REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 328 of 1996

JANE WARUIKU KIBATHI.…….....…….....PLAINTIFF

VERSUS

SAVINGS AND LOAN KENYA LTD ……..…….…1ST DEFENDANT

RUIRU NURSING HOME LTD ……..……..2ND DEFENDANT

BASELINE AUCTIONEERS ……..……...…….…….3RD DEFENDANT

RULING

This is an application by the plaintiff, for setting aside the orders for the dismissal of the suit. The plaintiff also seeks the consequential order, reinstating the suit.

In order to have a better understanding of the application, it is important to first re-visit the proceedings of 5th October 2005, when the suit was dismissed. The court records show that, on that day, Mr. Mose advocate appeared for the 1st defendant, whilst Mr. Kamaara Advocate appeared for the 2nd defendant. However, the plaintiff was absent, so also her advocate.

The first defendant asked the court to dismiss the suit, on the grounds of the absence of the plaintiff and her advocate. The 1st defendant also indicated that it would then withdraw its counter-claim against the plaintiff.

Thereafter, the 2nd defendant applied to the court for the dismissal of the suit, pursuant the provisions of Order 9B rule 4 of the Civil Procedure Rules.

Having given due consideration to the requests by the defendants, the Court did dismiss the suit, as it found no good cause why it should not have been dismissed. The costs of the suit were awarded to the defendants. Furthermore, the court granted the 1st defendant's plea to withdraw its counter-claim against the plaintiff. However, in relation to the said counter-claim, the court made no order as to costs.

Following the dismissal of the suit, the advocate for the 2nd defendant, Mr. Kamaara, ran into Mr. Kinyanjui, the advocate for the plaintiff, at a restaurant in downtown Nairobi. The two gentlemen met over a cup of tea, whereupon the advocate for the 2nd defendant informed his colleague that the suit herein had been dismissed by the court. Both gentlemen do confirm that that is what transpired.

According to Mr. Kinyanjui, advocate, it is that chance-meeting which caused him to immediately thereafter seek to ascertain from the court file, what exactly had transpired. He therefore instructed his court clerk to peruse the court file; the result of which revealed;

(i) That on 18th February 2005, the plaintiff's advocates had invited the other parties to attend at the High Court registry, to fix hearing dates.

(ii) That all parties to the suit did attend at the registry, and the case was fixed for hearing on 5th October 2005.

The foregoing facts were stated by Mr. Alphonce Ouko, in his affidavit, in support of this application. Mr. Ouko is the court clerk to the firm of advocates representing the plaintiff herein.

One wonders why the plaintiff and her advocates later failed to attend court, on 5th October 2005, when the case was scheduled for hearing, whereas they had been instrumental in setting down the suit for hearing.

Mr. Alphonce Ouko explained in his affidavit, that he had inadvertently failed to enter the trial date in the diary of Mr. Kinyanjui, advocate. And, the court clerk has produced in court, an extract from the said diary, to verify that this case was not entered therein.

In summary form, that is the explanation tendered by the plaintiff for her failure to attend court on 5th October 2005. She therefore asks this court to set aside the orders made on 5th October 2005, so that the suit may be reinstated.

In answer to the application, the 1st defendant submitted that the plaintiff had failed to give any reasons that would warrant the positive exercise of the court's discretion, in her favour.

It is the 1st defendant's contention that the plaintiff should have explained to the court, the steps which were undertaken as between her and her advocates, from 18th February 2005 (when the hearing date was fixed), and 5th October 2005, when the case was scheduled for hearing. It was said the failure to tell the court what had transpired during that period of time, left the court with many questions, as to whether or not the plaintiff's advocates ever had the file brought-up either for review thereof, or for briefing.

As far as the 1st defendant was concerned, the explanation advanced by the plaintiff's advocates and their court clerk, was not plausible, at it was very unlikely that the advocates did not do any work on the file between February and October 2005.

