REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Suit 30 of 2001

MOBESH RATEMO ATUTI ……. PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED ……. DEFENDANT

RULING:

The Plaintiff/Respondent, MOBESH RATEMO ATUTI sued the Applicant/Defendant bank seeking a declaration that the defendant's intended sale by Public Auction of his land No. NYARIBARI CHACHE/B/B/4985 was illegal. Suit was filed on 18th March 2001. Respondent at the same time made an application for a temporary injunction restraining the applicant from selling the said land until the suit was heard and determined. The court granted an interim order of stay on 19th March 2001 and fixed the application for inter parties hearing on 29th March 2001. It seems that applicant was not heard on that day and it was stood over for hearing on 7th May 2001. The application was eventually heard on 30th May 2001. After hearing submissions of both counsels the court ruled that the Plaintiff/Respondent had admitted receiving a loan from the defendant. The court therefore declined to grant the injunction sought.

The court however ordered the suit dismissed. Plaintiff appealed against the dismissal of the suit before the Court of Appeal. On 18th June 2003 the Court of Appeal sitting in Kisumu held that the dismissal of the suit was wrong as what was before the Judge for hearing was an application and not the full suit. The order of dismissal was therefore set aside. On 1st March 2004 the defendant filed the present application.

The application is under Order 16 rule 5(d) CPA and S.3A CPA. It seeks the suit to be dismissed for want of prosecution. It is supported by an affidavit sworn by one JOSHUA NAUWANKAS who described himself as a loans officer with the defendants.Mr. Soire who argued the application on behalf of M/s Kamonjo Kiburi & Co. Advocates for the applicant gave the background of the suit. He told court that after the suit was reinstated by the Court of Appeal in Kisumu on 18th June 2003, on 30th October 2003 the defendants/applicants' advocate wrote to the plaintiff's advocate asking him to fix the case for hearing within the next 30 days. There was no response to that letter and no action was taken. Thus on first March 2004 they filed this application. He said respondent is not desirous to have the case disposed of. He asked court to dismiss the suit.

Respondent/defendant filed a replying affidavit. Mr. Bosire opposed the application on behalf of Mr. C. Ayienda Advocate for the plaintiff. Both in the affidavit and submission it was said that by December 2003 the original court file had not been brought back from Kisumu Court of Appeal Sub-Registry. The plaintiff therefore could not take any action. Plaintiff deponed that it was only in the month of July 2004 that he was informed that the defendant had filed this application. He then instructed Mr. C.M. Ayienda Advocate to file an application to amend the plaint. This application was filed on 24th August 2004.

It was further submitted that the applicant's application is premature as discoveries have not been made in

accordance to order 10 rule 11 CPR.

I have carefully considered the application, affidavits and submissions. Order 16 rule

5 CPR provides as follows:

> "5. If within 3 months after –
>
> (a) the close of the pleadings, or
>
> (c) removal of the suit from the hearing list, or
>
> (d) adjournment of the suit generally the plaintiff of the court on its own motion on notice to the parties

does not set the suit down for hearing, the defendant may either set the suit down for hearing or apply for its dismissal."

The defendant chose to apply for the suit to be dismissed and not to set it down for hearing. This was his right.

The suit after dismissal on 30th May 2001 was last in court of appeal on 18th June 2003 when it was reinstated. This meant that after that the parties should have taken the necessary steps and set it down for hearing. By 30th October 2003 when the defendant wrote to the plaintiff to fix it for hearing the plaintiff took no action. By 1st March 2004 when the defendant filed this application no action was taken. The only action taken was on 24th August 2004 when an application to amend the plaint was filed. This was almost since months after the present application was filed and over one year 2 months since the suit was reinstated by the Court of Appeal. Clearly the plaintiff, after knowing his suit had been reinstated went to sleep and took no action. The defendant was quite right to come to court.

This court is aware that courts should act with caution in dealing with an application like this which prays for summary judgment in dismissal of the suit. The court has wide discretion but such discretion cannot be exercised in favour of an indolent litigant.

The reason given why no action was taken are not plausible. There was no evidence that by 30th October when the defendant wrote to plaintiff to fix the case the original file had not been returned from Kisumu. There is no affidavit of the advocate then on record, one Mr. Nyatundo to show that he had been told that in the registry.

There is no letter the plaintiff wrote to the Deputy Registrar requesting the file be made available for fixing of hearing dates. Also if indeed the file was late in being brought he should have had the Deputy Registrar swear affidavit to state when it was actually brought back. Further on that fact, if after receiving the letter of 30th October 2003 the plaintiff found the file was not back in the registry he would have written back to the defendant informing him so. As it were he did not take any action. The defendant was able to file his application on 1st March 2003. By that time the file was off of course in the registry. The plaintiff however never took any action upto 24th august 2004 after 4 months had elapsed. There is no explanation offered why no action was not taken within those four months. Thus the reason that the file was not back in the registry falls flat. It cannot be true.

Another reason given was that discoveries were never made and case could not be fixed for hearing. Again this explanation is not reasonable. The plaintiff himself never made discoveries. He did not explain why he failed to do that. The only assumption is that none of the parties had any discoveries to make and the plaintiff should therefore have fixed the suit for hearing. It seems he sat back safe in the knowledge that he had not made discoveries and the suit therefore could not be set down for hearing. Pleadings had been closed and the defendant was in order to come to court under order 16 rule 5 CPR. Thus, from the above I find the application by the defendant is merited and reasonable. I allow the same and strike out

and dismiss the suit with costs for this application and the suit.

Dated this 24th day of May 2005

KABURU BAUNI

JUDGE

Cc – Mobisa

Mr. Mokaya for Kamonjo for defendant

N/a for Respondent