



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 226 OF 2015

GLADYS WAKIO MURIUKI.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....FIRST DEFENDANT

ROBERT MAINA T/A

PETER GITONGA WANGAI.....SECOND DEFENDANT

CITIGATE DEVELOPERS LIMITEDTHIRD DEFENDANT

RULING

1. The Application before the Court is brought under a Certificate of Urgency filed on 14th December 2014. It is for an Application to reinstate a suit that was struck out. The Record shows that the Suit was dismissed on 30th April 2015 and the Injunction Discharged on 11th July 2015. On the face of it, the Application was therefore brought five months later.

2. The Certificate of Urgency signed by the Plaintiff's Advocates (now on record) states that the Suit was dismissed on 30th April 2015 for want of prosecution. After dismissal the Third Defendant through Waleen Auctioneers filed a different suit in the Lower Court (***Miscellaneous Application 766 of 2015***) and have obtained orders that are highly prejudicial and adverse to the Plaintiff/Applicant. As a consequence the Plaintiff stands "to suffer grave and irreparable loss and damage and be rendered destitute".

3. The Application is brought by Notice of Motion. The Motion is brought under *Articles 50(1) and 159(2)(a), (b), (d) and (e) of the Constitution 2010, Order 40 Rules (1) & (2) Order 12 Rule 7, Order 51 Rules (1) and (15) of the Civil Procedure Rules 2010, Sections 1A, B and 3A and 63 of the Civil Procedure Act Cap 21 and all other enabling provisions of the Law*. The Application seeks Orders that:

(1) This Application be certified urgent and the same be heard ex-parte and service be dispensed with in the first instance;

(2) Pending the hearing and determination of this Application inter-partes, the Defendants/Respondents, their agents, assigns, servants and any other person howsoever under their instructions be hereby restrained from offering for sale, selling, transferring, alienating, evicting the Plaintiff/Applicant, constructing and/or in any other way dealing in any manner

whatsoever with all that property known as L.R. No. Ruiru/KIU Block 3/49.

(3) *The Court be leased to reinstate the Plaintiff/Applicant's suit herein and set aside the Ruling, the dismissal Order and all consequential Orders issued on 30th April 2015 by Hon E..O. Ogola.*

(4) *Costs be in the Cause.*”

4. The Application is Supported by the Affidavit of Gladys Wako Muriuki (the Plaintiff) and is brought on the following grounds that:

a) *The non-prosecution of the Suit by the Plaintiff was a mistake and/or laxity on the part of Counsel, inadvertent and/or unintended by the Plaintiff and the same is highly regretted ;*

b) *The Plaintiff is not to blame for the alleged non-action on the Suit since at all material times she had instructed a firm of Advocates, Messrs Kayenga Chivai Advocates (hereinafter referred to as “First Advocates”)*

c) *The Plaintiff was not aware that the Application of 23rd February 2015, culminated in the order dismissing the suit as the same was never served upon her and now she seeks not to be condemned unheard.*

d) *The mistake and laxity of Counsel should not be visited upon her,*

e) *Upon the dismissal the 3rd Defendant instituted a suit in the lower court and obtained orders prejudicial to her allowing them to auction her property in respect of rent arrears arising from a tenancy agreement the existence of which is denied.*

f) *The Defendants servants and/or agents have raided the Applicant's premises and taken away her property*

g) *The Defendants have now placed “hired armed goons in the Suit premises and are hell-bent to evict the Plaintiff and her siblings from the suit premises and render them destitute.*

h) *That there is no prejudice to the Defendants by reinstatement.*

5. The Plaintiff has also sworn the Supporting Affidavit. In it she sets out that on about 14th April 2010, she first instructed Advocates to institute the suit on her behalf. The Supporting Affidavit sets out the facts relating to that. It also exhibits an Order of the lower court (Chief Magistrates Court Milimani Commercial Court, in ***Misc Application No 766 of 2015*** which Court made an order of eviction. The Order was made on the application of Warleen Auctioneers in the absence of the Applicant herein, who was the named tenant in that suit. The Order was dated 28th September 2015 and the Application was dated 9th September 2015.

6. The thrust of the Plaintiff's Application is that she should not be condemned unheard by the laxity of her then Advocates. The Applicant says she now has new advocates and is keen to prosecute her suit.

