



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 192 of 2007

ALLAN GEORGE NJOGU KAMAU.....PLAINTIFF

VERSUS

**HOUSING FINANCE COMPANY OF KENYA LIMITED.....1st DEFENDANT
DIGESH BHUCHENDRA UNIA.....2ND DEFENDANT**

RULING

1. Before me is a Notice of Motion application dated 9th August 2012. It is expressed to be brought under Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The application seeks orders for the setting aside of the orders made by this court on 6th February 2012 dismissing the Plaintiff's suit for want of prosecution. The Applicant further prays for orders for reinstatement of the suit for hearing and determination.
2. The application is based on the grounds stated on the face of the application and is further supported by the affidavit of Allan George Njogu Kamau, the Plaintiff, sworn on 9th August 2012.
3. The Plaintiff's case is that the failure by the Plaintiff's advocates to attend court and show cause why the suit should not be dismissed was occasioned by the fact that they were not served with a hearing notice for the Notice to Show Cause and only saw it on the daily cause list of 6th February 2012. Counsel for the Plaintiff Mr. Maina then requested Mr. Ondabu to hold his brief and have the notice to show cause stood over to another date as he had not anticipated the matter. The court however declined to grant an adjournment and proceeded to dismiss the suit. As neither the Plaintiff nor his advocates had been served with the Notice to Show Cause, the Plaintiff contends that it would be against the rules of natural justice for him to be condemned unheard. The Plaintiff therefore pleads with the court to reinstate the suit in the interest of justice and asserts that no prejudice would be suffered by the Defendant.
4. The application is opposed through grounds of opposition filed by the Defendants on 15th August 2012 and which essentially claim that the application is misconceived, incompetent and bad in law as no grounds or reasonable grounds have been furnished by the Plaintiff to warrant grant of the orders sought. The Defendants also claim that the application is untenable and is grounded on a simple misunderstanding of basic principles of law and has indeed been brought with inordinate delay. The Defendants further contest the jurisdiction of this court to grant the orders sought. In any event, the Defendants claim costs of the application.
5. At the oral canvassing of the application, counsel for the Plaintiff Mr. Ondabu submitted that the plaintiff was not served with the Notice To Show Cause why the suit should not be dismissed. The plaintiff was therefore not accorded an opportunity to show cause. He submitted further that there was an interlocutory judgment entered against the 1st defendant and that there were also pending contempt of

court proceedings.

6. **On his part, counsel for the Defendants Mr. Mbaluto submitted that** the allegation that no notice was served was untenable as there was attendance on behalf of the plaintiff during the hearing of the Notice To Show Cause on 16th February 2012. He submitted that Mr. Ondabu represented the plaintiff on that date and indicated that the plaintiff was keen to prosecute the suit. A ruling was made which had since never been set aside. There had also been no appeal against that ruling and neither was any stay application made. In any event, no cause had been shown to explain the inactivity on the file. Mr. Mabluto accused the Plaintiff of indolence to prosecute the suit, which went against the overriding objective of the court. He submitted further that the application before court was made six months after the orders were made and no reason had been advanced for the inordinate delay. He urged the court to dismiss the application.

7. I have considered the application herein, the grounds of opposition as well as submissions by counsel.

8. The plaintiff has argued that he was not served with the Notice to Show Cause why the suit should not be dismissed. However, the court record indicates that Mr. Ondabu was indeed in court holding brief for Mr. Maina and that he indeed made submissions on the notice to show cause albeit having told the court that he did not have Mr. Maina's file. Although he sought an extension of the notice to show cause, the court (Hon. Kimondo J) made a ruling on the request in which he declined to grant an extension and proceeded to make the finding that no cause had been shown as to why the suit should not be dismissed. The present application seeks a review of the said orders. However, the main reason upon which the application for review is made is that the Plaintiff was never served with the Notice to Show Cause. In my considered view, the Plaintiff having attended court on 6th February 2012 for the Notice to Show Cause, and the court having considered on merit the question of whether or not any cause had been made, the Plaintiff is now precluded from raising the ground of non-service of the Notice to Show Cause. In my view, under Order 45 Rule 1 of the Civil Procedure Rules, 2010, the ruling of the court of 6th February 2012 can only be reviewed if there is an error apparent on the face of the record; if there is discovery of a new and important matter or evidence or for some other sufficient reason. I do not find that the Plaintiff in his application demonstrated a manifestation of any of these grounds so as to merit the orders sought.

9. In the circumstances, the option available is for the Plaintiff to appeal against the decision if he still feels aggrieved by the ruling of the court dismissing the suit for want of prosecution.

10. For these reason, I am inclined to hereby dismiss the Notice of Motion application dated 9th August 2012 with costs to the Defendants.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2012

**J.M MUTAVA
JUDGE**