



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1927 OF 1999

FRUIT PROCESSOR LTD PLAINTIFF

VERSUS

CREDIT BANK LTD & 2 OTHERS DEFENDANTS

RULING

By an application dated 7.07.2004 and filed in Court on 9.07.2004, the plaintiff herein through its director, Patrick Kirono Mwaura seeks the Court to review its order of 7.04.2003 dismissing the plaintiff's suit and reinstate it so that it be fully heard and determined. He says in his grounds for the application *inter alia* that:-

- (a) there is a mistake, error, omissions and/or fraud that are/is apparent on the face of the record,
- (b) the suit was dismissed due to the failure of communication to the plaintiff/applicant and its advocates, and due to misrepresentation and/or fraud on the part of the 2nd defendant/respondent's advocates,
- (c) there is no other record of proceedings on that day except that Mr Kirongo & Co Advocates who were on record representing the 2nd defendant in the instant suit was representing the plaintiff,
- (d) the Notice to Show Cause why the suit should not be dismissed issued by the Court on 10.03.2003 was never received by the plaintiff/applicant's advocates then on record,
- (e) in the circumstances, the plaintiff/applicant did not have opportunity as it ought have had, to show cause why the suit should not be dismissed,
- (f) the plaintiff/applicant has a strong case against the defendants/respondents, with triable issues of both fact and law.
- (g) it would be in the best interests for all parties in the instant suit and for the ends of justice if the Court reviewed the dismissal orders issued on 7th April 2003 and reinstated the suit for it to be fully heard and determined,
- (h) the defendants/respondents do not stand to suffer any loss if the instant suit is reinstated,
- (i) the plaintiff/applicant stands to suffer substantial and irreparable loss, if the suit is not reinstated,

The application is also supported by the affidavit of Patrick Kirono Mwaura, in which he introduces on

oath, allegations of fraud, misrepresentation, non-service of the Notice to Show Cause, refers to the ruling of Lady Justice Gacheche as she then was, a Notice of Appeal of the orders of dismissal of 7.04.2003, the fact that the plaintiff has two pending suits HCCC 1205 of 2000 and HCCC 128 of 2003 between the plaintiff and 1st and 3rd defendants over the same suit property LR No 8827/11.

The plaintiff also avers that he stands to suffer substantial and irreparable loss if the suit is not reinstated, because the outcome of the other two suits depend on this suit. The applicant acknowledges that he has not paid legal fees and auctioneers charges now together with interest exceeding Ksh 1.0 million, and the total indebtedness of the loan moneys to him by the 1st defendant in excess of Ksh 29,248,342.4% as at 31.05.2004.

For all these grounds, and facts set out in the supporting affidavit the plaintiff seeks a review of the order of 7.04.2003 dismissing his suit, and reinstatement thereof.

Before I express my views over the application, I will make a brief reference to the replying affidavit of Patrick Kerongo, an advocate of the High Court who depones that he has the conduct of the case on behalf of the 2nd defendant, he acknowledges receiving the Notice to Show Cause why the suit should not be dismissed. He says that he did not attend court on 7.04.2003, and could not have held brief on behalf of any party. He points out that the plaintiff admits that he has not taken any steps to prosecute the suit.

I shall consider the Preliminary Objection and Grounds of Opposition dated 13.09.2004 and filed by the 1st defendant's advocates on 14.09.2004 while expressing my views over the application.

The plaintiff's application is premised upon the provisions of sections 3A and 80 of the Civil Procedure Act (cap 21) Laws of Kenya, and order XLIV rules 1, 2, 3 and 4 and order L of the Civil Procedure Rules. It is now trite law that section 3A of the Civil Procedure Act merely codifies the Court's inherent power to make orders in the interests of justice and to prevent the abuse of its process and no more need be said about it. Section 80 of the CPA is in these terms:-

“80. Any person who considers himself aggrieved:-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit,”

This too is merely an enabling provision. It confers on the Court a discretion, a power to be exercised judicially, to review its orders. The rules for the exercise of the power are however set out in order XLIV.

