REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND DIVISION

ELC CIVIL SUIT NO. 406 OF 2008

PURITY GATHONI MACHARIA……..……..……..1ST PLAINTIFF

S. K. MACHARIA…….2ND PLAINTIFF

-VERSUS-

EXCELO STRUCTURES LIMITED…….1ST DEFENDANT

OCEANFREIGHT TRANSPORT CO. LTD…..……2ND DEFENDANT

RULING

The Plaintiffs filed a Notice of Motion dated 8th February 2012 seeking various orders. The Plaintiffs are asking this court to set aside the orders made on 26th January 2012 dismissing the suit herein for want of prosecution, and to accord the Plaintiff's Advocates an opportunity to show cause why the suit should not be dismissed. In the alternative that this court reinstates the Plaintiffs' suit for hearing and determination on merits.

The Plaintiffs grounds for the orders sought are that after being served with a Notice to Show Cause why this suit should not been dismissed on 16th January, 2012, the Plaintiffs' advocates, due to an inadvertent mistake on their part did not attend court on 26th January, 2012 when the Notice to Show cause was scheduled for hearing. Further, that the mistake was in interpreting the cause list to read that the Notice to Show Cause was being heard at 2.30 pm on that date and not 9.00 am as was the case.

These grounds were explained in the supporting affidavit sworn by the Plaintiffs' Advocate, Gibson Kamau Kuria, to which he attached a copy of the cause list for 26th January 2012 . He also gave a history of the filing of the suit herein and its relation to bankruptcy proceedings between the parties herein being prosecuted before other courts, which was also the main reason given as to why the prosecution of the suit herein was overlooked. Copies of the pleadings and judgments given in the bankruptcy proceedings were attached.

The 2nd Plaintiff also swore a supporting affidavit on 19th December 2012 wherein he reiterated the facts of the longstanding litigation between the parties herein over the suit property, and stated that the suit herein is not plain and obvious or *res judicata* and therefore not amenable for striking out.

The 2nd Defendant thereafter on 15th June 2012 file a Notice of Motion of the same date, asking that the plaint filed herein be struck out and the Plaintiffs' suit be dismissed with costs to the second defendant.

As this suit was already dismissed by this court on 26th January 2012, this Notice of Motion appears to have been overtaken by events save for the fact that the 2nd Defendant's Advocate Mr. Maina Murage submitted to court on 24th April 2012 that he was willing to concede to the prayers that the court orders of 26th January 2012 be set aside and the Plaintiffs be allowed to show cause why the suit should not be dismissed for want of prosecution. The 2nd Defendant's Notice of Motion is also found to be competent in the event that this court decides to reinstate the Plaintiffs' suit.

The court thereupon directed that the 2nd Defendant's Notice of Motion be taken to be a reply to the Plaintiff's application, and that the Plaintiffs' and 2nd Defendants Notice of Motion be heard and determined together.

The substance of the 2nd Defendant's reply was that the Plaintiffs have not done anything or taken any steps to prosecute the suit herein since it was filed in 2008, and they have not given any reasonable explanation for their failure to prosecute the suit. Further, that the issue raised and the claims brought by the Plaintiffs in this suit are *res judicata* as they have been tried and determined by three courts of competent jurisdiction in Nairobi HCCC No. 3958 of 1991, Nairobi Bankruptcy Notice Nos. 3 & 4 of 2008 and in Nairobi Bankruptcy Cause Nos25 & 26 of 2009. It is further claimed that the Plaintiffs are barred by sections 5 and 8 of the Civil Procedure Act read together with section 7 of the Act, Order 3 Rule 4 the Civil Procedure Rules and by the doctrine of issue estoppel from bringing and/or maintaining their present claims in this suit.

