



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 340 of 2008**

**KOMAROCK VIEW ESTATE LIMITED.....PLAINTIFF**

**- VERSUS -**

**BANK OF BARODA (K) LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BUSAM HOLDINGS LIMITED .....2<sup>ND</sup> DEFENDANT**

**RULING ( NO. 2)**

1. This is the plaintiff's notice of motion dated 20<sup>th</sup> February 2013. The plaintiff prays that the order made on 19<sup>th</sup> February 2013 be set aside. The order had dismissed the plaintiff's suit for want of prosecution. The plaintiff thus seeks to reinstate the suit and the interim order of injunction first granted on 10<sup>th</sup> November 2008. The motion is expressed to be brought under sections 97 and 150 of the Land Act 2012 and Order 12 rule 7 of the Civil Procedure Rules 2010. It is also predicated on section 3A of the Civil Procedure Act.

2. The pith of the motion is that the suit should be heard on the merits. It is deposed in the deposition of Francis Ngatia that his failure to appear in court to testify for the plaintiff was not deliberate. At paragraphs 11 and 12, he states that he had not finalized or executed a witness statement by 19<sup>th</sup> February 2013 when the matter came up for hearing. The reason proffered is that he needed to peruse two documents: a guarantee and disbursement or account statement regarding the loan of Kshs 28,000,000 from the 1<sup>st</sup> defendant. He avers that the latter documentary evidence is central to the suit as the plaintiff's case is that no monies were disbursed under the loan. The defendant challenges the exercise of the bank's statutory power of sale by private treaty to the 2<sup>nd</sup> defendant. Fraud and undersale are pleaded in the plaint. As the defendants' counsel had not provided the statement of account and copy of the board resolution to borrow, the plaintiff feels the court blamed it unfairly.

3. The plaintiff avers at paragraphs 20 and 21 of the affidavit that the suit land measures 45 acres with a current value of Kshs 200,000,000. That is why it takes up cudgels on the bank's sale to the 2<sup>nd</sup> defendant for Kshs 22,000,000. The plaintiff also raised the ground that there are two other suits: ELC 80 of 2008 and civil suit 819 of 2007 pending at the High Court and between the parties over the same subject matter. In a synopsis, the plaintiff's case is that in a land matter of substantial value, the contested positions by the parties fall within the province of the trial court on tested evidence.

4. The motion is contested. The 1<sup>st</sup> defendant has filed grounds of opposition dated 5<sup>th</sup> March 2013. The primary objection is that the court is being invited to sit on appeal to its decision of 19<sup>th</sup> February 2012. To the 1<sup>st</sup> defendant, the court is *functus officio* and the remedy lies in an appeal. It was further contended that the plaintiff took no steps to prosecute the suit for 5 years and continued to benefit

from the interim injunction. This was at the expense of the chargee and the 2<sup>nd</sup> defendant. Accordingly, the court should frown at the applicant for coming to court with unclean hands. Equity should also not assist the indolent, it was submitted.

5. The 2<sup>nd</sup> defendant has filed a replying affidavit sworn by its director Nick Kariuki on 1<sup>st</sup> March 2013. There are also filed grounds of opposition of even date. In a nutshell, the 2<sup>nd</sup> defendant avers that it bought the suit property in the year 2007 for Kshs 22,000,000. To date, it has neither the money nor access to the land in view of the interlocutory injunction that was in place. The plaintiff went to sleep on the matter for 5 years. The 2<sup>nd</sup> defendant has thus been prejudiced and runs the peril of not recovering the money from the plaintiff or the bank. At paragraph 2 of the deposition, a comprehensive chronology of the sale and suit is captured. The 2<sup>nd</sup> defendant's position is that the order of dismissal made on 19<sup>th</sup> February 2013 was just in the circumstances. The remedy for the applicant is an action for review or appeal to the order. The present motion is thus defective or fatally flawed. I was implored to dismiss it.

6. I have heard the rival arguments. The plaintiff has brought this motion under order 12 rule 7. Order 12 rule 3 allows a court to dismiss a suit for non-attendance. Rule 7 then allows the aggrieved party to set aside that order and reinstate the suit. The decision of *Maina Vs Mugiria* [1983]KLR 78 reaffirms this court's wide and unfettered discretion to set aside an *ex parte* judgment and to do substantial justice to the parties. The case cited with approval the decision in *Shah Vs Mbogo* [1967] E A 116. The latter decision states that the discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a party who has deliberately sought to obstruct or delay the course of justice. See also *Mathias Nasubo Ogama Vs Rebman Ambalo Malala* Nairobi, High Court case 129 of 2007 [2012] e KLR, *Trust Bank Limited Vs Ajah Shah and 9 others* Nairobi, High Court case 185 of 2001 [2012] e KLR.

