



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI
CIVIL CASE NO. 625 OF 2006

JOSEPH KIARIE MBUGUAPLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LTD.....1ST DEFENDANT
GARAM INVESTMENTS.....2ND DEFENDANT

RULING

This application is made by a Notice of Motion dated 31st March, 2009, under **Order XXIII Rule 3 (2); Order XVI Rule 5 (d); Order L Rule 1** of the **Civil Procedure Rules; and Section 3A** of the **Civil Procedure Act**. The Applicants, who are the Defendants in this suit, seek the following three orders:-

1. *That the Court be pleased to declare that the Plaintiff's suit has abated.*
2. *That in the alternative, the Plaintiff's suit be dismissed for want of prosecution.*
3. *That the costs of this application and the suit generally be provided for.*

The application is supported by the annexed affidavit of James Kamau Thuku, the Advocate having the conduct of this matter on behalf of the Defendants herein, sworn on 31st March, 2009. It is premised on the grounds that -

- (a) *It is more than two (2) years since the Plaintiff herein passed away on 22nd December, 2006, and no application has been made to make his Legal Representatives parties to this suit.*
- (b) *It is more than two (2) years since the matter was last in Court on 30th January, 2007 when it was generally adjourned and the Plaintiff has not set it down for hearing or taken any other step towards*

its disposal.

(c) The obtaining circumstances are highly prejudicial to the 1st Defendant which cannot exercise its Statutory Power of Sale owing to the interim orders herein whereas the outstanding debt has not been paid.

(d) The delay in setting the suit in motion is inordinate, spurious and inexcusable taking into account that the Plaintiff's Chamber Summons application dated 15th November, 2006 was filed in Court under Certificate of Urgency.

From the Court record, the history of this matter shows that the application by Notice of Motion dated 31st March, 2009, was first served on the Respondents on 3rd April, 2009, informing the Respondents that the matter was fixed for hearing on 29th April, 2009. At the hearing on that date, the Applicant's Counsel informed the Court that the Respondents' Advocate had made some proposals and the parties had agreed to come back on 9th July, 2009. The matter was accordingly fixed for mention on the said date for recording a settlement. Unfortunately, it appears not to have been listed for mention on that date. It was next mentioned on 16th September, 2009, when Mr. Thuku appeared for the Defendants but the Plaintiff was not represented. Mr. Thuku told the Court that the parties had not been able to agree and requested for a date for the hearing of this application. It was duly fixed for hearing on 14th October, 2009.

On the aforesaid date, both parties were represented by Counsel and the Court was informed that the parties were negotiating a settlement and needed more time. The matter was then adjourned for mention with a view to recording a settlement on 24th November, 2009. On the said date, both parties were again represented by Counsel and Mr. Thuku for the Defendants informed the Court that negotiations had collapsed whereupon the matter was adjourned for hearing on 26th January, 2010. However, for some reason which is not recorded, the Defendants' Advocates sought a hearing date from the Registry on 2nd February, 2010 when the matter was fixed for hearing on 3rd May, 2010. On that date, unfortunately, the Plaintiff's Advocates had not been served and the matter was fixed for hearing on 24th June, 2010. The Plaintiff's Advocates were duly served with a hearing notice on 18th May, 2010, which gave the Plaintiff more than a month's notice to attend Court.

In spite of having been given sufficient notice to attend Court, the Plaintiff's Advocates did not attend on the appointed date for the hearing of the application, nor did they file any replying affidavit or grounds of opposition. In the circumstances, I agree with Mr. Thuku, who appeared for the Defendants, that the application was unopposed for which reason the Defendants are entitled to all the orders sought in the application.

I accordingly make the following orders –

(i) That it is hereby declared that the Plaintiff's suit has abated as prayed.

(ii) In the alternative, the Plaintiff's suit is hereby dismissed for want of prosecution.

(iii) The Defendants are entitled to costs of the suit as well as those for this application, the same to be paid from the Plaintiff's Estate.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 14th day of October, 2010.

L. NJAGI

JUDGE