The 2nd Defendant's Notice of Motion is supported by an affidavit sworn on 15th June 2011 by its Managing Director, Livingstone Ndungu Waithaka. The deponent gives a detailed history of the protracted court proceedings between the Plaintiffs and the 2nd Defendant in the High Court, the Bankruptcy Court, the Constitutional Court, the Judicial Review Court and the Court of Appeal, arising from land dispute which originated in October 1986, and annexed a lengthy chronology of events in relation to those proceedings between 1986 to 2011.

In summary, the deponent states that this suit was filed dishonestly for the improper and ulterior purpose of manufacturing a counter-claim, set off and cross demand to support the Plaintiffs' application in Nairobi B. N. Nos.3 & 4 of 2008 to set aside the bankruptcy notices served upon them in August 2008, and thereafter to oppose the bankruptcy petitions in Nairobi B.C 25 & 26 of 2008. Further, that the 2nd Defendant are not the owners and have no interest of any kind in the suit land L.R 209/9827. They also are not shareholders of directors, and have no interest in or connection with Excelo Structures Limited.

With respect to the failure to prosecute this suit, the 2nd Defendant stated that the excuse given by the Plaintiffs that the suit was overlooked owing to their concentration on the bankruptcy proceedings is not a good reason as a team of lawyers have in the last three years been representing and handling the Plaintiffs' matters in the various courts where these proceedings have been taking place.

Lastly, the 2nd Defendant averred that the Plaintiffs are barred by the doctrine of *res-judicata* and issue estoppel from bringing or maintaining their claims in this suit because those claims have already been tried and finally determined in the following judgments and rulings:

a. The judgment delivered by Rawal J. (as she then was) on 23rd October 2001 in Nairobi HCCC 3958/1991,
b. The ruling delivered by Kimaru J. on 27th May 2009 in Nairobi BN No. 3 & 4 of 2008, and
c. The judgment delivered by Koome . (as she then was) on 28th January, 2011 in Nairobi BC Nos. 25 & 26 of 2009.

The above-stated judgments and ruling were attached to the 2nd Defendant's supporting affidavit.

The Plaintiffs' counsel filed Grounds of Objection dated 4th December 2012 to the 2nd Defendant's

Notice of Motion. He opposed the said Notice of Motion on the grounds that striking out jurisdiction is not available to the 2nd Defendant as it is exercisable in only plain and obvious cases and the matter before the court is not plain and obvious. Further, that the Notice of Motion is aimed at defeating the overriding objective of the Civil Procedure Act to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes and offends the principle of law which forbids the trial of suits through affidavits.

Parties were directed by the court to file and serve submissions on the two Notices of Motion. The Plaintiffs' counsel in submissions dated 19th December 2012 argued that the application dated 15th June 2012 is *res judicata* since there is an order made by the court on 26th January 2012 dismissing the suit for want of prosecution. Counsel for the Plaintiff argued that as of 15th June 2012, there was no suit which the 2nd Defendant could apply to be dismissed. Counsel for the Plaintiffs contended that when the application dated 15th June 2012 was filed, no injury had been suffered by the 2nd Defendant to warrant him to come to court and he is therefore non suited. Reliance was placed on the case of **Kimani -vs- Attorney General, (1969) EA 29** for the submission that there can be no right without a remedy.

It was further submitted for the Plaintiffs that the application dated 15th June 2012 was based on a wrong notion of the doctrine of *res judicata* as the issues which have been raised by the Plaintiffs have not been raised before or determined by any court. Counsel relied on the case of **Omondi -vs- National Bank Kenya (2001) EA 177** where it was held that in determining whether a suit is *res judicata*, the court is perfectly entitled to look at the pleadings and other relevant matter in its record.

The Plaintiffs urged the court not to dismiss the suit as prayed by the 2nd Defendant and relied on the case of **D. T. Dobie & Company (Kenya) Ltd -vs- Muchina (1982) KLR 1** where the court stated that a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. Reliance was also placed in the case of **Singh -vs- Micheal Notkin 19 EACA 117** where the court held that the power to strike out is discretionary and one that should be used except in plain and obvious cases.