7. The plaintiff freely conceded that it has not prosecuted this suit for 5 years. This suit was presented to court on 24<sup>th</sup> June 2008. On 10<sup>th</sup> November 2008, and in a considered ruling, Joyce Khaminwa J, granted the plaintiff an injunction on the plaintiff's chamber summons filed contemporaneously with the suit. By the time of the suit, the property had been sold by the 1<sup>st</sup> defendant chargee to the 2<sup>nd</sup> defendant for Kshs 22,000,000 on or about 12<sup>th</sup> July 2007. A transfer to the 2<sup>nd</sup> defendant was made on 31<sup>st</sup> October 2007. Clearly, the suit was presented one year after the sale and eight months of the transfer. I am alive to the value of the suit property. The plaintiff does not deny charging the property to the bank. I am also alive to the plaintiff's claim that the property was sold irregularly or at an undervalue or fraudulently. At the point of sale, the plaintiff contends the property was valued by Lloyd Masika at Kshs 95,000,000. The plaintiff now avers the 45 acre property in Nairobi is prime and worth Kshs 200,000,000. To my mind, then, the plaintiff after securing the injunction should have diligently pursued prosecution of the suit. What happened instead was that the plaintiff slept on its rights. The record of the court shows that pleadings closed on 16<sup>th</sup> June 2009 with the filing of reply to defence by the 1<sup>st</sup> defendant. A hearing date was taken over a year later on 18<sup>th</sup> November 2009 for the 30<sup>th</sup> November 2010. The suit was taken out by the court.

8. On 27<sup>th</sup> September 2012, nearly two years later, the parties appeared before D.K. Musinga J, (as he then was) for a pre-trial session. The plaintiff did not fix the suit for hearing. From the file note, on 9<sup>th</sup> November 2012, the 2<sup>nd</sup> defendant moved the matter for mention on 19<sup>th</sup> November 2012. On the latter date, the parties were ordered to fix a hearing date on priority at the Court registry. The plaintiff did not do so. The record shows that on 22<sup>nd</sup> January 2013 the 2<sup>nd</sup> defendant took a date for hearing on 19<sup>th</sup> February 2013 when the suit was dismissed under order 12 rule 3.

9. I have set out that brief history to demonstrate the lethargy exhibited by the plaintiff. The plaintiff's conduct is consistent with that of a disinterested litigant. When the plaintiff now pleads that it has not sought an adjournment of the suit before the fateful day of 19<sup>th</sup> February 2013, it masks its own delays. True, on that date, the plaintiff was represented by learned counsel Ms Thyaka. It sought adjournment because it did not have a witness in court and its intended witness had not executed a

witness statement for the reasons I highlighted earlier. That was at 9.15 a.m when, for considered reasons on the record, the adjournment was refused. The matter was fixed for hearing at 10:30 a.m. At that hour, the plaintiff renewed the application for adjournment on grounds that its witness was perusing the guarantee and disbursement or account statements and had not thus filed a witness statement. In a considered ruling, the court found no merit in the regurgitated application and ordered the matter to proceed. As the plaintiff had no evidence to tender, and the defendants were not admitting to any part of the claim the suit was dismissed.

10. There is thus a clear pattern of unexplained and inordinate delays to prosecute the suit. Even in the present motion, no plausible explanation for those delays or failure to present witnesses is presented. Instead, the plaintiff at paragraphs 11, 12 and 15 rehashes the same arguments and states that in its view the suit “*was not ripe for hearing and that [it] needed more time to put in [its] statement and did not expect the defendant to object to the adjournment...*”

