



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 553 OF 2008

NDUMBERI DAIRY FARMERS

CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF

VERSUS

1. **FLORENCE WAIRIMU MBUGUA**
2. **GRACE WANJIKU MBUGUA**
3. **PETER CHEGE KIARIE**
4. **SYLVIA MURUGI MBUGUA** (sued as legal representative of the late

JOSEPH KIARIE MBUGUA)

5. MBWANJI LIMITEDDEFENDANTS

RULING

1. This is an Application to Set Aside the Order of 16 January 2013 dismissing the Plaintiff's suit for want of prosecution and/or for the re-instatement of the suit pursuant to Order 17 Rule 2 of the Civil Procedure Rules.
2. The Application brought by the Plaintiff in this by Notice of Motion under Sections 1A, 1B, 3, 3A, 63(e) and 80 of the Civil Procedure Act (Cap 21). In effect the Application seeks to set aside the Order of Hon Mr Justice Kimondo made on 16th February 2012 dismissing Plaintiff's suit for want of prosecution. The Plaintiff also relies on Order 17 Rule 2(1) and Order 45(1) of the Civil Procedure Rules together with Article 159 of the Constitution of Kenya 2010.
3. The Application is dated 31st May 2013 and is supported by the Affidavit of Mr Joseph Maina Kamau, the current Secretary of the Plaintiff Society also dated 31st May 2013. The Original Defendants were a Mr Joseph Kiarie Mbugua and Mbwaji Limited. Following commencement of the suit, the First Defendant passed away and has been replaced by his Legal Representatives as Joint Defendants.

Background

4. The Background to this matter concerns the intended purchase of two parcels of land by the Plaintiff Society from the Deceased. The Plaintiff, Ndumberi Dairy Farmers' Co-operative Society Ltd has a membership of about 3,000 members. The Dairy Farmers wished to expand

their activities and in consequence to purchase some land and/or buildings.

5. The Amended Plaintiff states that the Deceased was the registered owner of a parcel of land known as Ndumberi/Ndumberi/T.613/29 (“Ndumberi 29”). and the 5th Defendant was the Registered owner of a parcel of land known as Ndumberi/Ndumberi/T613/30 (“Ndumberi 30”). These facts are denied by both the Deceased and the Fifth Defendant Company. However, the true position can be easily ascertained from the Title Deeds and the Land Registry. Exhibited to the Notice of Motion are two Agreements for Sale signed by the Deceased wherein he agrees to sell both parcels of land to the Plaintiff Society on his own behalf and on behalf of the Fifth Defendant Company.
6. The Amended Plaintiff seeks relief against the Executors of the Estate of the Original Defendant (“the Deceased). Mr Joseph Kiarie Mbugua, that is the 1st to 4th Defendants. The 5th Defendant is a Limited Liability Company.
7. What is alleged is that the Deceased attempted to sell his land to the Co-operative around 7th September 2006. The Plaintiff, acting through its then Chairman and Treasurer, entered into an Agreement for the Sale of LR No NDUMBERI/NDUMBERI/T613/29 (“Ndumberi 29”). with the Deceased Joseph Kiarie Mbugua (“The First Sale Agreement”).
8. The Plaintiff also entered into an Agreement for the purchase of Ndumberi 30 from the 5th Defendant (“the Second Sale Agreement). The signature of Vendor appears to be the same as the 1st Agreement.
9. It was an express term of each and both Sale Agreements that the subject properties would be free from all encumbrances. Copies of the Agreements were exhibited to the Plaintiff.
10. The completion date was to be the ninetieth day from the date of the Agreements. That is, a date in December 2006. That is when the cause of action arose and the suit was instituted by a Plaintiff dated 12 December 2008.
11. It is pleaded that ten percent of the purchase price was paid being a sum of Kshs 4,750,000 and notwithstanding the relevant clauses in the Agreements and Professional undertakings being given completion was not possible.
12. It transpired that the titles of each and both Ndumberi 29 and Ndumberi 30 were charged in favour of the National Bank of Kenya. Also that Kenya Revenue Authority had a caveat lodged against the titles. In the circumstances the Sale Agreements were frustrated. The Plaintiff demanded repayment of the 10% Deposit. The Demand Letter was sent dated 25th March 2008. The demand was not met and the Deposit was not refunded to the Plaintiff.
13. The suit was instituted by a Plaintiff dated 12th September 2008. The cause of action arose in 2006. The Plaintiff issued its Plaintiff in 2008 for repayment of the Deposit, damages, costs and interest on 12th September 2008 the Plaintiff was amended on 21st November 2008. Amended Plaintiff seeks relief against the Estate of the Original Defendant (“the Deceased”). Mr Joseph Kiarie Mbugua.
14. On behalf of the 5th Defendant, it is denied that it was the registered owner of Ndumberi30. The Defence of the 5th Defendant is made up of bare denials to the Plaintiff. It was filed on 7th November 2008. It does however state there is no cause of action.
15. Similarly the Defence on behalf of the 1st, 2nd, 3rd and 4th Defendants (one document) are bare denials to the claim and its particulars. Again, notably ownership is denied.
16. It is not clear exactly what happened next because the Court file went missing and was not available for the mention on 5th December 2013 and subsequently needed to be re-constituted. The

file was not reconstructed until the latter part of 2014. Counsel for the Plaintiff says the Amended Plaintiff was not placed on the Court File. It seems that there is a suggestion that something was amiss.