In my understanding of that submission, the 1st defendant seems to be implying that had the plaintiff's advocates done any work on the file between February and October 2005, they would have become aware of the trial date. However, I do not think that that would have necessarily been the position. That is because even if the plaintiff's advocates might have communicated with their client, they would not have known about the hearing date, unless the said date had been endorsed either on the file or some documents inside the said file.

Now, if the court clerk is believed, he would not have entered the date in the diary belonging to Mr. Kinyanjui Advocate. In the circumstances, I find that it is no more than idle speculation to imagine that notwithstanding the court clerk's failure to diarise the hearing date, he did endorse the said date on the file. The 1st defendant has not given me any reason to enable me conclude that, in all probability, the court clerk had endorsed the hearing date on the file which was in the hands of the plaintiff's advocates.

The 1st defendant goes on to submit that the contents of paragraphs 4 and 5 of the affidavit of Mr. Alphonse Ouko were contradictory. The said paragraphs are in the following words;

"4. THAT I was further informed by Mr. Obendo that from the record in the Court file, the date for the hearing on 5th October 2005, was taken by consent of all the clerks of all the advocates on record for the Plaintiff, 1st Defendant and 2nd Defendant.

5. THAT I remember sometimes in February 2005, I was instructed by Mr. Kinyanjui advocate for the plaintiff to attend court's registry and have this matter fixed for hearing."

In the mind of the 1st defendant, since the court clerk did participate in the fixing of the hearing date, he could not have learnt about that fact from Mr. Obendo.

At a first glance, there appears to be some merit in the 1st defendant's submissions, because if a person did something first-hand, he could not later say that he learnt about that thing form another person. However, I do not think that the court clerk ever denied having participated in the fixing of the hearing date. All along, he made the point that he had forgotten to enter the information, regarding the hearing date, into both the diary of Mr. Kinyanjui as well as the office diary of the plaintiff's advocates. Therefore, it was only after being given the information by Mr. Obendo, who had perused the court, file, that the court clerk was reminded that he had, indeed, been party to the fixing of the Hearing date.

To my mind, those statements are wholly consistent with the court clerk's deposition, to the effect that he had inadvertently failed to enter the dates into the relevant diaries. I therefore hold that there are no inconsistencies between paragraphs 4 and 5 of the affidavit of Alphonce Ouko. In effect, I detect not even a whiff of dishonesty on the part of the said court clerk.

Next, the 1st defendant submitted that even if the plaintiff's advocates had been in court on 5th October 2005, he would have been unable to prosecute his client's case, as he had failed to file the plaintiff's List of Documents.

Given the fact that on 18th February 2002, the court had directed that if the plaintiff was not ready to proceed with the trial on the next trial date, the suit would stand dismissed. Therefore, as the plaintiff had not yet filed the List of Documents, she would have been unable to prosecute her case, which would thereby stand dismissed, said the 1st defendant.

The provisions of Order 10 rule 11 A (1) provide as follows;

"Notwithstanding anything contained in rule 11, within one month after the pleadings are closed in a suit in the High Court, every party shall make discovery by filing and serving on opposite party a list of the documents relating to any matter in question in the suit which are or have been in his possession or power"

Pursuant to those mandatory words, the parties were required to file their respective lists of documents. Therefore, the 1st defendant is correct to state that in the event that the plaintiff had been in court, on 5th October 2005, she would not have been ready to prosecute her case, as she had not yet filed her list of documents.

Would that have meant that the suit stood dismissed?

According to the 1st defendant, the answer is in the affirmative, in the light of the orders made by the Hon. Ombija J. on 18th February 2002. The pertinent parts of the said order read as follows;

"**The parties herein are not ready to proceed with the suit. They claim they have not complied with Order X rule 11A.**

The hearing dates were fixed by consent, so I am told.

In my view the parties are taking the court for granted. In those circumstances I reluctantly give a last adjournment in this matter with a warning that in the event the parties are not ready the suit shall be dismissed when next fixed for hearing."

The 1st defendant has asked me to reiterate the orders of the Hon. Ombija J., so that the suit can continue to rest properly, where it is.

