



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 355 OF 2011

ROSEMARY NJAMBI T/A REMS ENTERPRISES 1ST PLAINTIFF

ESTABELLA NYAMBURA GITAU 2ND PLAINTIFF

BENSON MESHULLAM NDAMBO 3RD PLAINTIFF

VERSUS

EQUITY BANK LIMITED 1ST DEFENDANT

ROBERT WAWERU MAINA T/A ANTIQUE AUCTIONS AGENCIES 2ND DEFENDANT

RULING

1. The application herein is a **Notice of Motion** dated 27th January 2016. It is brought under Order 12 Rules 1, and 7, Order 40 Rules 1, 2, 3 and 4, Order 51 Rules 1 of Civil Procedure Rule 2010 and sections 1A, 1B, 2, 3A and 63 (c) of the Civil Procedure Act Cap 21 Laws of Kenya and other enabling provisions of the law.

2. The application seeks for prayers that:-

1. That the Honourable court be pleased to set aside, vary or review the orders made on the 18th June 2015 dismissing the suit.

2. That the court be pleased to grant a temporary order of injunction restraining the Defendants/Respondents herein and/or their agents or servants from offering for sale, disposing, alienating the Applicants motor vehicles registration No. KAE 950 H and KAX 313, Land Title Numbers MAVOKO TOWN BLOCK 3/264 situated in Kenani Area, within the Athi River Riparian LAIKIPIA/KINAMBA/ MWENJE BLOCK 1/143 situated in Nganoini village, Kinamba Location 3 km from Nyahururu – Ngarua by way of public auction on 17th August 2011 and 18th August 2011 respectively, or any other date pending the hearing and determination of this application.

3. That the court order the 1st Defendant Respondent to release to the Applicants the statement of the loan account as at todate and the balance thereof, if any.

4. Costs of the application be provided for.

3. The application is supported by the grounds thereto and a supporting affidavit sworn by SUSAN NYANG. It was opposed vide a replying affidavit dated 24th February 2016, sworn by PURITY KINYANJUI. The parties filed their respective written submissions in relation to the same.

4. In a nutshell, the Applicants states that they have a good and/or a valid claim in this matter, and that if the prayers in the application are not granted, the applicants' will suffer irreparable damage, as the loss incurred is serious. The Applicants further states that the Defendants/Respondents will not suffer any prejudice if the application is allowed. That they are ready to prosecute the suit expeditiously if granted a chance.

5. In answer to their delay in prosecuting the suit, the Applicants submitted that the parties have been engaged in negotiations and as at the last time the matter was in court, they had repaid the loan facility to an amount of Kshs.2,968,000.00. That they have made an overpayment of Kshs.1,228,000.00 which necessitated the amendment of the pleadings. Thus the loan facility which is the subject matter of the suit has been substantially repaid and yet the 1st Defendant/Respondent is still holdings the title deeds used as a security thereof. Hence, the need for the suit to proceed to a full hearing to enable the parties prove their respective claims.

6. The Applicants states that the delay in making the application for reinstatement of the suit is not inordinate and was occasioned by the failure of the advocate to check the Judiciary website and take note of the Notice of dismissal of the suit. That, that mistake should not be visited on the Applicant.

7. In the replying affidavit, the respondents stated that, the suit was dismissed for want of prosecution on 18th June 2015. That upon extracting the order, the 1st Respondent issued the 1st Applicant with a demand for repayment of arrears vide a letter dated 15th October 2015. That despite the demand, the Applicants failed to take steps to safeguard their alleged interests and delayed in bringing this unmerited application. Thus, the Applicants have failed to disclose or demonstrate justifiable reason or explanation to warrant the reinstatement of the suit. This is based on the following reasons;

- ***they failed to move the court from 18th June 2015 when the suit was dismissed and***
- ***they failed to bring the application from the 15th October 2015 when they received the demand notice***
- ***that there is no proof of the alleged negotiations between the parties, as none existed between the 24th March 2014 when the matter was in court and its dismissal on 18th June 2015, thus the allegation regarding the negotiations are falsehood and deliberate attempt to mislead the court to give them favour***
- ***that the Plaintiffs' failed to fix the matter for hearing after they were granted leave to amend the plaint on 24th March 2014.***

8. In a nutshell, the 1st Respondents states that, the application should not be allowed because the Applicants have been enjoying temporary injunctive orders and infact the application has been overtaken by events as the Applicants have been issued with updated arrears payable and a detailed computation of the outstanding monies as 15th October 2015. Thus that the 1st Plaintiff has unclean hands having accepted under paragraph 31 of her supporting affidavit that she is in arrears. That the Applicants are on a fishing expedition to reinstate the suit, this is because although they also allege that the court file went missing, there is no proof of any attempt to trace the file.