17. It seems the file was available in February 2012 as there was a hearing before Hon Mr Justice Kimondo. What is also clear is that the suit was dismissed by Hon Mr Justice Kimondo on 16th February 2012 pursuant to a Notice. The Plaintiff's position is that this dismissal did not come to the attention of the Plaintiff's until 16th May 2013.

18. Submissions were filed on 27th November 2013 but the further hearing could not be effective as the file could not be traced. At the hearing listed on 5th December 2013 the file was not available. By a Letter dated 19 June 2014 the Deputy Registrar advised the Plaintiff to make an Application for reconstruction of the Court file. That was done. The matter proceeds on that reconstructed file.

19. The Plaintiff's counsel explains that there was delay caused by the Plaintiff's previous representatives although neither the Defendants nor their representatives attended, and thereafter the disappearance of the Court File caused further delay. In the circumstances the delay should not be attributable to the Plaintiff. The Plaintiff accepts that there was some delay caused by its previous Advocates but that was not the fault of the members and they should not suffer the consequences. Counsel submits that there is a new Chairman and a new Secretary and they are eager to pursue the matter in the interests of its members. It is submitted that the Notice to show cause why the suit should not be dismissed was not served and not received by the Plaintiff.

20. The arguments put forward by the Defendants are-

- (1) The suit was dismissed following inordinate delay by the Plaintiffs. Further that the suit was dismissed on Notice to the Parties resulting in the Order for dismissal.
- (2) The Plaintiff's claim that it traced the file after several months is not justifiable and should not be excused.
- (3) Prejudice to the Defendant and whether they would have a fair trial.
- (4) The delay by the Plaintiff was not solely caused by the loss of the file but there was delay in the Plaintiff's conduct of this litigation.
- (5) Before the Court dismissed the suit there would have been a Notice served on all the Parties.

21. As stated, the file in had to be reconstructed following the loss of the previous file. Following the hearing on 31st May 2013 before Hon Justice Kimondo the file could not be located. Although the file was subsequently reconstructed, there is no copy of the Notice to Show Cause.

22. By way of highlighting, the documents I have been taken to are –

- (1) The Order of 16th February 2013 – Order dismissing the Plaintiff's suit for want of prosecution.
- (2) Application dated 31st May 2013 asks the Court to set aside, review and/or vary the Order made on 16th February 2012.
- (3) The Notice of Motion dated 5th August 2014 seeking the reconstruction of High Court Civil Suit No 553 of 2008.
- (4) The supporting Affidavit of Joseph Maina Kamau the Secretary of the

Plaintiff Society dated 31st May 2013.

(5) Letter to the Deputy Registrar dated 5th February 2014.

23. In addition, Counsel for the Plaintiff complains that the Amended Plaintiff was not placed on the Court file after it was filed (Affidavit JMK paragraph 13). As to the question of prejudice caused by the delay and the completion of probate, it is submitted that the Estate of the late Kiarie Mbugua received money from the Government which can be assessed any time.

24. Grounds of Opposition dated and filed on 1st November 2013 on behalf of the 5th Defendant.

1. That the application is an abuse of the process of this Honourable Court as the matter was dismissed for want of prosecution on 16th February 2012 by Honourable Justice Kimondo and the application does not given any excusable reason to warrant the reinstatement of the suit.

2. That the application has been filed after inordinate delay the subject matter of the suit is a matter of probate that has been finalized. The application has therefore been overtaken by events.

3. That the Plaintiff's own Notice of Motion dated 31st May 2013 and filed in Court on the same day at Paragraph 1 and the accompanying Supporting Affidavit at Paragraphs 9 and 10 both admit that their advocate on the record at the time did not handle the matter with due diligence and this is not the forum to address the Plaintiff's grievances as this does not concern the 5th Defendant.

4. That effectively, there is nothing to be tried or set down for hearing and that is the end of the case. There must be an end to litigation in a fair, just, expeditious and timely manner as envisaged in Section 1A and 1B of the Civil Procedure Act 2010.

5. That the application herein is an afterthought and therefore calculated to reinstate a suit that has already been dismissed without citing a valid reason and it is tantamount to abuse of the judicial process.

6. That in the circumstances and based on the foregoing reasons, the orders sought in the present application, in the interests of justice and fairness, ought to be refused and the said application dismissed with costs.