11. Granted those circumstances, the court was then well entitled to dismiss the suit. Authorities in support of that abound and include *Mukisa Biscuit Manufacturing Company Vs Westend Distributors* [1969] E A 696, *Fitzpatrick Vs Batger & Co Ltd* [1967] 2 ALL 657, *Ivita Vs Kyumbu* [1984] KLR 441. It remains the duty of the plaintiff and its advisors to move on with the case. In *Allen Vs Mc Alpine & Sons* [1968] ALL ER 543 the view of the Court was that when delay is established, until a credible excuse is made out, the natural inference is that it is inexcusable. So much so that this case is distinguishable from the matter that came before me in *Mathias Nasubo Vs Malala* case (supra). There, there had been delay to prosecute for 5 years. But on the date of the hearing, the plaintiff and his counsel had come to court late and did mention the matter to the Judge. The court reinstated the dismissed suit. In the present case, no witnesses were available at all for the plaintiff at the hearing over 5 years since the suit was filed. In sum, the conduct of the plaintiff and the history of the matter militates against the exercise of discretion. Certainly the plaintiff’s conduct has obstructed the course of justice and fails the test in *Shah Vs Mbogo* (supra).

12. The motion is also predicated upon section 3A of the Civil Procedure Act and sections 97 and 150 of the Land Act 2012. This court is now enjoined to do substantial justice to the parties. That is the overriding objective of the court decreed by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act. Justice is however a two way street. In our adversarial system of justice, the court must strike a delicate balance to ensure that parties remain at equal arms length. I appreciate that this is a land matter. It can be emotive. It has a substantial value. It justifies the plaintiff’s plea for his day at the throne of justice. On the other hand is the 2<sup>nd</sup> defendant who paid Kshs 22,000,000 for the land on 12<sup>th</sup> July 2007. The money was paid to the 1<sup>st</sup> defendant bank. It can’t access the land because of the injunctive orders. It has neither the money nor the land. It thus runs a real risk. Its prejudice or peril is plain to see. The plaintiff pleads for a final opportunity to test the scales of justice. In our system of justice, even the weak and the vanquished must be granted some say before judgment. See *Sankale Ole Kantai t/a Kantai & Co Advocates Vs Housing Finance Company Limited* High Court case 471 of 2012 (unreported). But considering what I stated in the preceding paragraph, the plaintiff does not deserve the orders sought. I would only be persuaded to look in its direction on terms.

13. Those terms in my view require the plaintiff to demonstrate sincerity and *bona fides* by depositing, at the very minimum, Kshs 22,000,000 in an interest earning joint account of the plaintiff and the 2<sup>nd</sup> defendant. To do otherwise will cause a grave injustice. I do not think it is oppressive considering that the plaintiff deposes that the land is worth more than Kshs 200,000,000. The proposed deposit is thus a mere tenth. It is also not arbitrarily because it is conceded that that is the sum the 2<sup>nd</sup> defendant paid for the land. But I am also prepared, in view of the sum, to grant the plaintiff 90 days to place that deposit. And I remain alive of the existence of the other suits I referred to earlier between the parties. But I heard the 2<sup>nd</sup> defendant state, and it was not controverted, that some of the suits and in particular HCCC 49 of 2010 were stayed to await the determination of this suit. It fortifies my view that the plaintiff should have been a little more diligent in prosecuting this suit.

14. For all the reasons and considerations, the orders that commend themselves to me to grant are as

follows:-

- a) **THAT** the order of the Court dated 19<sup>th</sup> February 2013 dismissing the suit be and is hereby set aside and the suit reinstated subject to the conditions set out in order c) below;
- b) **THAT** the interim order of injunction granted by the Court on 10<sup>th</sup> November 2008 is hereby reinstated subject to the conditions set out in order c) below;
- c) **THAT** the plaintiff shall deposit a sum of Kshs 22,000,000 (twenty two million only) in an interest earning account in the joint names of the plaintiff's and 2<sup>nd</sup> defendant's lawyers in a reputable bank in Kenya within 90 days of the date hereof. In default thereof, the plaintiff's suit shall stand dismissed with costs.
- d) **THAT** the plaintiff shall pay both defendants thrown away costs assessed at Kshs 25,000 each, that is to say Kshs 50,000 in total to be paid within 90 days or the next mention or hearing of this matter whichever is earlier.
- e) **THAT** upon satisfaction of conditions c) and d) above, the plaintiff shall be at liberty to set down the suit for hearing on a date to be granted by the registry on priority.

It is so ordered.

**DATED and DELIVERED at NAIROBI** this 19<sup>th</sup> day of March. 2013.

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

Ms. S.N. Thyaka for the Plaintiff.

Mr. S.O. Ogutu for the 1<sup>st</sup> Defendant.

Mr. S.K. Waweru for the 2<sup>nd</sup> Defendant.

Mr. Collins Odhiambo Court Clerk.