REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL COURTS)
CIVIL SUIT 1877 OF 1997

JACKSON KAMAU NDEGWA …….…….. … PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA……...…..... DEFENDANT

RULING

On 15th June 2005 the Plaintiff filed a Chamber Summons, seeking the following orders:

"1. **THAT** this application be heard ex parte in the first instance.

2. **THAT** this application be certified urgent and heard and determined on priority.

3. **THAT** pending the hearing and determination of this application, there be a temporary injunction restraining the defendant, its agents, employees and/or servants from selling, auctioning by public auction or in any other manner interfering with the Applicant's enjoyment and peaceful stay at property L.R. No. NAIROBI/BLOCK 72/1178 – NGEI ESTATE.

4. **THAT** the orders of this court given on 21st. October, 2003 dismissing this suit for want of prosecution be set aside.

5. **THAT** this suit be set down for hearing and determination afresh on priority basis.

6. **THAT** costs of this application be in the cause."

The application is supported by the Plaintiff's affidavit, in which he sets out the background to the matters concerned.

He commenced by indicating that this case was dismissed for want of prosecution; the said dismissal order having been made on 21st October 2003. The Plaintiff blames his former advocates for the dismissal, because the advocates never attended court, yet kept informing the Plaintiff that everything was fine.

However, at some point in time, the Plaintiff learnt that judgement had been entered against him. When he asked his advocates about that development, the said advocate told him that he (the advocate) had been unwell, and had relocated from Nairobi to Machakos. It is then that the Plaintiff engaged his current lawyers, to take over the conduct of his case, from M/s D. M. Mutinda & Co. Advocates.

The Plaintiff also deposed in his affidavit that he had learnt from the Law Society of Kenya that Mr. Mutinda, his former advocate, had been convicted for failing to render professional services to another client. Annexed to the Plaintiff's affidavit is a copy of what has been described by the Plaintiff, as "the

Law Society of Kenya secular".

Under the sub-title;

"DCC 46/2004 – DAVID N. MUTINDA" is a notice containing a message in the following words;

> **"David N. Mutinda of David Mutinda & Co. Advocates, Nairobi has been convicted of failure to render professional services despite having been paid fees and failure to reply to correspondence from the Complaints Commission. Mr. Mutinda has been ordered to refund Kshs.7,000/= to the complainant. He had also been fined Kshs.20,000/= and ordered to pay costs of Kshs.5,000/= to the Complaint's Commission."**

Although the Defendant did not take issue with the said "Law Society of Kenya **secular"**, this court was not persuaded that there exists such a document. But even assuming that the document was an excerpt from the minutes of some meeting that was held by the Council of the Law Society of Kenya, one would have expected that the whole document be copied out, so that it is clear, from the face of it, what the date of the document was.

Be that at it may, when Mr. Odhoch, advocate for the Plaintiff, put forward his client's case, he indicated that the plaintiff was only pursuing the prayers numbered 3, 4, 5 and 6 on the application. He first pointed out that the suit was filed in 1997.

The record shows that on 30.7.97, the court granted an exparte interim injunction. That order was later vacated, by consent of the parties, on 16.3.98. Finally, on 5.6.98, the Plaintiff withdrew its application for injunction. Later, on 21.7.00 the Plaintiff filed a new application by which it was seeking an injunction to restrain the defendant from realising the security. In the first instance, that application was heard exparte, and the court granted an interim injunction, on 21.7.00.

Thereafter, the parties held negotiations, and on 5.9.00, they recorded a consent order, pursuant to which the Plaintiff was to give its proposals for the redemption of the loan. The parties also agreed that if the negotiations broke down, the Plaintiff's application would be heard on 25.10.00. As fate would have it, the negotiations did not bear fruits, but the application was also not heard on 25.10.00. Thereafter, the interim injunction lapsed, when Hewett J. declined to extend it, on 21.2.01.

The case then went to sleep for almost two years, until 3rd February 2003, when the Defendant applied to court for the dismissal of the suit for want of prosecution. The application was set down for hearing on 29th July 2003. However, when it came up in court on that day, the Defendant's counsel sought an adjournment. The reasons given for seeking that adjournment was that M/s D. N. Mutinda Advocates had declined service, on the grounds that they did not have instructions from the Plaintiff. Having accepted the explanation tendered by the Defendant's counsel, the court adjourned the case.