It was further argued for the Plaintiffs that it is improper for the 2nd Defendant to claim that the Plaintiffs have not taken any steps to prosecute this suit since it was filed four years ago, yet from the many letters exchanged between the parties' advocates, the Plaintiffs' advocates invited the 2nd Defendant's representative to obtain a mutually convenient hearing date. Counsel for the Plaintiffs stated that despite the 2nd Defendant's advocate numerous letters to the effect that the suit could not be set for hearing or mention for reasons that pre-trial directions had not be complied with, the 2nd Defendant has not undertaken any pre-trial activities.

Counsel argued that this case falls within the rule formulated in **Shah -vs- Mbogo(1967) EA 126** and **Mbogo -vs- Shah (1968) EA 93.** The Plaintiffs further relied on section 1A of the Civil Procedure Act as well as article 159(2)(d) of the Constitution. Reliance was placed on the decision in **African Safari Club -vs- Safe Metals Ltd, CA no. 53 of 2010** for the proposition that the court is now required to take a much broader view of justice after the enactment of the overriding objective. It was submitted for the Plaintiffs that in the case of **Ivita -vs- Kyumbu(1984) KLR 441**, the court held that the test to be applied by the court for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay.

While submitting that the court has jurisdiction under Order 12 Rule 7 of the Civil Procedure Rules to revive a suit which has been dismissed, counsel for the Plaintiff stated that he misinterpreted the cause list in which the suit was listed and believed that the Notices to Show Cause were to come up for hearing in the afternoon when he had planned to attend court. Further, It was contended that the prosecution of this suit was overlooked owing to the concentration accorded to the Bankruptcy proceedings in HCCC no. 3958 of 1991. The Plaintiffs relied on the case of **Francis Githinji Karobia -vs- Stephen Kageni Gitau (2006) eKLR** where the court held that it will not dismiss a case for want of prosecution unless it is satisfied that there has been inordinate and inexcusable delay on the part of the Plaintiff, and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action.

The 2nd Defendant's counsel filed submissions dated 12th February 2013, and argued that on 24th April, 2012 the 2nd Defendant conceded to the orders of 26th July 2012 being set aside, and the Plaintiffs be given another opportunity to show cause why their suit should not be dismissed. According to counsel, the only issue which remained to be dealt with was for the Plaintiffs to actually show cause why their suit should not be dismissed pursuant to the notice issued by the court under Order 17 Rule 2(1). Counsel contended that it was on that basis that he gave notice of his intention to file an application to have the suit dismissed on among other grounds, *res judicata* and *estoppel* under Order 3 Rule 4 of the Civil Procedure Rules.

Counsel submitted that the overriding objectives defined in sections 1A and 1B of the Civil Procedure Act imposes a duty on all litigants and their advocates to assist the court in furthering the objective and relied on the case of **Hunker Trading Co. Ltd -vs- ELF Oil Kenya Ltd**, **Nairobi Civil Application number 302 of 2008** where the court stated that litigants and their advocates should note that in the "O_2 principle" , they have a powerful ally where they are advancing its aim and a powerful adversary where they are subverting its aims. Further reliance was placed in the case of **City Chemists -vs- Oriental Commercial Bank Nairobi CA no. 302 of 2008**, where the Court of Appeal emphasized the necessity of ensuring that every case is dealt with fairy and expeditiously.

It was submitted for the 2nd Defendant that after filing the suit, the Plaintiffs abandoned the same and have never taken any steps or done anything to prepare the suit for hearing for more than 4 years, over four times the one year delay provided in Order 17 Rule 2(1) of the Civil Procedure Rules. Counsel submitted that the reason given by the Plaintiffs that "this suit was overlooked owing to their concentration on the bankruptcy proceedings" is not a satisfactory explanation for the Plaintiffs' failure and neglect to prosecute this matter for more four years.

