi for the Plaintiff

Miss Koki for the 1st to 3rd Defendants

No appearance for 4th to 9th Defendants

Mr. C. Odhiambo, Court clerk.