



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 123 OF 2006

BERNARD KITUVA NGANGA.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....1ST DEFENDANT

MUTUKU MALONZA.....2ND DEFENDANT

EZEKIEL MWAKA MUSAU.....3RD DEFENDANT

RULING

1. The Application for determination is the Notice of Motion dated 25th January 2016 for the following orders:-

1. THAT the Honourable Court be pleased to review, set aside and/or vary the Dismissal Order made on the 4th May 2009 dismissing this suit for want of prosecution and reinstate the suit for hearing and determination on its merits.

2. THAT costs of the Application be costs in the cause.

2. In the ruling of 4th May 2009 Khaminwa J. held as follows:-

“I have perused the Plaintiff’s explanations and I find no good reason to give him more time, these allegations have no merit. If he is not able to proceed with the prosecution of the case he could withdraw the suit. He must comply with the rules of procedure as set out in the Civil Procedure Act and Rules thereunder as to the conduct of suits”.

3. In an Affidavit sworn on 25th January 2016 the Applicant states that at the time of dismissal of his suit, the Court did not consider the strength of his Replying Affidavit. He also claims that he was acting in person and was ignorant of some material aspects of the rules of the Court. An example of a material aspect, I would think, is the claim that the Applicant has on a number of occasions made attempts to fix the matter for hearing. And that although he did not include this in his Replying Affidavit the attempts were on the file.

4. The Applicant thought that the Judge was too harsh by making a drastic Order of Dismissal when she could have considered other options including setting aside the Injunction Orders the Applicant was enjoying.

5. As to why there was delay in bringing the Application, the Applicant explained that since the year 2009 when the Dismissal Order was made, he has been perennially ill and in and out of hospital due to stress occasioned by the acts of the 1st Defendant. Attached to his Affidavit are copies of Treatment Notes and a medical Report dated 14th January 2013.

6. The Court could only trace Grounds of Opposition filed by the 3rd Defendant. The 3rd Defendant opposed the Application on the grounds that it was frivolous, vexatious and an abuse of the Court process. The 3rd Defendant highlighted that the Application was brought 7 years after the Dismissal of the suit and 10 years since it was instituted.

7. At the hearing of the Application, Mr. Wachira appearing for the Applicant reiterated the contents of the Grounds appearing on the face of the Application and the Supporting Affidavit of the Applicant. In addition, Counsel urged the Court to consider the Medical condition of the Applicant between the time of Dismissal of the suit and 25th January 2016 when the present Application was filed.

8. Mr. Ondieki for the 3rd Defendant reminded Court that it had been asked to exercise a discretionary power and so the facts surrounding the matter needed to be taken into account. That the Application of Dismissal of the suit for Want of Prosecution was necessitated by the Plaintiffs inaction after filing suit. Secondly, even after the Dismissal Order was made the Plaintiff waited for 7 years to bring the present Application.

9. The Court was asked to note that the Medical slips covered the period of May 2011 to January 2013. Counsel posed the question, ***“What happened from 2009 – 2011 and then from 2013 to 2016?”***

10. It was submitted for the Defendants that allowing the Application would prejudice the Defence because the suit related to issues that happened in the 1980s.

11. While associating himself with Counsel for the 3rd Defendant, Mr. Wati for the 2nd Defendant asked the Court to consider that the Dismissal of the suit was on merit and that Review is only on narrow issues which the Application did not demonstrate. That a Medical condition is certainly not one of the issues to warrant a Review.

12. The Application before Court is brought under the Provisions of Order 45 Rule 1 which reads:-

“Any person considering himself aggrieved –

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.”

13. The Provisions of Order 45 Rule 1 requires that an Application for Review be made without unreasonable delay. The Application for Review was filed on 26th January 2016. That would be about 6 years and 8 months after the Order sought to be reviewed was made. That delay is undoubtedly inordinate. But what is more critical is whether the Applicant adequately accounted for the delay?

14. The delay was blamed on what the Applicant described as perennial illness. Attached to his Affidavit, were Medical Chits and Report in proof of his illness. The Court has scrutinized the Chits and Report and has observed that they are for the period from 2007 up to August 2014. Clearly then, the Submissions by

Defence Counsel that a substantial period is not accounted for is with merit. More specifically, no explanation was made why the Application was not made soon after August 2014 when he last attended Hospital. That would be at least 16 months before the filing of the Application. That delay is longer still when one considers that the Application filed on 26th January 2016 was intended to review an Order that had been made in 2009. The Applicant should have moved with the necessary urgency as soon as his health allowed him (which on his own evidence would be August 2014).

15. The delay in bringing the Application was excessive and unexplained. It is inordinate and inexcusable. It would be needless to interrogate the Application any further. The Notice of Motion dated 25th January 2016 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 22nd day of September ,2016.

F. TUIYOTT

JUDGE

PRESENT;

Wachira for Plaintiff

Ochieng for 1st Defendant

N/A for 2nd Defendant

N/A for 3rd Defendant

Alex - Court Clerk