



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 134 OF 2004

AGRICULTURAL FINANCE CORPORATION.....1ST PLAINTIFF

AGRICULTURAL DEVELOPMENT CORPORATION.....2ND PLAINTIFF

VERSUS

LUSTAMAN & COMPANY (1990) LIMITED.....DEFENDANT

RULING

1. The **Notice of Motion** application before the court is dated and filed in court on **19th March 2015** by the Plaintiff. The application seeks the following orders:-

1. *That this suit herein be reinstated.*
2. *That the court do set aside the order dated 23rd January 2012.*
3. *That the Plaintiff be given more time within which to adhere to the provisions of Order 11 and within which to set the matter down for hearing.*
4. *That the costs of this application be in the cause.*

2. The application is premised on the grounds set out therein and is supported by the affidavit of **Antony Ademba** sworn on **25th February 2015**. The Plaintiff's/Applicant's case is that on 23rd January 2012 this court ordered that the matter herein be set down for hearing within 45 days thereof failing which the suit would stand dismissed. At the time the provisions of Order 11 had not been complied with and therefore the matter could not be set down for hearing within 45 days. The Plaintiff then set about to get witness statements but could not do so in time as witness were not available as most had left the employment of the Plaintiffs. Now the Plaintiffs state that they obtained the statements and are therefore ready to have them filed and proceed with the matter, and that they are truly keen to proceed with the matter as they have a good and strong claim. The Plaintiffs aver that it would be grossly unfair not to let them have their day before court, and that no prejudice would be suffered by the Defendant.

3. The Defendant/Respondent have opposed the application vide a replying affidavit of **Phoebe Amiani** sworn on **4th May 2015**. The deponent stated that she is the Property Manager of the Defendant Company and that she is fully conversant with matters herein. The Defendant's case is that the Plaintiffs are guilty of inordinate and inexcusable delay in filing the Application herein for the following reasons:

- i. As admitted by the Plaintiffs, on 23rd January 2012, this Court ordered that the Plaintiffs set the suit herein down for hearing within 45 days otherwise the suit would stand dismissed.
- ii. The Plaintiffs did not take any action for the 45 days, effectively disobeying the court orders of 23rd January 2012.
- iii. The Plaintiffs did not even attempt to commence compliance with the provisions of *Order 11* of the *Civil Procedure Rules, 2010* within the said 45 days allowed by the Court and have not advanced any reason for their failure to attempt compliance with the said Order 11.

iv. If indeed the Plaintiffs needed more time than the 45 days to comply with the provisions of *Order 11* of the *Civil Procedure Rules, 2010* as they now allege in the Application herein, why did they not attempt to seek an extension of the time or otherwise seek review of the order of this Court of 23rd January 2012 to enable them to comply? The Plaintiffs have not advanced any reason as to why they did not go back to court for such orders.

v. Even after the lapse of the said 45 days on or about 9th March 2012 and it was evident that the suit herein had been dismissed, the Plaintiffs took no action to set aside the orders of the Court until 9th March 2015 when they filed the present Application.

vi. It therefore took the Plaintiffs 3 years since the suit was dismissed to file the present Application, which delay is inordinate and inexcusable.

4. The Respondent submitted that it is evident that the Plaintiffs went into a deep slumber in respect of the prosecution of the suit even after this Court had allowed them the opportunity to redeem themselves on 23rd January 2012.

5. I have looked at the file record and noted that prior to the Ruling of this Court on 23rd January 2012, the Plaintiffs had consistently exhibited a lethargic disposition towards the prosecution of the suit. For the avoidance of doubt:

i. As early as 11th February 2005, the Defendant/Respondent's advocates requested the Plaintiffs to comply with the Civil Procedure Rules on discovery of documents;

ii. The Plaintiffs ignored the Defendant/Respondent's said request prompting this Court (Mr. Justice Ochieng, J) on 26th May 2006 to order compliance within 2 weeks of its order.

iii. The Plaintiffs still did not comply.

iv. Five months later, the Plaintiffs had not complied with the said orders given on 26th May 2006 prompting the Defendant to make an Application on or about 1st November 2006 for dismissal of the suit for failure to comply with the order of discovery and/or for want of prosecution.

v. On 7th February 2007, this Court made its Ruling on the aforesaid Application in which the Court declined to dismiss the suit as prayed but warned that the Plaintiffs continued delay in prosecuting this suit would render the suit liable for dismissal in future.

vi. The Plaintiffs failed to set down the suit for hearing or take any steps on the prosecution of the suit prompting the Defendant to make yet another Application to dismiss the suit for want of prosecution on 4th June 2008, one year and 4 months later. (see annexure marked "PA.1" being a copy of the Defendant's Application and Supporting Affidavit sworn by Natalie Njanja outlining the events stated above.)

vii. As can be seen from the above, since 4th June 2008 to 23rd January 2012, the Plaintiffs did not take any step towards the prosecution of the suit prompting the Court to rule as it did on 23rd June 2012.

6. I have considered the application. I have also considered the entire history of the file, and the issue I raise for determination herein is one: whether or not this court can still exercise its discretion to allow the application or to allow the suit to be heard on its merits.

7. It is apparent from the court file that before 23rd day of January 2012 when the court ordered that the suit be heard within 45 days, there were already several instances of failure by the Plaintiff to prosecute the matter. This is well and aptly documented in the replying affidavit of Phoebe Amiani. It is clear that the court has promptly extended discretion to the Plaintiff to enable the Plaintiff take steps to prosecute the suit. All those were disregarded by the Plaintiff.

8. After several failures by the Plaintiff the court on its own motion issued a Notice to Show Cause to the parties why the suit should not be dismissed for want of prosecution. The Notice to Show Cause was heard on 23rd January 2012 after which the court ordered the Plaintiff to fix the matter for hearing within 45 days. It is over three years and the Plaintiff has done nothing except to bring this application well after the suit had stood dismissed in March 2012.

9. I have considered the reasons given for the delay. It is evident that the Plaintiffs have been indolent in the prosecution of the suit herein and their conduct in respect of the suit is therefore contumelious and an abuse of the court process and the Plaintiffs do not deserve any more clemency from this Court. Further, and in response to the contents of paragraph 4 of the Supporting Affidavit, no evidence has been availed to this Court as proof that the Plaintiffs' witnesses have left office and/or that they could not be found for a period of 3 years. Accordingly, the reason for the delay in the prosecution of the suit is not verifiable and therefore not plausible. Contrary to the assertions in paragraph 7 of the Supporting Affidavit, the setting aside of the orders of 23rd January 2012 and the reinstatement of the suit herein will greatly prejudice the Defendant/Respondent who had already closed its file after the suit stood dismissed on or about 9th March 2012.

10. For the foregoing reasons, I am not satisfied that the current application has any merits. It is dismissed with costs to the Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 29TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for the Plaintiff

No appearance for the Defendant

Teresia – Court Clerk