Later, the application dated 3rd February 2003 was set down for hearing on 21st October 2003. A Hearing Notice was then served on the Plaintiff's advocates, who had, by then, moved their offices from Nairobi, to Mwatu wa Ngoma Street, Machakos. However, notwithstanding the fact that the Plaintiff's advocates were duly served, a fact which the Plaintiff acknowledges in this matter, the said advocates failed to attend court on 21st October 2003.

After giving due consideration to the submissions of the Defendant, the court noted that the Plaintiff had failed to take any steps to prosecute the suit, for a period in excess of one year and eight months. That failure to act was held to constitute a breach of the provisions of Order 16 rule 5 (d) of the Civil Procedure Rules. Furthermore, the court held that the Plaintiff's failure to prosecute its case with all due speed, served to create unnecessary anxiety in the mind of the Defendant. Therefore, the court ordered that the suit be dismissed for want of prosecution.

After the suit was dismissed, the Defendant had its Bill of Costs taxed by the court, in the sum of Kshs.65,750/=. The Ruling by the taxing officer was delivered on 5th October 2004. Ten days later, the

Plaintiff's current advocates filed an application for leave to come on board, instead of D. M. Mutinda & Company Advocates.

Leave was granted to the firm of McOdhoch, Ochieng & Co. Advocates to come on record, in place of D. M. Mutinda & Co. Advocates, on 18th October 2004. However, it was not until 30th November 2004 that the said advocates filed a Notice of Change of Advocates.

Then, on 7th December 2004, the Plaintiff applied to this court for the reinstatement of the suit. But when that application came up for hearing on 7th April 2005, the Plaintiff successfully applied for its withdrawal. The said withdrawal was followed by the filing of the present application, dated 30th May 2005, which seeks, inter alia, an injunction to restrain the Defendant from selling the suit property, as well as the setting aside of the order dismissing the suit.

To my mind until and unless the order dismissing the Plaintiff's suit is set aside, the Plaintiff cannot prosecute the application for an injunction, or for anything else. I hold the view that if the suit was not reinstated, any other applications within the same proceedings would be in vacuum. It is for that reason that I must first ask myself if the applicant is deserving of the order to set aside the dismissal of the suit. And it was for that reason that I deemed it necessary to set out in detail the history of the case, as gleaned from the court file.

The basic position is that the suit was dismissed on 21st October 2003. However, apart from saying that he knew that fact, the Plaintiff did not inform this court when and how he came by that information. That omission makes it impossible for the court to assess for itself whether or not the plaintiff acted with due dispatch in seeking to set aside the dismissal.

But a perusal of Exhibit "JKN2," annexed to the Plaintiff's affidavit reveals that he had become aware of the dismissal by 3rd November 2003; for that is the date when the Plaintiff wrote to the Registrar, High Court of Kenya, complaining about the negligence of his former advocates. What did the Plaintiff then do?

From the record, the first step which the Plaintiff took was to instruct his current advocates. However, the Plaintiff does not disclose the date when he instructed them. Similarly, when Mr. Odhoch Advocate swore an affidavit in support of his firm's application for leave to act for the Plaintiff, he too did not disclose the date when he was first instructed.

However, it is clear that it was not until 15th October 2004 that the Plaintiff's new lawyers filed an application to come on record. In effect, there is an unexplained period of inactivity between 3rd November 2003 and 15th October 2004. That is a period of almost one year.

And whereas, one could understand the Plaintiff's complaint that the suit was dismissed for his former advocates' failure to attend court, I can see no justification for the Plaintiff's own inactivity for almost one year, after he had learnt about the dismissal. He certainly cannot blame that delay on his former advocates.

Then, once the court granted leave to the current advocates to come on record on 18th October 2004, they did not do so for over one month. That period of inactivity is also unexplained.

Another week then went by, after the new advocates came on record. Whilst I accept that a week is not too long a period, on the face of it; if it is taken into consideration that it is a further period of delay, it goes to further lengthen the overall delay.

Next, the Plaintiff's application for the reinstatement of the suit was filed on 7th December 2004. But it was later withdrawn by the Plaintiff on 7th April 2005, thus negating the step that had been taken by filing it in the first instance.

As if that was not bad enough, the Plaintiff waited another almost two months before filing the present

application. Once again, the Plaintiff has not tendered any reasonable explanation for that delay.

In the final analysis, I hold that the Plaintiff has been guilty of inordinate unexplained delay in seeking to set aside the dismissal of the suit.

Furthermore, I also uphold the submissions of the Defendant's counsel, Mr. Mutahi, that the provisions of Order 16 rule 5; and also Order 9B rule 8 of the Civil Procedure Rules are inapplicable to this matter.