I set out the said order and applicable rules for the sake of the completeness of this record as the plaintiff is acting by its director, and not advocate. Order XLIV rules 1 (1)(2), (rule 2 was deleted by Legal Notice No 216 of 1985, and reference to it in the application is in error), 3 and 4. Rule 4 gives this Court jurisdiction over the matter as the judge who made the order of 7.04.2003 is no longer attached to this division, and sub-rule (2) of rule 1 is not applicable as it merely refers to other grounds other than those mentioned in those matters set out in rule 1(1) which is as follows:

“1 (1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of

some mistake or error apparent on the face, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.”

I shall revert to rule 3(1) and (2) of the said order XLIV, later in this ruling. The Court dismissed the plaintiff’s suit on 7.04.2003 pursuant to the provisions of order XVI, rule 2(1) which provides that:-

“2(1) In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown, to its satisfaction, may dismiss the suit (2) If cause is shown to the satisfaction of the Court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.”

The facts here are these, Lady Commissioner of Assize (as Lady Justice Gacheche then was) nullified the sale by public auction of the suit property on 15.03.2000. When the suit was dismissed for non prosecution by Lady Justice Ondeyo, is a period of over 4 years. The Court had watched for all that period the file in the Court registry without any further application or step taken to prosecute the suit. The rule requires only one year for the matter to be dismissed. The parties were duly informed by the Court, they failed to file any papers in court to show cause why the suit should not be dismissed.

The affidavit of Kerongo acknowledges that he received the Court’s notice dated 10.03.2003. He swears that he did not attend court, presumably because it was not his case, he had no reason to show cause. There is nothing to show that M/s Nyachae & Co or Githanji Mungai & Co Advocates for 1st defendant and the plaintiff respectively did not receive the said notice to show cause why the suit should not be dismissed. I can see no mistake, error, omissions, and least of all fraud apparent on the record.

The plaintiff’s application is also procedurally fatal. The plaintiff failed to annex a copy of the decree to be reviewed. The onus is upon him to extract such decree. He failed to do so. This application is therefore not tenable.

The whole philosophy behind the staggered provisions of order XVI rules 2(1), 5 and 6 is that:-

(1) the rules of court and associated rules of practice devised in the public interest to promote the expeditious despatch of litigation must be observed.

(2) a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate.

(3) the Court will similarly not exercise its inherent jurisdiction to dismiss a plaintiff’s action for want of prosecution unless the delay complained of after the close of pleadings, the last procedural step taken in the suit, has caused a real risk of prejudice to the defendant.

The situation here is such that the plaintiff not only acknowledges that he owes the 1st defendant a handsome sum of Kshs 29,248,347.40 as at 31.05.2004 from the original Kshs 11,220,560.30 and that the plaintiff wants the Court to help him by procrastinating the settlement of his clearly acknowledged liability. I think that is a case where the applicant is merely interested in going round in circles keeping the defendants “in a state of perpetual anxiety through the yoke of litigation yet it is undesirable that they should be so kept when the rules and principles of justice militate otherwise.”

The plaintiff/applicant says in paragraph 11 of his grounds for the application, with tongue in the cheek, I think, that the defendants/ respondents do not stand to suffer any loss if the suit is reinstated. No, on the contrary, it is the respondents who have suffered (ie nullification of sale of the suit property), and will continue to suffer serious prejudice and not the applicant. It has a large outstanding sum due from the defendant. The defendant fails to prosecute his suit, he will not bind the Court in the chain of procrastination. I think he and his counsel have been guilty of gross indolence, and a court of equity will not lend its hand to the indolent. It does not also carry favour with the Court to say that the suit property is

family land for the plaintiff/applicant knew when he put it out there as a security for the 1st defendant's loan. Once it was put out as security, it became a commodity for sale, and any such commodity for sale can be compensated in damages. Subject to the law of limitation the plaintiff is at liberty to institute a fresh suit against the defendants for any alleged fraud, mistake and misrepresentation. For the present, I think the plaintiff's application is misconceived, bad in law, and is an abuse of this Court's process. The same is dismissed with costs.

Dated and Delivered at Nairobi this 7th day of October 2004.

M.J.ANYARA EMUKULE

JUDGE