25. The Defendants also submit that they are disadvantaged as they will not have a fair trial. It seems to me that as the Chairman and Secretary of the Plaintiff have changed. The Plaintiff would be at a similar disadvantage were they to seek to rely on oral testimony. However, it seems to me that the best evidence available in this dispute is the documentary evidence, namely the Sales Agreements and the Registration of Title. Those would deal with ownership. As to the question of payment of the deposit, again the transfer of funds is also a matter that has a documentary record. The Plaintiff's principal claim is for the refund of the Deposit paid.

26. In addition to the Plaintiff's suit for repayment, there is an allegation of fraud against the Deceased. I consider that it is in the Defendants' interest to be able to defend such a serious allegation.

27. The Defendant's submissions state that there is "no way" the suit can be dismissed without notice. Despite a search neither party has been able to produce such a notice. None appears on the reconstructed file, neither have the Defendants produced a copy to demonstrate that it exists and was served upon them, therefore it is logical to surmise that it was not served.

Application of Law and Principles

28. The matters that the Court needs to take into consideration in deciding this Application is:

1. Has there been a delay by the Plaintiff
2. Are there any good reasons for the delay?
3. If so, are there any reasons why the delay should be excused?
4. If there has been delay, is it of significant magnitude to cause prejudice to the Defendants in that they will not have a fair hearing?
5. Alternatively, is it possible that both Parties can have a fair hearing notwithstanding the passage of time?
6. What is the prejudice to the Plaintiff Society if it is not successful in its Application?
7. Should the dilatoriness of the previous Advocates be visited on all 3,000 of the Dairy Farmers, including those who have not been involved in the management of the Plaintiff Co-operative
8. Is the subject matter of the dispute still in existence?

29. I have carefully considered the contents of all the authorities contained in the Lists of Authorities put forward by both Parties. I will not set out each one, in the interests of time but take into account the guidance and principles set out therein. I do note that a few have been superseded by the Constitution of Kenya 2010.

30. In relation to legal principles, in particular I am guided by Article 159(1) –

“159 (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.”

And 159 (2)

“159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- a. **justice shall be done to all, irrespective of status;**
- b. **justice shall not be delayed;**
- c. **alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);**
 - (d) **justice shall be administered without undue regard to procedural technicalities; and**
 - (e) **the purpose and principles of this Constitution shall be protected and promoted.**

31. Further **Article 50** provides –

50. (1) Every person has the right to have any dispute that can be

resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Order 17 Rules 2(1) provides –

“17 2. (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.”

32.It is therefore undeniable that before the suit is dismissed the Party presumed to not pursue the matter is given an opportunity to show cause “why the suit should not be dismissed”. The Defendant submits that this was done by way of a Notice to Show Cause followed by a Hearing. The Plaintiff says there was no Notice issued. Counsel says that if there had been a Notice it was not served and therefore there was no attendance at the Hearing and the Order challenged was obtained through a process that was unfair.

Section 3A of the Civil Procedure Act provides: “*In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of Justice of prevent an abuse of the process of court*”

33.I have considered the Authorities on each of the Parties’ Lists as they very helpfully provided copies to the Court. I notice that although some have been superseded by the new Civil Procedure Rules and the Constitution, they provide valuable guidance.

34.It seems to me (as enunciated by Hon Mr Justice Havelock in ***Dubai Bank HCC 907 of 2009***) the Court has a wide discretion in relation to this Application, saying “*In my Opinion looking at the two differing positions as regards the authorities, the Court has complete discretion as to whether to dismiss ... or allow it to proceed to a hearing and a logical determination and conclusion of the suit*” .

35.I am also conscious that striking out is a draconian measure and should not be ordered lightly. To that end I note that in the case of ***Ari Credit and Finance Ltd v Trans-National Bank Ltd (2005)*** it was held that:

‘The court should be slow to dismiss the case for want of prosecution where the suit can be heard without further delay or where the defendant will suffer no hardship and where there has been no flagrant and comfortable inactivity on the part of the plaintiff’

36.The Defendant in its Notice of Objection as well as its Written Submission advocates the opposite approach, in summary that the Plaintiff has not pursued the suit with the alacrity it requires and deserves, that the Defendants will be disadvantaged if the Application is successful as they cannot have a fair hearing in view of the delay. The Defendant also says that the Plaintiff/Applicant’s reasons for delay are not provided for in law. Also that “the Courts seem inclined to find that delay usually caused by the Plaintiff will prejudicie the Defendant and prevent a fair trial

37.Interestingly both opposing Parties rely on equitable principles in aid of their arguments.

38.Dismissal of a suit is a draconian measure and therefore it is only fair that a party should be heard. I have considered arguments on both sides and in the exercise of my discretion I allow the application.

39.I also direct as follows:

1. Parties to comply with Order 11 within 60 days;
2. List for mention after 60 days to ensure compliance.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24th DAY OF NOVEMBER, 2014.

FARAH S M AMIN

JUDGE