



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 796 OF 1998

MARYJUSTER CHEPLETING MITEI.....PLAINTIFF

VERSUS

DAIMA BANK LIMITED.....1ST DEFENDANT

RHODA CHELENGAT KANDIE.....2ND DEFENDANT

RULING

1. The application dated 6th February 2014 sought the disqualification of Havelock J. who was the trial Judge.
2. The plaintiff also prayed for the setting aside or the variation of the orders which Havelock J had made on 17th September 2013. The said orders constituted the dismissal of the plaintiff's case, on the grounds that she was not in court to prosecute her case.
3. The other relief which the plaintiff sought was that the proceedings which were recorded when the counter-claim was being heard, be set aside.
4. In a nutshell, the plaintiff was asking that the trial of this suit should start de novo.
5. As regards the plea to have the trial Judge disqualify himself, the same was overtaken by events, as Havelock J. has retired from the Judiciary.
6. Therefore, the only reliefs which the court now has to adjudicate upon, are those that relate to whether or not the trial of the suit ought to start de novo.
7. Primarily, the plaintiff was urging the court to allow her to prosecute her case from the start because she says that she had, earlier, been prevented from doing so due to ailment.
8. The plaintiff felt that the trial Judge had been unfair to her, by attributing all the delays to the plaintiff only, whilst the defendants had also contributed to some of the delays.
9. I have chosen to mention the issue of delay, not because of that fact of itself: but more so because the trial court did impose conditions upon the plaintiff, arising from the said delays.
10. On 17th September 2013, Havelock J. dismissed the plaintiff's case. The order for the dismissal was made at about 3.00 p.m.
11. The reasons given for the dismissal were as follows;

“Not only today but on a number of occasions, the plaintiff has been given ample opportunity to prosecute her case. She has failed to do so, breached 2 Court Orders and has not provided the court with a Medical certificate today, to prove (that) her illness was sufficient to keep her away from Court today. This situation must come to an end”.

12. After dismissing the plaintiff's case, the learned Judge directed the defendants to fix a date for the

- hearing of the counter-claim.
13. On 17th October 2013, the counter-claim was scheduled for hearing. Mr. Njoroge, the learned advocate for the plaintiff sought an adjournment because he had a doctor's appointment later in the morning of that day. Secondly, the plaintiff was reportedly in Eldoret.
 14. Having given consideration to the application, the trial Judge directed that the counter-claim would proceed to hearing at 3.00 p.m.
 15. At the assigned hour, the hearing of the counter-claim commenced. **ADAM BORU**, the Liquidation Agent of **DAIMA BANK LIMITED**, testified.
 16. After the witness was cross-examined, the court directed that the witness should make himself available on the following day, so that he could provide some explanations on the statements which had been referred to during cross-examination.
 17. On 18th November 2013, Mr. Njoroge informed the court that the plaintiff needed more time to prepare for the further hearing.
 18. The learned Judge agreed with the plaintiff, on the need for more time to peruse documents. Consequently, the case was adjourned to 2nd December 2013.
 19. However, neither the plaintiff nor her advocate attended court on 2nd December 2013.
 20. The next step in the proceedings was the filing of the application seeking the disqualification of the trial Judge.
 21. When the application came up before Havelock J., the learned Judge informed the parties that he was due to be retiring from the bench. He was therefore unable to hear application.
 22. Mr. Nyawara, the learned advocate for the 1st Defendant explained that on 17th September 2013, the plaintiff's advocate had told the court that his client was unwell.
 23. When the court directed the plaintiff's advocates to provide a medical certificate at 3.00 p.m, on that day, the plaintiff failed to do so.
 24. Furthermore, both the plaintiff and her advocate failed to attend court at 3.00 p.m on 17th September 2013. It is in those circumstances that the plaintiff's suit was dismissed.
 25. The 1st defendant also submitted that because the plaintiff had failed to remit monthly payments of Kshs. 50,000/- as she was ordered to do by Warsame J. on 5th June 2008, this court should not exercise its discretion in favour of the plaintiff.
 26. Meanwhile, as regards the complaints directed against Havelock J., the 1st defendant pointed out that when the counter-claim came up for hearing, the plaintiff proceeded with it, without lodging any complaint to the Judge about the earlier order, dismissing her suit.
 27. On her part, Miss Njoroge, the learned advocate for the 2nd defendant, associated herself with the submissions of Mr. Nyawara.
 28. Miss Njoroge went on to say that the court had been very lenient with the plaintiff. Therefore, the 2nd defendant said that it was now about time, that the court gives effect to the principle that Justice cuts both ways.
 29. Considering that after her case was dismissed, the plaintiff cross-examined the witness for the 1st Defendant; and this application seeking to have the trial start de novo was only brought 6 months after the plaintiff's suit was dismissed, I was invited to find that the application was just an after-thought.
 30. To my mind, there appears to be some merit in the view expressed by the 2nd defendant, about the application being an after-thought. I say so because on 6th November 2013, Mr. P.K. Njoroge, the learned advocate for the plaintiff said;

“I have a date for 11th November 2013 to 18th November. I didn't want to revisit the plaintiff's case. I can still do my plaintiff's claim by cross-examination of the defendant's witnesses. I have no problem proceeding with the defendant's counter-claim”.