The court records reveal that this case did come up for hearing on 21st June 2004, before the Hon. Azangalala J. On that date, the plaintiff's advocate informed the court that the plaintiff had suffered a stroke, and was thus unable to prosecute her case. The 1st defendant was not present in court, on that day. However, the 2nd defendant did not object to the plaintiff's application for an adjournment.

Consequently, the learned judge did adjourn the trial, with the consent of the 2nd defendant.

To my mind, it is obvious that if as at 19th January 2006, the plaintiff's advocates had not yet filed their client's list of authorities, no such list could have been in existence as at 21st June 2004, when the case was listed for hearing. Therefore, if any person wished to pursue the orders made by the Hon. Ombija J. on 18th February 2002, he would logically have asked the court, on 21st June 2004, to formally dismiss the suit. I say so because in my perusal of the records herein, I found that the 21st of June 2004 was the next hearing date, subsequent to 18th February 2002.

However, instead of the defendants urging the court to formally dismiss the suit, on the grounds of the plaintiff's non-compliance with the orders of the Hon. Ombija J., the 2nd defendant consented to an adjournment.

I think that it is not difficult to understand why the 2nd defendant accommodated the plaintiff, for she had suffered a stroke.

However, that does not deviate from the orders of the court. If the plaintiff was not ready to prosecute the suit when the case was next scheduled for hearing, the suit was to be dismissed. In that regard, I believe that it is important to pay particular attention to the wording of the orders by the Hon. Ombija J. He directed that if the parties were not ready,

"the suit shall be dismissed when next fixed for hearing."

In my understanding of that order, the court was still required to make an order for the dismissal of the suit. In my considered view the words used by the learned judge are clearly distinguishable from the phrase;

"the suit shall stand dismissed," which would imply that no further order need be made, for the suit to be dismissed.

It is little wonder therefore that when the plaintiff suffered a stroke, the 2nd defendant did not press for the dismissal of the suit; but instead, consented to an adjournment.

I am convinced that my above-stated interpretation of the orders made on 18th February 2002 was not only correct, but was also shared with the defendants, because otherwise, they would not have asked me, on 5th October 2005, to dismiss the suit. By applying to the court to dismiss the suit, on 5th October 2005, the defendants must be deemed to have acknowledged that, as at that date, the suit was still very much alive. I therefore do not accept the 1st defendant's contention that this suit stood dismissed on 18th February 2002.

On its part, the 2nd defendant submitted that although it was its advocate who notified the plaintiff's

advocate that the suit had been dismissed, the plaintiff did not deserve this court's discretion, in setting aside the dismissal.

It was the 2nd defendant's contention, (which was shared with the 1st defendant), that the plaintiff should have personally sworn an affidavit to support this application. The non-involvement of the plaintiff, personally, implied that although this was supposedly her case, she had been left out of the application, as if she were a stranger thereto.

The 2nd defendant emphasized that the facts giving rise to this case, date back to the 1980's. Over that period of time, memories of witnesses had faded. Given those facts, the 2nd defendant felt that the plaintiff should have sworn an affidavit to demonstrate that she still had a keen desire to prosecute her claim, if it were to be reinstated.

The 2nd defendant also faulted the plaintiff for failing to offer any apologies to both the court and the defendants.

Finally, the 2nd defendant submitted that the courts should only set aside judgements if by so doing, the court would be avoiding injustice or hardship resulting from accident, inadvertence or excuseable mistake. But, the plaintiff herein was said to be undeserving of the court's discretion, as she had deliberately sought to obstruct or delay the course of justice.

To that end, the 2nd defendant relied on the authority of **SHAH –VS- MBOGO [1967] E.A. 116,** and added that the suit herein was dismissed on facts which disclosed gross negligence on the part of the plaintiff and her advocates. However, the 2nd defendant did not elaborate on its assertion that the plaintiff and her advocates were guilty of gross negligence. Therefore, I believe that the perceived gross negligence is supposed to be inferred from the failure by the court clerk to the plaintiff's advocates' to enter the Hearing dates into the diary.

