



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
HIGH COURT CIVIL CASE NUMBER NO. 808 OF 2009
AFRICAN BANKING CORPORATION LIMITED.....PLAINTIFF
VERSUS
JAMES GAKANYA NJIHIA.....DEFENDANT

RULING

1. The Plaintiff's Notice of Motion dated **24th February, 2016** was filed herein on **8th March, 2016** pursuant to **Article 159 of the Constitution of Kenya, Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, and Order 51 Rule 1 of the Civil Procedure Rules, 2010**, seeking for following orders:

- 1) That the order made on 17th June, 2015 dismissing this suit for want of prosecution be set aside;**
- 2) That this Court be pleased to reinstate the Plaintiff's suit for determination on merit.**
- 3) Costs of the Application be provided for.**
- 4) That this Court be pleased to make such and other further orders as it may deem just and fit in the circumstances of the case.**

2. The application is based on the grounds set out therein and is supported by the Affidavit of the **Steve Luseno** and sworn on **26th February, 2016**.

3. The background to the application is that the Plaintiff commenced this suit vide the Plaint dated **30 October 2009** claiming a sum of **Kshs. 3,515,607** together with interest and costs thereon at 24% per annum from **28 October 2008** until payment in full. The court record shows that the Plaint along with Summons to Enter Appearance were duly served on the Defendant, but that in spite thereof, the Defendant did not enter appearance or file a Defence. Consequently, the Plaintiff requested for default judgment on **15th March 2015**. It is the Plaintiff's contention that while that Request for Judgment was pending, it was notified by the Deputy Registrar that the suit had been dismissed on **17 June 2015** for want of prosecution.

4. According to the Plaintiff, no notice as contemplated under **Order 17 Rule 2(1) of the Civil**

Procedure Rules was ever served, and yet the effect of the order was to drive it away from the judgment seat without a the benefit of a hearing. The Plaintiff further averred that its claim is substantial and that it ought to be given an opportunity to prosecute its case as no prejudice will be visited on the Defendant if the suit is reinstated.

5. A perusal of the Plaintiff shows that the cause of action is hinged on a contract for a financial facility in the sum of **Kshs. 5,740,000.00** that was provided to the Defendant at his request by the Plaintiff to enable him purchase a **Mercedes Actross Prime Mover Registration Number KAW 879V** and **semi-trailer Registration Number ZC 5352**; and that in acceding to the Defendant's request it was expressly agreed between him and the Plaintiff that:

a) **The Defendant would repay to the Plaintiff the loan facility in 36 months by monthly installments of Kshs. 202,495.00 until payment in full.**

b) **The Defendant would pay additional interest on any one instalment not paid punctually.**

c) **The facility would attract interest at the rate of 9% flat although the Plaintiff reserved the right to vary such rate.**

d) **The financed asset would not during the pendency of the Agreement be moved and/or caused to be moved outside the Country.**

e) **The Defendant's Statement of Accounts with the Plaintiff would constitute conclusive evidence of his indebtedness.**

f) **If the Defendant defaulted in payment of any two consecutive installments then the total amount of the facility together with interest due thereunder would become immediately payable; and**

g) **In case of such default by the Defendant, the Plaintiff would be at liberty to *inter alia* repossess and dispose of the motor vehicle and the Defendant would bear costs attendant to such recovery as well as other legal charges.**

6. The Plaintiff averred that the loan was accordingly disbursed and the physical control of the **Mercedes Actross Prime Mover Registration Number KAW 879V** and **semi-trailer Registration Number ZC 5352** were vested in the Defendant in terms of the Agreement aforesaid, but that the Defendant defaulted in payment of the agreed monthly instalments thus causing his loan account to be in substantial arrears.

7. Thereupon, Plaintiff in exercise of its right to repossession under the Agreement between the parties repossessed the **Mercedes Actross Prime Mover Registration Number KAW 879V** and had it sold for **Kshs. 2,200,000.00**, thus leaving an outstanding balance of **Kshs. 3,515,607**, which is the sum claimed herein. The Plaintiff further averred that it had been unable to reposes the semi-trailer registration **Number ZC 5352**. It was, thus, in recovery of the balance aforesaid that the Plaintiff filed this suit.

8. All indications are that the Defendant was duly served with Summons to Enter Appearance and Plaintiff, and that when there was no response within the time stipulated by the Court, the Plaintiff submitted a Request for Judgment herein dated **8 March 2013**. The request was apparently received at the Court Registry on **15 March 2013**, and it is plain on the face thereof that no action was taken pursuant thereto. What followed instead is an order dated **17 June 2015** dismissing the suit for want of prosecution. As was posited by the Plaintiff, there is no indication that a notice to show cause pursuant to **Order 17 Rule 2(1) of the Civil Procedure Rules** was ever issued to the Plaintiff prior to the dismissal. it is a requirement of the Rule aforesaid that:

"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."

9. It is now a constitutional imperative that, as far as is practicable, parties be afforded a hearing before adverse orders are made against them. Accordingly, for the reason that the Plaintiff had done all that was required of it, and was awaiting entry of judgment, or to be otherwise advised by the court, and for the reason that no notice to show cause was served on the Plaintiff prior to the dismissal order of **17 June 2015**, I find and hold that sufficient cause has been made to warrant the setting aside of that dismissal order, to pave way for the re-instatement of the Plaintiff's suit. Accordingly, the Notice of Motion dated **24 February 2016** is hereby allowed and orders granted as hereunder:

- a. That the order made on 17th June, 2015 dismissing this suit for want of prosecution be set aside;**
- b. That this suit be reinstated for determination on merit.**
- c. Granted the circumstances hereof, it is hereby directed, pursuant to Section 63(e) of the Civil Procedure Act, as read with Order 5 Rule 1 of the Civil Procedure Rules, 2010, that Summons to Enter Appearance be re-issued for service on the Defendant so as to give the reinstated suit a fresh start;**
- d. Costs of the Application to be in the cause.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20th DAY OF MAY 2016

OLGA SEWE

JUDGE