31. Having proceeded with the cross-examination of Adam Boru, the plaintiff then brought this application, seeking to undo, not only those proceedings but also all the earlier proceedings.
32. If the trial Judge had not retired, he would have determined this application. I have no idea what he would have said about the call to him to disqualify himself. I also have no idea what the learned judge would have said about the application to start the trial afresh.

33. But from my reading of the record of the proceedings, I note that Mr. Njoroge, the learned advocate for the plaintiff, was involved in an accident shortly after his client's case was dismissed. He has provided evidence to show that he was hospitalized.
34. That development explains why the plaintiff could not have brought the current application earlier. I therefore find that the delay in bringing the application has been explained to the satisfaction of the court.
35. The Court did ask the defendants what would happen when parties to a case which was part-heard, could not agree on how to proceed further with the case.
36. Both defendants answered that such a case would have to start de novo.
37. However, Miss Njoroge added that when a part of that case had already been dismissed, that part could not start de novo. Therefore, I was invited to order that only the hearing of the counter-claim should start de novo.
38. On his part, Mr. Njoroge, the learned advocate for the plaintiff pointed out that his client had also asked this court to direct that the whole case ought to start de novo.
39. At that point, the court sought to know if the plaintiff had complied with the orders which Warsame J. made on 5th June 2008.
40. When the answer was in the negative, the court asked the plaintiff if he could still be accorded a hearing, after she had failed to comply with the orders of the court.
41. The plaintiff said that she was aware of her obligation to comply with orders of the court. Her advocate suggested that this court could therefore give time-limits to the plaintiff to comply with those earlier orders.
42. After the court allowed the advocate time to obtain instructions from the plaintiff, on the issue regarding the amount of time she needed to enable her comply with the orders of the court, I was told that the plaintiff was still unwell. She therefore pleaded for more time, so as to enable her revert to the court, with information about the amount of time she needed, in order to comply with the orders made on 5th June 2008.
43. Mr. Njoroge, the learned advocate for the plaintiff, explained that the failure by the plaintiff to comply with the court orders was not a matter of choice. He said that her inability to comply stemmed from the fact that she fell ill.
44. I did indicate to the parties that when a party had failed to comply with orders of the court, he should thereafter expect little or no sympathy from the court when he later seeks other orders from the court. I will bear that factor in mind when determining this application.
45. The plaintiff was allowed to retain possession of the suit property on condition that she paid Kshs. 50,000/- into court, every month.
46. Prior to the order of Warsame J., it was already clear that the plaintiff was unwell. She had however, obtained an injunction to restrain the 2nd defendant from taking possession of the suit property.
47. On 27th July 2006, I indicated that the 2nd defendant was at liberty to apply to the court for the discharge of the injunction, in the event that the suit was not set down for hearing soon.
48. The failure to comply with orders of the court is a very serious matter indeed. Therefore, the defendants could always have taken appropriate steps, when the failure to comply with court orders persisted.
49. Whether or not the court would decline to give a hearing to the party who had failed to comply with orders of the court will depend on the application made against that party. I will therefore not pre-empt the possibility that the defendants may seek appropriate orders.
50. For now, I note that on 17th September 2013, Havelock J. not only dismissed the case, but he also ordered thus;

“Status quo orders made in favour of the plaintiff are hereby lifted”.

51. I now revert to the question whether or not the whole case should start de novo.
52. Initially, I was reluctant to order that the whole case should start de novo. But after due consideration of the directions which the trial Judge gave at the tail-end of the cross-examination of Adams Boru, I became convinced that justice could only be done if the whole case was heard afresh.
53. I say so because from the cross-examination, the court was convinced that there was need for a

more complete story to be told, concerning accounts which the bank's witness had been referred to.

54. Accordingly, I now direct that the whole case, including that of the plaintiff, should be heard de novo.

55. The costs of this application will be in the cause.

56. However, notwithstanding the order that the case be heard de novo, the orders which had been made earlier will remain in force unless any of them had been subsequently varied or set aside.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of June 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Miss Njoroge for the 1st Defendant

Nyawara for the 2nd Defendant

Collins Odhiambo – Court clerk.