



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL SUIT 840 & 863 OF 2000

KEDE ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

SAVINGS AND LOANS (K) LIMITED.....DEFENDANT

CONSOLIDATED WITH

(MILIMANI COMMERCIAL & TAX DIVISION)

CIVIL SUIT NO. 863 OF 2000

WILFRED M. OMINDO.....1ST PLAINTIFF

LUCY M. OMINDO.....2ND PLAINTIFF

VERSUS

ROBERT KIBAGERI OTACHI1ST DEFENDANT

REBECCA K. OTACHI.....2ND DEFENDANT

SAVINGS & LOANS) (K) LIMITED.....3RD DEFENDANT

PANAMA ROVERS.....4TH DEFENDANT

R U L I N G

The two suits are consolidated since they touch on the same subject matter. The Notice of motion under consideration is the one dated 4th July, 2007. It has been brought by the Defendant in HCCC No. 840 of 2000 who is also the 3rd Defendant in HCCC No 863 of 2000. It seeks three prayers:

- 1. THAT this Honourable be pleased to dismiss this suit for want of prosecution.**
- 2. THAT in the alternative, the injunctive orders made on the 17th May, 2000 by the Hon. Hewett**

CA (as he then was) be set aside.

3. THAT the Plaintiffs in both suits be condemned to pay the costs of this Application and the costs of the suit(s).

The application is premised on the following grounds:

- a) THAT the Plaintiffs herein have failed to take any steps to set down this matter for hearing for well over four (4) years after the matter was last in Court, despite the age of the suit and the date of the alleged cause(s) of action.**
- b) THAT the Plaintiffs have ex facie demonstrated lack of interest in the suit; therefore the Defendant(s) and the Court ought to be disencumbered by the said suit.**
- c) THAT the Plaintiffs are guilty of inordinate and inexcusable delay such that the suit cannot proceed without injustice to the Defendant(s).**
- d) THAT the Defendant has, been and continues to be prejudiced and it is in the interest of Justice that the orders sought be granted.**

The application is supported by an affidavit sworn by Moses S.M. Mugo, Branch Manager of the Defendant of even date. Part of the facts relied upon by the Applicant is that since the matter was filed 7 years ago, no significant steps have been taken by the Plaintiffs in the two suits to set the matter down for hearing. The Applicant also decries that as of 13th March, 2003, the Plaintiffs in both suits had not done the pre-trial procedures of agreeing on the issues as well as discovery of documents, and hence the suit is not ready for hearing. The Applicant also decries the fact that no further step has been taken by the Plaintiffs to set the suit down for hearing since 13th March, 2002 yet the Plaintiffs in HCCC No. 863 of 2000 are enjoying injunctive relief as against all the Defendants in both suits in respect of Nairobi/Block 90/236. The deponent also states that the delay on the Plaintiffs' part is inexcusable, that the Plaintiffs have demonstrated that they are no longer interested in the prosecution of the suit, that no understanding as to costs has been given by the Plaintiffs to the 3rd Defendant in HCCC No. 863 of 2000, and that therefore the suit should be dismissed.

Both Respondents have filed replying affidavits. Robert Otachi who is the 1st Defendant in HCCC No. 863 of 2000, and the Director of the Plaintiff in HCCC No 840 of 2000, has sworn an affidavit on his behalf and on behalf of the 2nd Defendant in HCCC No 863 of 2000, and the Plaintiff Company in HCCC No 840 of 2000. In that affidavit dated 8th October, 2007 it is deposed that the 1st and the 2nd Defendants in HCCC No 863 of 2000 have never been served with summons to enter appearance in that suit and that in the circumstances the current application is immature since the necessary preliminary steps have not been taken to warrant the making of the present application. It is further deposed that due to the failure by the Plaintiffs in HCCC No 863 of 2000 to take out summons, and since the suit is consolidated with HCCC No. 840 of 2000, the 1st and the 2nd Defendants in HCCC No. 863 of 2000 are unable to proceed with the prosecution of their suit in HCCC No. 840 of 2000, and that since the two suits are consolidated, they ought not to be blamed for any delay in the prosecution of the case.

