



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Civil Suit 95 of 2004**

**GOEFFREY NDUATI WAINAINA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF.**

**VERSUS**

**KENYA COMMERCIAL BANK LTD. ::::::::::::::::::::::::::::::::::::::: DEFENDANT.**

**R U L I N G.**

The plaintiff **Geoffrey Nduati Wainaina** filed this suit on 7th October, 2004 praying for a declaration that the advertisement and intended sale of his portions of land by the defendant is null and void and for injunction to permanently restrain the defendant and its agents/servants from advertising, auctioning, disposing of or in any other manner interfering with the plaintiff's title to the said portions of land.

The plaintiff also prays for a statement of account for the year 2004 relating to his loan account arising from overdraft facility and loan made by the defendant in his favour.

The plaint was filed contemporaneously with a chamber summons for a temporary injunction order against the defendant pending the hearing and determination of the suit.

Accordingly, a temporary injunction order was issued by the court on 21st October, 2004.

Thereafter, on the 9th December, 2004, the suit was fixed for hearing on 19th July, 2005 but nothing seems to have been done on that date.

The matter remained dormant upto 12th October, 2006 when this present application dated 28th September, 2006 was filed by the defendant.

The application is for striking out of the suit for failure to disclose a reasonable cause of action and/or for being an abuse of the court process. Alternatively, the defendant prays for dismissal of the suit for want of prosecution.

The grounds for the application are essentially that the plaintiff was notified in time of the defendant's claim including the statutory notices of sale and notification of sale. That, the plaintiff was aware and is aware that he is truly indebted to the defendant in the sum claimed and that he is using the court process to deny the defendant the right to exercise their statutory power of sale over charged property. That, since the filing of this suit nearly two years ago, the plaintiff has not taken serious steps to have the suit prosecuted and that by his conduct, the plaintiff has shown lack of interest in prosecuting the case.

From these grounds, it is apparent that this application is essentially for dismissal of the suit for want of prosecution more than striking out suit for failing to disclose a reasonable cause of action and/or for being

an abuse of the court process. This ruling is therefore directed at the alternative prayer in the notice of motion which is supported by an affidavit dated 26th November, 2006 deposed by the defendant's advocate and which is opposed by the plaintiff vide a replying affidavit dated 4th January, 2007.

In his objection to the application, the plaintiff stated that the suit has not been set down for hearing because negotiations have been underway and towards that end, he made part payment to the defendant. Therefore, this application is an afterthought and made in bad faith.

The plaintiff further stated that the defendant has partly contributed to the delay in finalizing the suit and in any event directions have not been taken nor has discovery been made. Further, the defendant has not made any attempt to fix the case for hearing.

After having considered the application and the opposition thereto, it is clear to this court that indeed there has been extra ordinary delay in having the suit set down for hearing.

Order 17 rule 2 (1) of the Civil Procedure Rules provides for dismissal of suit if no steps have been taken within a period of one year to have it heard unless satisfactory explanation is given by the affected party. The provision provides for the issuance by the court of a notice to show cause why the suit should not be dismissed. Rule 2 (3) of the said Order 17 indicates that any party to the suit may apply for its dismissal as provided in the sub-rule.

This application is a step taken by the defendant to have the suit dismissed for want of prosecution. Prior to the filing of the application on 12th October, 2006, the last step taken by the plaintiff was on the 9th December, 2004 to have the suit fixed for hearing on 19th July, 2005.

However, on 19th July 2005, the suit did not proceed. There was no indication as to why it could not proceed neither was there indication as to whether it was placed before the court. The matter was simply ignored and left at that until the filing of this application. More than one year later, the explanation given by the plaintiff for failing to set the matter down for hearing is that negotiations were in progress. However, the court was not notified that indeed parties were negotiating towards a settlement of the matter. No attempt was made by the plaintiff to have the matter fixed for mention for the purposes of notifying the court that the parties were negotiating the matter. In any event, negotiations would not prejudice a plaintiff's obligation to set down the suit for hearing. Such obligation is vested in the plaintiff and not the defendant. The defendant in the event of inaction by the plaintiff would be at liberty to set down the suit for hearing or apply for its dismissal for want of prosecution. Herein, the defendant opted to apply for dismissal rather than fix the case for hearing and serving a hearing notice upon the plaintiff.

The defendant cannot therefore be accused of having contributed to the delay in having this matter heard and determined. The greatest responsibility for such failure lay with the plaintiff and the plaintiff alone.

It strongly appears that the plaintiff became disinterested in the matter and went into a deep slumber after obtaining a temporary injunction order against the defendant way back in the year 2004. consequently, he cannot expect the court to exercise discretion in his favour and more so, in the absence of satisfactory grounds. This application by the defendant is therefore merited and is allowed to the extent that the suit be and is hereby dismissed for want of prosecution.

The defendant shall have the costs of the suit and the application.

Ordered accordingly.

**[Read and signed this 20th day of November, 2012.]**

**[In the presence of Mr. Ambutsi H/B for Shitama for applicant and Mr. Wanyonyi for respondent.]**

**J.R. KARANJA.**

**JUDGE.**