



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL CASE NO.11 OF 2000

SELINE ANJELINE ADUOGO.....PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITEDDEFENDANT

R U L I N G

1. (a) The Defendant, **Co-operative Bank of (K) Limited**, filed the notice of motion dated 28th April 2015 seeking to have the suit filed by **Seline Anjeline Aduogo**, the plaintiff, dismissed with costs for want of prosecution. The application is based on four grounds including that the plaintiff has not taken steps to prosecute this case and the delay is an abuse of the process of court. The application is supported by the affidavit of **J.A. Staussi** sworn on 28th April 2015 that it has been over one year since the pleadings of this suit filed on 17th July 2000 were closed and the plaintiff has not set it down for hearing.

(b) The application is opposed by the plaintiff through the replying affidavit sworn by **Kowinoh Omondi** on 5th January 2016 and filed on 9th February 2016 to the effect that the Defendant filed a counter claim to their suit and has also not taken steps to prosecute the suit. It is important to note that the replying affidavit was filed without leave while the matter was pending for ruling whose date had been fixed on 9th November 2015.

2. (a) The plaintiff filed the notice of motion dated 13th May 2015 seeking to have the Defendant's counterclaim dismissed for want of prosecution. The application is based on four grounds and the supporting affidavit of **Kowinoh Omondi** sworn on 13th May 2015 to the effect that the Defendant filed a counterclaim to the suit filed on 17th July 2000 and has not set it down for hearing.

(b) The application is opposed by the Defendant through the replying affidavit of **Jane Margaret Staussi** sworn on 23rd June 2015. The deponent annexed documents to show the steps the Defendant had taken to fix the suit for hearing and blames the plaintiff counsel for the various adjournments.

3. The counsel for the Defendant filed their submission dated 14th October 2015. When the matter came up for mention on 9th November 2015 a ruling date for the two applications was fixed.

The plaintiff had not filed submissions and none has been filed to date. The Deputy Registrar subsequently wrote a letter dated 28th January 2016 to the counsel for the parties asking them to appear before the court on 9th February 2016 and provide copies of the second application (dated 13th May

2015) which was not traceable in the court record. During that mention a copy of the notice of motion dated 13th May 2015 and replying affidavit sworn by Kowinoh Omondi on 5th July 2016 were provided to the court. The counsel also confirmed that the ruling coming up today is for the two applications dated 28th April 2015 and 13th May 2015.

4. **SUMMARY OF THE DEFENDANT COUNSEL'S SUBMISSIONS:**

- a) That the plaintiff has not taken any steps to set the suit down for hearing since 5th June 2014.
 - b) That on 5th June 2014, the counsel or the plaintiff indicated that he was having difficulties tracing his client and intended to cease acting for her. The counsel submitted that that was an indication that the plaintiff had lost interest with the suit and the plaintiff's suit should be dismissed with costs.
 - c) That the plaintiff's application to have the Defendant's counterclaim dismissed should not be allowed as the defendant has shown in the replying affidavit that it has been taking steps to set the suit down for hearing and that the delay has been occasioned by the plaintiff.
 - d) The counsel referred the court to decision in Nairobi, Milimani H.C.C.A No.151 of 2010, **Mumbe Kisilu -V- Express Kenya Limited.**

5. The court has considered the grounds on the two notices of motion, the affidavit evidence and submission by the Defendant's counsel. The court has also perused the court record and then come to the following determinations:

- a) That indeed, the plaintiff's suit was filed on 17th July 2000 as confirmed by counsel in the affidavit in support of the respective applications.
- b) That the record shows that on the 29th October 2013 the representatives of both counsel fixed the suit for hearing on the 27th February 2014 when the matter was rescheduled to 5th June 2014. On that date counsel for the plaintiff indicated that he intended to cease acting for the plaintiff as he was having difficulties tracing her and the matter was placed for mention on 30th June 2014.
- c) That none of the parties or counsel appeared in court on 30th June 2014 and the court directed that another date be fixed at the registry. Then the Defendants filed the notice of motion dated 28th April 2015 on the 29th April 2015 and had it fixed for hearing on 24th June 2015. Then on 22nd May 2015 the plaintiff filed the notice of motion dated 13th May 2015 and on its face it is indicated that it was for hearing also on 24th June 2015.
- d) That the provision of **Order 42 Rule 13(3) and 35(1) of the Civil Procedure Rules** which both the Defendant and plaintiff have cited at the headings of their respective applications deal with directions and dismissals of appeals and are not relevant in the notices of motions herein. The relevant provision is **Order 17 rules 2 (1) and (3) of the Civil Procedure Rules** they state as follows:

" 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)

- a. ***Any party to the suit may apply for its dismissal as provided in Sub- rule 1. "***

The notice of motion by the Defendant is dated 28th April 2015 and was filed on 29th April 2015. That

by the plaintiff is dated 13th May 2015 and was filed on 22nd May 2015. The record shows counsel for the parties were last in court on 5th June 2014 when the matter was fixed for mention on 30th June 2014. This clearly shows that the two notices of motion were drawn and filed in court before the expiry of one year from 30th June 2014. The provision of **Order 17 Rule 2(1) of Civil Procedure Rules** envisages a situation where the application for dismissal is brought after one year without any steps taken or application filed being filed. Both parties filed their respective applications before the period one year could end from the date of the last action and the two applications therefore fails.

e) That notwithstanding the finding in (d) above, the court notes that this suit has taken too long to be heard. The Defendant seem to blame the plaintiff while the plaintiff response is that the Defendant has as much responsibility to set the suit for hearing as the plaintiff due to the existence of the counterclaim. This situation cannot be allowed to continue indefinitely and the court will give direction aimed at ensuring the hearing commences without any more undue delay.

6. That for reasons set out above the court orders as follows:

- a) That the Defendant's and plaintiff's notices of motion dated 28th April 2015 and 13th May 2015 respectively are both dismissed with each party bearing their own costs.
- b) That parties are directed to comply with Order 11 of the Civil Procedure Rules, including filing and serving of witness statements and list of documents, within the next 14 days. Leave is also granted for the party served to file any further witness statements and or list of documents within 14 days after service.
- c) That hearing date will be fixed after the reading of this ruling when the hearing will commence.
- d) That any party or counsel with any outstanding issues of representation should ensure such issues are dealt with before the hearing date.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered at Kisumu this 24th day of February 2016

In presence of:

Plaintiff Absent

Defendant Absent

Counsel Mr Mugoye for Stausi for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/2/2016

24/2/2016

S.M.Kibunja J.

Oyugi court clerk

Parties absent

Mr Mugoye for Stausi for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/2/2016

Court: The ruling delivered in presence of Mr Mugoye for Stausi for Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/2/2016