The Plaintiffs in HCCC No. 863 of 2000 have sworn one affidavit by the 1st Plaintiff on behalf of both Plaintiffs. The affidavit opposes the current application. The deponent admits that there has been a delay in the prosecution of the matter but deposes that the application is premature as all necessary preliminary steps have not been taken out to warrant the making of the application. The deponent also denies being entirely to blame for the delay in the prosecution of the consolidated matters by virtue of the consolidation.

The general principles applicable in an application for dismissal of a suit for want of prosecution are very clear. A court ought not to dismiss an action for want of prosecution unless it is satisfied, one, that the default in prosecution has been intentional and contumelious, or secondly there has been prolonged,

inordinate and inexcusable delay on the part of the Plaintiff or its lawyers, and that the delay will cause a substantial risk, that it is not possible to have a fair trial of the issues in the action or is likely to cause or to have caused serious prejudice to the Defendants or to both parties. See Halsbury's Laws of England (4th Ed.) Vol 9 paragraph 448 and Ivita v. Kyungu [1984] KLR 441.

I have considered the application by the Defendant in HCCC No. 840 of 2000 who is also the 3rd Defendant in HCCC No. 863 of 2000. It is not disputed that these two actions were consolidated for the simple reason that both of them dealt with the same subject matter. It is quite clear from the proceedings that the suits arose out of a sale of the suit property to two different parties. The seller was the Applicant in the application. In HCCC No.840 of 2000 the Defendant/Applicant herein sold the suit property to Kede Enterprises Limited. Kede Enterprises has two directors who are the 1st and 2nd Defendants in HCCC No. 863 of 2000. In HCCC No. 863 of 2000 Savings and Loan (K) limited, who are the 3rd Defendant, sold the same suit property to the Plaintiffs, Wilfred Omido and Lucy Omido who are husband and wife.

On the question of prejudice the Applicant in this suit has caused the circumstances leading to the filing of the two suits, it cannot therefore claim it is suffering any prejudice. The parties who stand to suffer prejudice are the Plaintiffs in both suits. It would be wrong to dismiss the suits on an application by the Applicant since it will be tantamount to allowing the Applicant to benefit from its own wrong doing. That act is inequitable and will not meet the interests of justice.

I do agree that there is a prolonged and inordinate delay in the prosecution of these two matters. Having considered the submission by all the parties concerned, it is very clear to the court that the delay that has arisen in the matter has been caused by the two Plaintiffs in HCCC No. 863 of 2000, by their failure to take out summons and to serve the 1st and 2nd Defendant in the suit. Since the two suits are consolidated and involve the same subject matter, the Plaintiff in HCCC No. 840 of 2000 has a reasonable explanation and excuse for the delay in setting out its suit down for hearing. The excuse being that until the 1st and 2nd Defendants are served with the summons in the suit against them (HCCC No. 863 of 2000) the two Defendants who are also the Directors of the Plaintiff in HCCC No. 840 of 2000, cannot be able to move and set down the suit now consolidated for hearing. Since the suits are consolidated, one cannot be heard independent of the other unless the Court makes such an order.

I have also considered that dismissing these suits will not serve the interest of justice as there are contentious and important issues that must be resolved and therefore the suit should be heard. The issue of the property sold twice by Savings and Credit (K) Limited, has to be resolved. In that regard I find that there will be no justice served if the application to dismiss the suit is allowed. It is my view that justice will still be done despite the delay involved in prosecuting the case.

In order to have these suits progress to hearing I will conclude by making the following orders.

- 1. The application dated 4th July 2007 be and is hereby dismissed with each party bearing their own costs of the application.**
- 2. The 1st and 2nd Plaintiff in the consolidated Civil Suit No. 863 of 2000 are granted 30 days within which to take out the summons and to serve them upon the Defendants with either party having leave to apply.**
- 3. All the parties in the two suits have 60 days within which:**
 - (a) To file and serve their list of documents and to exchange the documents themselves.**
 - (b) To agree on the list of agreed issues and/or file their Statement of issues.**
- 4. In default of (3) above, either party is granted leave to apply.**

Dated at Nairobi this 22nd day of May, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

N/A for Mr. Wandabwa for Respondent/Plaintiff (HCCC No. 863/00)

N/A for Mr. Oyugi for Plaintiff in HCCC 840.00 & 1st & 2nd Defendant in HCCC 863/00

N/A for Mr. Maruti for Applicant/Defendant in HCCC 840.00 & 3rd & 4th Defendant in HCCC 863.00

LESIIT, J.

JUDGE