



**Wachira & another t/a Connel Trading Services & another v
Family Bank Limited & another (Commercial Case 258 of 2014)
[2023] KEHC 18943 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 258 OF 2014
DAS MAJANJA, J
JUNE 16, 2023**

BETWEEN

**GEORGE WACHIRA & PAULINE GICHIMU T/ACONNEL TRADING
SERVICES 1ST PLAINTIFF
MARGARET WAIRIMU KARANJA 2ND PLAINTIFF**

AND

**FAMILY BANK LIMITED 1ST DEFENDANT
ANTOTECH AUCTIONEERS 2ND DEFENDANT**

RULING

1. This is a 2014 case. It has been on the court rolls for the last 9 years. It was dismissed for want of prosecution on February 27, 2020. The Plaintiffs now seek to reinstate the suit by their application dated March 1, 2023. They also seek an injunction restraining the 1st Defendant (“the Bank”) from selling the Inoi/kiaga/725 (“the suit property”) pending the hearing and determination of the suit.
2. The application is grounded on the supporting affidavits of George Wachira sworn on March 1, 2023 and June 5, 2023 respectively. It is opposed by the Defendants through the replying affidavit of Wambani Sylvia, an officer of the Bank, sworn on May 29, 2023. I have considered the matter and take the following view.
3. It cannot be gainsaid that the court had jurisdiction to set aside a dismissal order and reinstate a suit. This jurisdiction must be exercise judiciously and in this regard the factors the court may take into



account are various and I think the observations by Chesoni J, in *Ivita v Kyumbu* [1984] KLR 441 are apposite:

The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.

4. The Plaintiffs' case is that the suit was dismissed on account of the fault of its previous advocates on record who failed to deal with the matter. They are however keen on prosecuting it. They state that despite the fact that the suit had been dismissed, they were making efforts resolve the debt by engaging with the bank and to that extent they made some payments. The 1st Plaintiff states that he even made payments to settle the uncontested debt. The Defendants oppose the application to reinstate the suit on the ground that the Plaintiffs have not set out sufficient evidence to warrant reinstatement of the suit given the history of the matter.
5. Although there has been delay in prosecuting the suit, I think justice can be done despite the delay. There is no evidence that witnesses may not be able to testify or that documents are not available or have been lost. The issue in dispute is loan secured by a charge on the suit property. It is therefore in the interests of justice that the suit be reinstated. Further, the Plaintiffs should not be punished for the laxity of their advocates on record. They are now willing to prosecute their suit and I do not see any prejudice to the parties if the suit is reinstated that would not be compensated by an award of costs.
6. As to whether the court should grant an injunction, the courts discretion is governed by the principles in *Giella v Cassman Brown* [1973] EA 348. The Plaintiffs must demonstrate that they have a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour. The Court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR, added that these requirements are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially.
7. The Plaintiffs bear the burden of showing that they are entitled to an injunction. The fact that the suit has been reinstated does not entitle them to an automatic injunction. From the application and depositions, they do not complain that the Bank's statutory power of sale has not arisen. There is also nothing in their depositions that shows that the Bank contravened any provisions of the *Land Act*, 2012 in issuing the notices which they have admitted receiving. Their complaint as I understand, is that the amount claimed by the Bank is excessive and violates the in duplum rule. It also complains of illegal and unexplained debits on its account. In my view, all these issue go to the extent of indebtedness. The courts have held from time to time that the court will not issue an injunction to restrain a charger from exercising its statutory power of sale on account of a disputed debt (see *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003]eKLR and *National Bank of Kenya v Juja Coffee Exports*



Limited [2021]eKLR). I hold that the Plaintiffs have not made out a case for the grant of an injunction. An injunction will not be granted merely because the suit has been reinstated.

8. For the reasons I have set out, I allow the March 1, 2023 on the following terms:
- a. The dismissal order dated February 27, 2020 be and is hereby set aside and this suit is reinstated.
 - b. The Plaintiffs shall pay the Defendants costs of Kshs 35,000.00 being costs for the application within 14 days from the date hereof.
 - c. The application for injunction to restrain the 1st Defendant from selling or otherwise disposing of the suit property; Inoi/kiaga/725 is refused and the order issued in that respect on May 19, 2023 is hereby discharged.
 - d. The matter shall be fixed for case management on a date fixed.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Chebwogei instructed by Mwangi Kiai and Company Advocates for the Plaintiffs.

Mr Kamotho instructed by Kamotho Njomo and Company Advocates for the Defendants.

