



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 93 OF 2001

MABEL WAKASA ASUMBA ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

JOHN MWAURA WAINAINA ::::::::::::::::::::::::::::::::::: 1ST DEFENDANT

WAKAMBO SERVICE COMPANY LIMITED ::::::::::::::: 2ND DEFENDANT

HESBON AHIRO ASUMBA ::::::::::::::::::::::::::::::::::: 3RD DEFENDANT

MARGARET KAPTUIYA CHEIBOWO ::::::::::::::::::::::: 4TH DEFENDANT

TRUST BANK LIMITED (In Liquidation) ::::::::::::::: 5TH DEFENDANT

R U L I N G

1. By a **Notice of Motion** dated **25th February 2015**, the 1st Defendant seeks as the main order the dismissal of this suit for want of prosecution. The application is premised on the grounds set out therein and is supported by affidavit of **John Mwaura Wainaina** sworn on **25th February 2015**. The Defendant's/Applicant's case is that the Plaintiff filed the suit on 24th January 2001 under a Certificate of urgency for orders of permanent injunction and challenged the validity of the Charge dated 7th November 1996 and the Guarantee. A temporary Order was issued on 24th January 2001 restraining the 1st and 2nd Defendants from evicting the Plaintiff and sale of the suit property pending the determination of the suit. A Ruling was given dated 6th July 2001 confirming the Order issued on 24th January 2001 and restraining the 1st and 2nd Defendants from evicting the Plaintiff and sale of the suit property pending the determination of the suit. From 2001 till 2012, the Plaintiff amended the Plaint filed on 24th January 2001 in 2006, filed a Statement of issues in 2010 and filed their List of documents and Reply to the defence and cross claim in 2012. The last time the Plaintiff arranged to take a date for hearing was in June 2012. There has been inactivity since the suit was mentioned in December 2013. Fourteen years later, since the injunction was issued in 2001, the suit has never been fully heard and determined. It is now the Defendant's case that the Plaintiff has lost interest in the suit, has abandoned it and it should be dismissed with costs.
2. The Plaintiff has opposed the application through a replying affidavit of his counsel **Neville Walusala Amolo** sworn on **15th June 2015**. In the affidavit, Mr. Amolo has given reasons for the alleged delay in the prosecution of the matter. Counsel deponed that following the failure by

the 1st and 2nd Defendants to enter appearance and to file a defence, he applied for and obtained judgement which the 1st and 2nd Defendants applied to set aside and it was set aside by consent. Thereafter it became necessary to seek the leave of court to proceed with the suit against Trust Bank Limited (in liquidation), and that leave was granted on 7th November 2002 and later, an amended plaint was filed enjoining a new Defendant Margaret Kaptuiya Cheboiwo who is a key party to the cause. Counsel deponed that his office filed a statement of agreed issues on 1st October 2010 after the advocates on record for the 1st and 2nd Defendants M/s Meshack Obura & Co. Advocates and the advocate for the 5th Defendant Waweru Gatonye refused to approve them or make amendments thereto. The Plaintiff filed all pre-trial documents on 14th May 2012 and fixed the trial of the suit on 29th May 2012 but the matter could not proceed and had to be adjourned because the 1st Defendant filed his documents on the day of the trial and it is clear that the failure of the trial, thus triggering adjournment. Since then there have been other activities on the matter. By a letter dated 11th June 2012 the Defendants were invited to attend the registry on 19th June 2012 to take dates but a date was not taken because on 18th June 2012 the 1st Defendant filed an application for leave to amend his defence together with a Notice to Cross-claim against the 5th Defendant on 20th June 2012. The case was then listed for hearing before Hon. Justice Mabeya on the 29th May 2012 and although the Plaintiff was ready to proceed the hearing was stood over generally on the request of the 1st, 2nd and 5th Defendants.