9. The 1st Respondent thus submitted that it has been one year since the Plaintiffs/Applicants set down the suit for hearing and therefore it will be prejudicial to the Defendants to reinstate the suit as the Respondent has moved on and laid the matter to rest. That the suit is unmerited and indeed litigation must come to an end. The Defendants/Respondents invited the court to dismiss the application with costs.

10. At the conclusion of the submissions of the parties and considering the Application, grounds thereof,

supporting and replying affidavit and the written submission, I find the key issue for determination are whether the court should:

- *set aside, vary or review the orders made on 18th June 2015 dismissing the suit herein.*
- *reinstate the suit and the application dated 10th August 2011 and order it be urgently listed for expeditious hearing.*
- *grant the injunctive orders sought.*
- *order the Plaintiffs/Applicants to be provided with a statement of the loan account todate.*

11. I shall deal with the 1st and 2nd issues together because as they are closely related, and the decision thereon will determine the need to consider or not consider the other issues. Basically, the issue is whether the court should order for reinstatement of the suit, by setting aside, varying and or revoking the order made on 18th June 2015. The suit was dismissed pursuant to the provisions of order 17 Rule 2 of Civil Procedure Rules 2010. That order 17 Rule 2 of Civil Procedure Rule 2010 states that;

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 the expeditious hearing of the suit and shall consider all matters which should have been raised by a summons for direction.

3. Any party to a suit may apply for its dismissal as provided as provided in sub-rule1.

4. The court may dismiss the suit for non-compliance with any direction given under this rule."

12. Thus the provisions of that order require that before a suit is dismissed;

- *There should have been no steps taken by either party for one year.*
- *The court may give notice to the parties to show cause why the suit should not be dismissed.*
- *If the cause shown is not satisfactory the suit may be dismissed.*

13. In the instant case, First, the suit was dismissed on 18th June 2015, and the last step taken herein was on 24th March 2014. Clearly **one year** had elapsed as stipulated. Secondly, the Notice to show cause was issued via the official Judiciary website. The Plaintiffs applicants do not dispute that fact, save that due to their counsel's oversight, they did not take notice of the same. Thirdly the issue of whether a satisfactory cause was shown or not does not apply as the Applicants were not in court when the suit was dismissed. I therefore find that the suit was lawfully and procedurally dismissed under order 17 Rule 2 of Civil Procedure Rules 2010.

14. The key Question is this; **Should the suit be ordered reinstated?** The law on dismissal and/or reinstatement of suits was set down in the case of *Ivita –vs- Kyumbu 1984 KLR 441* Chesoni J (as he then was) stated that guiding factors are:

- *Whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay.*
- *Whether the Plaintiff has given sufficient or credible excuse for the delay.*

15. Has the Applicant given sufficient or credible reason for the delay? The Applicants' answer to this question, as aforesaid is that they were engaged in negotiations with the Respondents, that the file went missing and that due to the lawyer's oversight they did not take note of the Notice to show cause.

16. The court record shows that:

- the suit herein was filed in court on 10th August 2011 and Injunctive orders given in the Notice of Motion Application dated 10th August 2011. Those orders were extended on 25th August 2011, 3rd October 2011 and 16th November 2011.
- On 16th November 2011, 18th January 2012 and 17th February 2012 the court was notified of negotiations between the parties.
- On 25th January 2013 the matter was marked stood over generally (S.O.G) as the Applicant's counsel informed the court that their chamber file had been misplaced.
- On 21st February 2014, another Notice of Motion dated 21st February 2014 was filed in court. That application which was seeking for the amended of the plaint, was heard on 24th March 2014 and disposed of on the same date.