If that be the intention, I am unable to draw the said inference. First, because the plaintiff has not been shown to have been aware of the hearing dates, at any time whatsoever. And, if she was not made aware of the hearing date of 5th October 2005, she cannot be said to have been negligent, simply because she did not attend court, on the material day. Similarly, as the plaintiff's advocate has sworn an affidavit, stating that he was not made aware of the hearing date, I am unable to discern how he could be said to have been negligent.

Finally, the court clerk has accepted that he did participate in fixing of the consent hearing date. However, he thereafter failed to enter the date into the appropriate diaries, resulting in the date not being communicated to the plaintiff's advocates. The clerk ascribes his said failure to an error, on his part.

Mr. Kinyanjui advocate described the court clerk's failure as an inadvertent human error.

Having given due consideration to the facts in this matter, I do accept the plaintiff's description of his failure, and do now find that it was an inadvertent human error. It is the kind of error which could be made by any person, who was otherwise diligent in his work. I detect absolutely no attempt, deliberate or otherwise, by the plaintiff to delay or obstruct the course of justice.

In **SHAH –VS- MBOGO [1967] E.A 116** at 123, Harris J. held as follows;

"I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgement obtained exparte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

I am fully in agreement with that decision.

In **PATEL –VS- E.A. CARGO HANDLING SERVICES LIMITED [1974] E.A. 75** at 76, Duffus P. stated as follows;

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgement, he does so on such terms as may be just.

The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."

In view of the foregoing pronouncements, I did ask myself if indeed the plaintiff has made out a case to warrant the positive exercise of the court's discretion. That question arose out of the fact that the plaintiff herself did not swear any affidavit in support of this application, and was therefore accused of having failed to demonstrate that she was interested in prosecuting this case.

The suit herein was filed on 12th February 1996. It is founded on a loan which the plaintiff applied for in 1980. However, it is evident, from the plaint that the main complaints by the plaintiff were in relation to a sale of the charged property, which was carried out on or about 6th November 1995. In effect, the 2nd defendant was not wholly right when it attributed the suit to events in "the 1980s".

That fact notwithstanding, there is no doubt that the case is relatively old. Therefore, it is in the best interests of all parties that the suit be heard and determined soonest. Any further delays would result not only in the fading of the memories of witnesses, but also the possibility of the demise of some of them. In the event that the memories of witnesses faded or that some of them passed way, it may not be possible for true justice to be attained.

However, I also take cognisance of the fact that as recently as 5th October 2005, the defendants were ready to proceed with the trial. In the circumstances, as the plaintiff did move the court immediately after she became aware of the dismissal of this suit, I hold the view that the defendants could not become unduly prejudiced by the reinstatement of this suit.

Accordingly, I do hereby order that the orders made herein on 5th October 2005 be set aside. In effect the order dismissing the suit herein is vacated forthwith. Secondly, the order marking the 1st defendant's counter-claim as withdrawn is also set aside. To my mind, it is only by so doing that the court will give to the parties an equal opportunity to obtain justice in the case. There is absolutely no reason why the 1st defendant should have to make a separate application to set aside its withdrawal of the counter-claim, as I believe that the same had only been withdrawn in the face of the application to strike out the plaint.

The plaintiff shall pay the costs of this application, in any event. And finally, the plaintiff is directed to take steps within the next 30 days to have this suit set down for hearing. This direction is intended to compel the plaintiff to take further action without any delays. Therefore, the 2nd defendant should soon be able to know whether or not the plaintiff was genuinely desirous of prosecuting this matter.

For now, I hold the view that she did not have to swear any affidavit in support of this application. That is because the two persons who were directly involved in the acts or omissions which had a direct bearing on the plaintiff's failure to attend court, have both sworn affidavits. In the circumstances, the plaintiff's own affidavit would have added little, if anything, to the explanation tendered by Mr. Kinyanjui advocate, and Mr. Alphonce Ouko.

If the plaintiff fails to take steps, within the period of thirty (30) days, to fix new hearing dates, the suit herein shall stand dismissed, with costs to the defendants.

Dated and Delivered at Nairobi this 13th day of February 2006.

FRED A. OCHIENG

JUDGE