



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 314 of 2002

JAMES NJUGUNA MWANIKI.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK OF KENYA.....1ST DEFENDANT

KINYANJUI WANJUU T/A DOLPHIN AUCTIONEERS.....2ND DEFENDANT

WILSON GICHUHI GACHAGWI.....3RD DEFENDANT

PETER NDIBA KABAYA.....4TH DEFENDANT

R U L I N G

This is an application by the 3rd and 4th Defendants, who are seeking the dismissal of the suit for want of prosecution. The said application is brought pursuant to the provisions of Order 16 rule 5 (d) of the Civil Procedure Rules, as read together with Section 3A of the Civil Procedure Act.

The precise orders sought by the applicants were in the following terms:

“THAT this Honourable court be pleased to dismiss the plaintiff’s suit with costs, for want of prosecution and interlocutory judgement be entered as prayed in the counterclaim.”

From the court records it is clear that the plaint herein was filed on 12th March 2002. On that same date, the plaintiff also filed an application for a temporary injunction, with a view to stopping the sale of the suit property.

After the application was canvassed, the Hon. T. Mbaluto J. dismissed it on 17th May 2002. In view of that date, it was totally incorrect for the plaintiff to depose, in his replying affidavit, that:

“THAT the injunction application was duly prosecuted in the year 2003 when it was disallowed after inter partes hearing.”

That fact does not however deviate from the dissatisfaction of the plaintiff, following the dismissal of his application for a temporary injunction. In the light of the said dissatisfaction, the plaintiff filed a Notice of Appeal on 21st May 2002. However, he thereafter did not file any appeal.

The applicants see the failure to appeal as a sign of the plaintiff’s disinterest in the suit. The said

disinterest is deemed to arise from the fact that although the 3rd and 4th defendants had duly purchased the suit property, at a public auction held on 8th March 2002, the plaintiff continued to be in possession of the said property.

But the plaintiff counters that contention by pointing out that he enjoys no injunctive relief. Also, the fact that he had filed a Notice of Appeal did not grant him any protection, to the detriment of the applicants herein.

I find considerable merit in the plaintiff's said views, for there is absolutely no doubt that a Notice of Appeal could not, and did not, operate as some form of injunction or order for the maintenance of the status quo. Therefore, I cannot fathom why the applicants hold the view that the plaintiff was confusing matters by filing a Notice of Appeal, yet thereafter failing to file an appeal.

But, what is the plaintiff's explanation for failing to pursue his intended appeal? He says that he decided not to proceed with his intended appeal against the decision of the Hon. T. Mbaluto J. because the said action had been overtaken by events. The reason for his saying so was that the suit property had been sold off, and that therefore the action which was intended to stop the sale was no longer of any tangible value.

I note that the 4th defendant has annexed to the affidavit in support of this application, an extract of the document of title, for the suit property. A perusal of the said extract of title reveals that the suit property was transferred to the 3rd and 4th defendants, through a conveyance that was registered against the title on 27th June 2002. Meanwhile, the applicants' exhibit does confirm that shortly after the plaintiff's application for a temporary injunction was dismissed, the suit property was transferred to the 3rd and 4th Defendants.

As a consequence of that development, the plaintiff felt that there was a need to amend the Plaintiff, so as to incorporate the changed circumstances. On 26th February 2003, the plaintiff filed an application for leave to amend the Plaintiff. The said application came up for hearing on 19th March 2003, and the Hon. Mwera J. allowed it, with the consent of the defendants. Thereafter, an Amended Plaintiff was filed on 18th September 2003.

The 3rd and 4th Defendants filed their Defence and Counter-claim on 30th September 2003. The Plaintiff then filed his Reply to Defence and Defence to Counterclaim on 14th October 2003. Meanwhile, the 2nd Defendant filed his Defence on 21st October 2003.

The applicants submitted that the plaintiff was guilty of inordinate delay as he had failed to prosecute the suit since the pleadings closed. But the plaintiff blames any delay that there has been in the prosecution of the case, on his lawyers. First, he was represented by the firm of Meenye & Kirima Advocates. However, when the said advocates delayed in seeking leave to amend the Plaintiff, the plaintiff engaged M/s Gathenji & Company Advocates. The court records show that Gathenji & Company came onto the record on 5th March 2003.

After successfully prosecuting an application for leave to amend the Plaintiff, and thereafter filing an Amended Plaintiff, the firm of Gathenji & Company Advocates filed an application, on 11th August 2004, seeking leave to cease acting for the plaintiff. The affidavit of service of Mr. Johnstone Kisengi, a process server, discloses that the plaintiff was served with the application on 26th January 2005. The application was then listed for hearing on 4th February 2005, and the court then granted leave to Gathenji & Company Advocates to cease acting for the Plaintiff.