The 2nd Defendant's counsel relied on the case of **Fitzpatrick -vs- Batger & Co. Ltd(1967)1All ER 657** where the court held that public policy demands that the business of the courts should be conducted with expedition. Reliance was also placed in the case of **Ivita -vs- Kyumbu,(1984) KLR 441** where the court held that the delay of 4 years was inordinate and inexcusable as well as the case of **Haraka Hire Purchase -vs- Wessel Gunter & anor, Nairobi HCCC No. 44 of 2001** where a suit that had been adjourned for a period of almost 3 years was dismissed for want of prosecution.

The counsel argued that the Plaintiffs are barred by *res judica*ta and *estoppel* from re-litigating issues which have already been determined by other competent courts, and that the Plaintiffs claims and allegations were the same matters that were in issue before the court in Nairobi Bankruptcy Notice nos. 3 and 5 of 2008 and in Nairobi Bankruptcy Cause No. 25 and 26 of 2009. He cited the case of **Hershi Hassan -vs- The Attorney General & anor Nairobi High Court Petition No. 50 of 2011** where the court stated that the doctrine of *res judicata* provides that where there is a final judgement in a matter by a court of competent jurisdiction, then subsequent litigation between the same parties on the same subject matter and on the same cause of action is not permissible. Reliance was also placed in the cases of **Thoday -vs- Thoday (1964)1 All ER 341**, **Fidelitas Shipping Co. Ltd -vs- Expotchleb(1965)2 All ER 4** and **Ramdev Malik -vs- Lionel Albert Callow (1959)EA 87** for the proposition that issues having been decided by the court cannot be re-opened.

It was further submitted for the 2nd Defendant that under section 7 of the Civil Procedure Act, *res judicata* applies not only to the matters which were tried and decided by the court but also to matters which ought to have been brought forward as a ground of attack and defence in the former suit. Counsel contended that the Plaintiffs' in this suit are barred because they ought to have been brought forward in Nairobi HCCC 3958 of 1991. Counsel for the 2nd Defendant argued that having omitted to sue for their present claims by pleading them as a counterclaim in Nairobi HCCC 3958 of 1991, the Plaintiffs are barred by Order 3 Rule 4 from bringing the same claims thereafter.

Lastly, counsel for the 2nd Defendant contended that the Plaintiffs suit is a vexatious proceeding that should be dismissed as an abuse of the court process under Order 2 Rule 15 of the Civil Procedure Rules and relied on **Halsbury's Laws of England, 3rd edition, volume 15,** at page 186**.** For this submission,

counsel relied on the case of **City Chemists -vs- Oriental Commercial Bank, Nairobi CA no. 302 of 2008** where it was held that it is an abuse of the court process for a party to file a suit to re-litigate matters which have already been decided by another court.

After consideration of the pleadings filed and the submissions made, I find that the issues for determination are firstly, whether reasonable cause has been shown to the satisfaction of the court for the reinstatement of the suit herein. Secondly, if the suit is reinstated, whether the Plaint filed herein is liable to be struck out as against the 2nd Defendant. I must at the outset state that I have been ably guided in the determination of these issues by the judicial and other authorities cited by the counsel for the Plaintiff and 2nd Defendant, for which I am most grateful.

The applicable law for reinstatement of a suit that has been dismissed for want of prosecution is set out in Order 17 Rule 2 of the Civil Procedure Rules which provides as follows:

> **"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.**
>
> **(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**
>
> **(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**
>
> **(4) The court may dismiss the suit for non-compliance with any direction given under this Order."**

It is not disputed that the threshold of one year's delay in prosecuting the suit herein was met, and that it was subject to dismissal. The Plaintiffs argue that the delay was excusable and have put forward the reason that there was ongoing litigation between the parties in other cases, which led to the suit herein being overlooked. The 2nd Defendant argues that the delay is inexcusable and the suit should be dismissed for being *res judicata*. In determining the issue whether the suit herein should be reinstated, I am guided by the ruling of this Court in **Ivita vs Kyumbu (1984) KLR 441** that even if there are good reasons for the delay, the court must also be satisfied that justice will still be done to the parties despite the delay.