Order 16 rule 5 does not apply to this matter as the dismissal of the Plaintiff's suit did not come about following his failure to attend court, at the hearing of the suit. If anything, the suit herein has never been set down for hearing.

The record clearly shows that the suit was dismissed on an application filed by the Defendant. And even then the court did not just dismiss the suit because the Plaintiff failed to attend court. The order for dismissal was granted after the court gave due consideration to the Defendant's application, and came to the conclusion that there was want of prosecution.

On its part, Order 9B rule 8 is also only applicable when a party was seeking to set aside a judgement or a dismissal, if such judgement or dismissal was as a result of non-attendance. As already said herein, this suit was not dismissed because the Plaintiff had failed to attend court, but only because he had failed to prosecute his case.

For all the foregoing reasons, I decline to set aside the orders dismissing the suit.

I should therefore not have to give consideration to the Plaintiff's application for an injunction. However, if I were wrong to have declined to reinstate the suit, I believe it is just and equitable that I make a decision on the said aspect of the application. In that regard, the wording of prayer (3) in the application are significant. The Plaintiff is seeking an injunction to restrain the defendant from selling, auctioning by public auction or in any manner interfering with the Plaintiff's peaceful enjoyment and stay on the suit property. The said injunction sought is supposed to remain in force **pending the hearing and determination of this application.**

I found the wording above, to be somewhat curious. I therefore drew it to the attention of the Plaintiff's advocate, as I thought that there might have been a typographical error. However, Mr. Odhoch advocate re-assured the court that his client was happy to get the injunction order in the terms set out in prayer (3).

I pause here to point out that in my understanding, if the court did grant the said order in the terms set out by the Plaintiff, the court would have acted in vain. I say so because such an injunction would, by the very wording thereof, lapse immediately after this Ruling was delivered.

Anyhow, I must ask myself if an injunction does lie, in favour of the Plaintiff. In the Plaintiff's affidavit sworn on 18th April 2005, in support of this application, the Plaintiff did not make out a case for an injunction. The said affidavit appears to have been geared solely towards persuading the court to set aside the dismissal of the suit, save for one statement, which was as follows;

"THAT I am likely to suffer irreparable loss as my only home is likely to be sold at any time from now."

That statement is not backed by any material, from which the court can make an informed assessment as to whether or not the intended sale was illegal, unlawful, irregular or otherwise.

In any event, a look at the Plaint reveals that the Plaintiff admitted being in arrears, to the tune of Kshs.220,265.50 as at July 1997. He then contended that the Defendant should reimburse to him the sum of Kshs.368,529.50, which he believes ought to have been spent by the Defendant in repairs to the house; cost of evicting the former occupant, from the said house; land rates; water bills; electricity bills and other conservancy charges; as well as the loss of rent for the period when the former occupant remained in the

house.

In the light of the quantification of the Plaintiff's claim, I hold the considered view that the loss, if any, which the Plaintiff may suffer is not irreparable. In arriving at that conclusion, I have taken judicial notice of the fact that the Defendant is a longestablished financial institution. And although I may not have information about its financial standing at present, the Plaintiff has not put forward any suggestions that the Defendant's financial status was so doubtful that it could be unable to reimburse such sums as may be found to be due to the Plaintiff.

Also, in the Plaint, the Plaintiff admits that the Defendant did give him a loan to buy the suit property. The exact quantum of the said loan is cited in the Plaintiff's affidavit sworn on 28th July 1997, as being Kshs.900,000/=.

The Plaintiff has not demonstrated to the court that he had paid that loan. He is very silent on that score, but is quick to say that if the suit property were to be sold, he would suffer irreparable loss. I am afraid that the conduct such as that demonstrated by the Plaintiff does not warrant the favourable exercise of the court's discretion, for the issuance of an injunction. It must always be remembered that an injunction is an equitable remedy. Therefore, he who seeks equity must come to court with equity. He must put all his cards on the table. He must not withhold any material information from the court. And through the said material, he must demonstrate a prima facie case with a probability of success. He should also persuade the court that if the orders sought were not granted, he would suffer irreparable injury or loss which cannot be compensated in damages. And, if he got through the first test above, but the court was doubtful as to repercussions of the grant or denial of the injunction, the application would be determined on a balance of convenience.

In this case, the Plaintiff has failed the first two tests. Accordingly, he is not deserving of the orders sought.

In conclusion, the Plaintiff's application dated 30th May 2005 is dismissed with costs.

Dated and Delivered at Nairobi, this 20th day of July 2005.

F. A. OCHIENG

JUDGE