3. Counsel deponed that on 18th June 2012, the 1st Defendant applied to amend its pleadings and directions were given that the 5th Defendant file witness statement and bundle of documents within 14 days and the cause be mentioned on 19th September 2012 on which date the 1st and 2nd Defendants sought leave of court to further amend their defence and cross-claim, and the matter was again put off to 11th October 2012. Thereafter his office faced challenges in getting hold of the court file for purpose of taking hearing dates. Counsel submitted that the Plaintiff had done everything to ensure that the matter is heard, but these efforts were frustrated by the various applications by parties to amend their pleadings and to file requisite documentation and it would be unjust, unfair and against the spirit of Sections 1A and 1B of the Civil Procedure Act to allow the application to dismiss the suit as requested and it is only fair that pre-trial directions be taken and a date for trial fixed.
4. Parties with the leave of court filed submissions which I have considered. I do not intend to write a long ruling in this matter. The Applicant has cited adequate legal provisions including the Constitution, the Oxygen Principle, the Civil Procedure Rules, the Principle of Social Justice and that of Unjust Enrichment, upon which consideration, this court should have no problem allowing this application and striking out the Plaint. I have carefully considered those legal provisions.
5. However, I have also considered the reasons given by the Plaintiff for the alleged delay in the prosecution of this matter. The court record shows that while the suit was filed in the year 2001, the suit became very active as from the year 2010, and most activity, as was deponed to by Mr. Amolo, involved the Defendants making various applications in the suit. The following activities are notable:-
 0. *the applicant changed advocates pursuant to a Notice of Change of Advocates dated 23rd June, 2011,*
 0. *this suit was set fixed for hearing on the 29th May 2012 and the respondent served a Hearing Notice dated 2nd April 2012,*
 0. *in conformity with the Civil Procedure Rules, Legal Notice No. 157 of September 2010 the respondent filed her Witness Statement, List of Documents, and Bundle of Documents on 14th May 2012,*
 0. *the applicant filed a Notice of Cross Claim dated 15th June 2012.*
6. Although the suit was ready for trial on the said 29th May 2012, come that date, it could not proceed because the applicant filed Witness Statement and Bundle of Documents on 28th May 2012. On the date of the hearing namely 29th May, 2012 the 1st, 2nd and 5th defendants applied for an adjournment and the 1st defendant asked for leave to amend his defence. Whereas Honourable Mr. Justice Mabeya had already granted leave to amend his defence, the 1st defendant filed a Formal Application dated 25th June 2012 and then filed an Amended Defence on 12th July

2012. Again, on the 24th September, 2012 the applicant filed a Further Amended Defence and Cross Claim further delaying the trial. Repeated reference to the year 2001 is without doubt a deliberate stratagem to cast the Plaintiff/Respondent in negative light but the facts show that the 1st Defendant/Applicant is the one guilty of obstructing the commencement of the trial.

7. Striking out pleadings is a process a court of law must resort to as a last option, and the parties to a suit should be given their day in the sea of justice, as far as it is possible. This view was expressed in the case of, **Victory Construction Company Vs Duggal [1962] E.A. 697 at 698** where Edmonds J. stated thus,

“However, in deciding whether or not to dismiss a suit under r.6 it is my view that, where the parties have been called upon to show cause against such an order, a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship, and that there has been no flagrant and culpable inactivity on the part of the plaintiff. In regard to the latter two conditions, however, a defendant may find it difficult to persuade a court of hardship or of culpable inactivity on the part of a plaintiff if he, the defendant, has been guilty of inactivity in failing to take any step to protect himself under the provisions of r. 5 of O. XVI, which gives him a remedy in the event of a Plaintiff failing to prosecute his suit.

8. In the light of the foregoing, the order that this court must give is one that dismisses the 1st Defendant’s application under consideration, with a further order that the parties shall conclude pre-trial directions and set up the matter for hearing within 45 days from the date hereof. Parties shall bear own cost of the application.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 23RD DAY OF NOVEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for the Plaintiff

M/s Muriuki for the 1st Defendant

Teresia – Court Clerk