I note from the court record that interlocutory judgment was entered against the 1st Defendant on 3rd February 2009. The fact that the long-standing litigation between the Plaintiffs and 2nd Defendant in various other cases has been shown and is not disputed, is in my opinion a reasonable excuse for the delay in prosecuting the case herein. The 2nd Defendant's has also conceded to allowing the suit to be reinstated if good cause is shown. I hereby find that reasonable cause has been shown as to why the suit should not be dismissed for want of prosecution and hereby order that the suit herein be, and is hereby reinstated for hearing and determination on merits.

Having so reinstated the suit, I must now deal with the second issue, which is whether the Plaint herein should be struck out as against the 2nd Defendant. I have in this respect perused the Plaint filed by the Plaintiffs dated 19th August 2008, and note that as against the 2nd Defendant, the orders sought are a declaration that it never acquired a beneficial interest in either Nairobi-off Enterprise Road Un-surveyed plot No. 28 or L.R No 2009/9827, and a permanent injunction to restrain it from selling, transferring , charging or otherwise dealing with the said property.

The law on striking out of pleadings is stated in Order 2 Rule 15 of the Civil Procedure Rules and in various judicial decisions. Order 2 Rule 15(1) provides that:

> ***(*1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

The salient principles that apply to striking out of pleadings are that this is a draconian measure to be employed sparingly, and the grounds for striking out must be plain on the face of the pleadings and from the facts alleged by the parties. This was stated by the Court of Appeal in D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 as follows at page 9:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

I am of the view that this is one of those plain and obvious cases for striking out of pleadings for two main reasons. The first is that the transaction that is relied on by the Plaintiffs in the Plaint filed herein as giving rise to their claim against the 2nd Defendant was the subject of the decision by Rawal J. (as she then was) on 23rd October 2001 in **Oceanfreight Transport Co. Ltd vs Purity Gathoni Githae and S.K. Macharia H.C.C.C No. 3958 of 1991.** The Honourable Judge in the said ruling held that the said transaction did not give rise to a binding sale agreement between the parties, and the court entered summary judgment for the refund of Kshs 500,000/= being the deposit paid by the 2nd Defendant to the Plaintiffs for the purchase of the suit property herein.

It is therefore plain from the said ruling that the 2nd Defendant did not acquire a beneficial interest in the suit property arising from the said agreement, and which allegation which is the basis of the Plaintiff's claim herein. It would be an unnecessary waste of the court's and parties' time and costs to proceed to hearing when there is already a determination by this court on this issue. It is therefore my finding that the entire claim against the 2nd Defendant in the suit herein is *res judicata* and the Plaint filed herein is struck out as against the 2nd Defendant.

The second reason is as explained in section 7 of the Civil Procedure Act. The said section which provides for the doctrine of *res judicata* states that any matter which might and ought to have been made ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The Plaintiffs therefore ought to have raised all the issues on their transaction with the 2nd Defendant with respect to the suit property in **Oceanfreight Transport Co. Ltd vs Purity Gathoni Githae and S.K. Macharia H.C.C.C No. 3958 of 1991.** They are therefore barred from raising them herein as they are *res judicata*. The 2nd Defendant's Notice of Motion dated 15th June 2012 is accordingly allowed and the Plaintiffs shall meet the costs of the said application and of the suit against the 2nd Defendant.

The Plaintiff's suit herein therefore only survives as against the 1st Defendant, and in this regard I hereby direct pursuant to the provisions of section 1A, 1B, 3A of the Civil Procedure Act and Order 17 Rule 2(2) of the Civil Procedure Rules that the Plaintiffs takes steps to comply with the provisions of Order 11 of the Civil Procedure Rules, and to set the suit for formal proof hearing within 90 days of the date of this ruling. In default the suit as against the 1st Defendant shall stand dismissed. The Plaintiff's Notice of Motion dated 8th February 2012 is therefore only allowed to this extent, and the costs of the Notice of

Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____10th___ day of _____June____, 2013.

P. NYAMWEYA

JUDGE