7. The First and Second Defendants have not participated in the proceedings here. The Third Defendant has filed a Replying Affidavit. The Replying Affidavit goes into great detail as to the background and in particular matters arising before the Application to dismiss the suit was made. It argues that the Plaintiff should not be permitted to hide behind her previous Advocates who ceased to act due to lack of instructions. It seems there was another application that the Plaintiff did not answer because those Advocates did not serve her with the application. Whether what was said is true or not has been superseded by events, but it cannot be treated as if it was either uncontrovertible or accepted by the Plaintiff. It is said the Plaintiff failed to prosecute the suit for a period of 4 years. The Suit was filed on 14th April 2010. The Application to dismiss was dated 23 February 2014, In total the period of 4 years

had not lapsed between the date of issue and the application to dismiss. The Application was heard on 27 March 2014. Again 4 years had not lapsed. The Affidavit states as follows:

7. THAT since the date when the court issued an ex parte order in favour of the plaintiff/applicant, she never took out any further step in the prosecution of this matter and continued enjoying the benefit of the said order until the same was discharged by an order of this court.

8. THAT the failure to prosecute the suit on the part of the plaintiff, precipitated the dismissal hereof upon our application, by this court on 20th April 2015.

9. THAT it is unreasonable and untenable for the Plaintiff to now heap blame on her advocates for the failure to take any steps toward the prosecution of the suit herein for over four (4) years which clearly demonstrates that she had lost all interest and regard for the suit and she is now precluded from seeking to have the suit reinstated for hearing.

8. It is noteworthy that the Injunction was against the 1st Defendant chargee of the suit property and its auctioneer. The 3rd Defendant was not a party to the suit when the first application was made. Therefore cannot have waited four years for it to have been adjudicated upon.

9. The Court file shows that it was on 30th April 2015 that Hon. E Ogola J dismissed the suit for want of prosecution with costs. It seems that Order was made on the Application of the 3rd Defendant. Although the Order was made on 30th April 2015, it was not extracted until 2nd December 2015. As a matter of logic, that (2nd December 2015) would therefore have been the first date on which it could possibly have been served on the Applicant. As to service of the Application dated 23 February 2015, which resulted in that order, there is no Affidavit of Service for that Application on the Court File. The Order of 30th April 2015 was made pursuant to a Ruling delivered that day. In fact the hearing had been on 23 March 2015. The Judge considered that the Plaintiff had been served. It seems that service was effected on the firm of Messrs Khayega Chivai. That is significant because earlier in the proceedings during 2014, Hearing Notices had been served on the Plaintiff personally for example on 2nd June 2014, in relation to Hearing Notice for the Application dated 2nd September 2014. That was to be expected as the firm of Kayega Chivai had ceased acting for the Plaintiff around March 2014. There is no indication that they came back on the record in February/March 2015 and therefore the reason they should be served.

The Law

10. The test the Court has to apply in dismissing a suit can be garnered from **Order 17(2)** of the **Civil Procedure Rules** which provides:

2. (1) *In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.*

(2) *If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.*

(3) *Any party to the suit may apply for its dismissal as provided in sub-rule 1.*

(4) *The court may dismiss the suit for non-compliance with any direction given under this Order.*

11. The Applicant has quoted other Rules of procedure and Articles of the BI. In particular I am guided by **Articles 159(1)** and **159(2)**

“159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

In addition under **Article 50(1)** *Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court....”.*

12. The Parties have filed their Written Submissions and attached Authorities all of which have been considered. The 3rd Defendant’s authorities deal with the issue of dismissal of the suit. Although the dismissal of a suit serves a useful purpose in clearing the system of “dead files” and improving access to justice for those people to wish the pursue their suits. However, it is also undoubtedly a draconian order. That can be seen from the safeguards that are put in place before it can be instituted. Under **Order 17 Rule 2 (2)** It is therefore undeniable that before any suit is dismissed the Party presumed to not pursue the matter is given an opportunity “to show cause why the suit should not be dismissed” and as consequence received adequate notice to do so. In this case the Applicant did not. In the circumstances, the application must succeed on that ground. However, looking at the delay of 12 months that needed to indicate lack of interest, the matter was before the Court on 4th December 2013, again on 10th March 2014, again on 27th March 2014 for the hearing of the application for dismissal. Therefore, it is not clear from the record, which was the preceeding12 month period that justified the making of the Order.

13. Dealing next with the Plaintiff’s conduct after she discovered the dismissal. As stated above, she could not have been served before 2nd December 2014 as that was when the Order was extracted. The Application is brought under Certificate on 14th December 2104. That is less than two weeks later. In the circumstances, there has not been any delay to speak of.

14. For the reasons set out above the Application is allowed with costs.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED AND DELIVERED AT NAIROBI THIS 25thday of January 2016.

In the Presence of:

Clerk: Naomi

Mr Njeru for Applicant

No Appearance for Respondent