To my mind, the reasons which were given by Mr. Mbuthi Gathenji, advocate, for wanting to have his firm cease acting for the plaintiff, are relevant to the matter now before me. He said that there were personal differences between him and the plaintiff. He also said that due to pressure of work, he had asked the plaintiff to instruct other advocates. And most significantly, Mr. Gathenji said that the plaintiff

remained keen on having the firm of Gathenji & Company Advocates continue acting for him.

The conduct of the plaintiff is significant because it does help explain why the plaintiff did not even try to either act in person or get another lawyer, until after his preferred choice had been released by the court.

But as the said lawyers ceased to act for the plaintiff on 4th February 2005, why did not the plaintiff take steps soon thereafter to prosecute the case? According to the plaintiff, he set about looking for legal assistance. It was only on 17th February 2006 when the plaintiff's new lawyers, M/s J. M. Njenga & Co. Advocates came on record.

Is the time of the new firm coming on record indicative that if the plaintiff was keen on engaging new lawyers sooner, he could have done so, as suggested by the applicants?

It is certainly tempting to believe that as the plaintiff was served with this application on 14th February 2006, and he then had engaged an advocate within two weeks, he could possibly have engaged new advocates sooner, following the withdrawal of Gathenji & Company Advocates.

But it is also equally possible that when the plaintiff was faced with the prospects of having his suit dismissed for want of prosecution, he had no option but to act quickly. That would not, in my considered opinion, necessarily imply that the plaintiff had otherwise lost interest in prosecuting the case. However, the plaintiff must realise that any periods of inactivity on his part, give rise to a real possibility that the suit could be dismissed for want of prosecution. He must therefore be diligent and strive to expedite the prosecution of the suit.

For now, I find that the explanations tendered by the plaintiff, for the delay in prosecuting the suit are reasonable and thus the delay is excusable. However, it must be emphasized that this decision is based on the facts of this case alone. I emphasize that point because ordinarily, when a plaintiff has failed to take steps in the proceedings, for a period of over two years, he can expect the court to dismiss his suit for want of prosecution.

One of the special circumstances of this case is the existence of the Counter-claim against the plaintiff. The said counter-claim was lodged by the applicants herein, seeking vacant possession and mesne profits, amongst other prayers.

The reason why the counter-claim gives rise to special circumstances is not simply by virtue of the fact that it is in existence. No. It is the fact that the 3rd and 4th Defendants appreciate the fact that without obtaining the requisite court order, they could not lawfully obtain vacant possession of the suit property, even though they had purchased it at an auction. In other words, the mere dismissal of the plaintiff's suit would not by itself give to the applicants the real substantive relief which they require, which is the vacant possession of the suit premises as well as mesne profits for the period when the plaintiff has remained in occupation, after the auction sale.

As the plaintiff is challenging the validity of the public auction through which the applicants acquired title, I hold the considered view that the interests of justice will be best served if the plaintiff's claim and the applicants' counterclaim are heard and determined at the same time.

The cause of action is said to have accrued on or about 8th March 2002. That was just over four years ago. I therefore do not consider it to be too long a period of time, which could have resulted in the weakening or loss of witnesses' memories, from lapse of time. I therefore think, that as the 3rd and 4th defendants would also still need to prosecute their counterclaim before they could hope to get vacant possession, they could not legitimately be prejudiced: Their memories could not remain fresh in relation to the counterclaim, and have faded in relation to their defence to the plaintiff's claim.

I accept the public policy demand, that it is the duty of the plaintiff to get on with the case. Therefore,

although I am satisfied about the explanation tendered for the delay which has already taken place, the court cannot allow any more delays. Therefore, the plaintiff is directed to finalise all pre-trial procedures, (including Discovery of Documents; filing a List of Documents; Filing a list of Issues which are to be determined by the trial court) within the next THIRTY (30) DAYS, from today. If the defendants or any of them are not co-operative in ensuring compliance with this direction, the plaintiff will be at liberty to draw and file his own list of Issues.

Following compliance with the pre-trial procedures, the plaintiff must invite the defendants within THIRTY (30) DAYS, from the date of compliance, or after the next thirty days, whichever is earlier; to fix hearing dates for the suit.

In the event that the plaintiff does not comply with the two directions, as set out above, the suit shall stand dismissed for want of prosecution, with costs to the 3rd and 4th Defendants. But if the plaintiff does comply with the directions, he shall nonetheless pay to the 3rd and 4th defendants the costs of their application dated 27th January 2006.

The plaintiff is to pay those costs although the application has not succeeded, because the application has resulted in stringent conditions which will ensure that the plaintiff gets on with the case. In other words, the applicants were right to have brought the application, even though it has ended up with the plaintiff being given an opportunity to prosecute his case.

Dated and Delivered at Nairobi, this 23rd day of May 2006.

FRED A. OCHIENG

JUDGE