17. Since then no cause of action was taken in the matter till when it was dismissed on 18th June 2015. It is therefore clear, that the last time parties held negotiation was on 17th February 2012, and therefore as of 18th June 2015, when the suit was dismissed. **THREE YEARS (3)** had gone by without any active negotiation. As such the reasons advanced by the Applicants that the parties were engaged in negotiation is not true.

18. Equally, the Applicants allege that the court file was missing but from the above analysis it's clear the court file has not gone missing at all and neither has the Applicant substantiated that claim. To the contrary, it is the Applicants counsel who sought the matter to be marked stood over generally due to the misplacement of their own file. The Applicant is thus outwardly lying to the court. In conclusion, the Applicants reasons advanced are indeed without merit.

19. However, one issues stands out, the delay in setting down the suit for hearing seems to rest on the Applicant's counsel's, indolence and or mistake other than the Applicant's. I say so because of two reasons:-

- ***On the 25th January 2013, the counsel sought for the matter be marked stood over generally for lack of their own file.***
- ***The counsel has admitted an oversight of the Notice to show cause for dismissal of the suit.***

20. Should this failure on the part of the Applicant's counsel be visited on the Applicants? To answer this question, court has taken two consideration the following matters and/or issues;-

- The principles set down in the case of ***Ivita –vs- Kyumbu 1984 KLR 441*** that is:
- Whether justice can be done despite the delay.
- Whether the Plaintiff has given sufficient or credible excuse for the delay.
- Whether on the face value, the Applicant's cause of action as set out in the plaints raises any triable issue(s).
- Whether the Respondent will suffer any prejudice if the prayers sought herein are granted.
- Any other orders or conditions that the court may grant to meet ends of justice and in the interest of fair and justice decision.

21. In that regard, I find that;

- The suit was dismissed through the courts initiative not on the application by the Respondents,
- The delay in this matter was of the period between 24th March 2014 when the matter was last in court to 18th June 2015 when it was dismissed. That is a period of one year and 3 months. That is not too inordinate.
- I further find that although indeed the reasons given for delay are "lame" However the mistake of the counsel should not be visited on the litigant.
- I further find that the Applicant has a claim of overpayment of the loan facility and seeks for a statement of accounts of the facility.

22. It will be unfair, and unjustifiable to deny the Applicant an opportunity to be heard. The Respondents has submitted that they will suffer prejudice, as the Applicant is enjoying Injunctive orders and that the Respondent will be condemned to a lengthy unmerited suit. However, I find that there is no record of a subsisting Injunctive order, and if anything the Defendant's can be compensated with costs for an inconvenience cause. I wish to also reiterate the remarks of Cheson J, (as he then was) in the Ivita's case stated that, although the Plaintiff may not justify a prolonged and inexcusable delay, if justice is to be done despite the delay, then the court ought to reinstate the suit.

He stated;

“Justice is Justice to both Plaintiff and Defendant, so both parties to the suit must be considered ...”

23. In conclusion I therefore make the following orders in the interest of the parties and justice. The Application dated 27th January 2016 is allowed in the following terms.

1. That the orders made by the court herein on 18th June 2015 dismissing the suit, be are hereby set aside.

2. The Plaintiffs suit is hereby reinstated on the following conditions:

(a)The application dated 10th November 2011 pending herein be set down for hearing within 14 days from the date of this ruling.

(b) The main suit should be set down for hearing within a period of TWO MONTHS from the date of this ruling.

3. The orders sought for in prayer (3) and (4) are not capable being granted, as they are not only similar to prayers 2 and 3 of the application dated 11th August 2011, but, cannot be granted as they have been made in a dismissed suit. Thus they can only be prosecuted once the suit is reinstated.

4. The costs of this application are awarded to the 1st Respondent and be paid by the Applicants counsel.

5. If the Plaintiff/Applicant fails to comply with the orders given herein under 2 (a) and (b) above as to timelines the suit will stand dismissed at the expiry of the TWO MONTHS given.

Ordersaccordingly.

READ,DELIVERED AND DATED,ATNAIROBITHIS 16TH DAY OF JUNE 2016.

G L NZIOKA

..... for Plaintiff

..... for Defendant

Teresia – Court Clerk