



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.382 OF 2017

MINA ACHENDID.....PLAINTIFF

VERUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

(1) Before this Court is the Amended Notice of Motion dated **1st July 2019** by which **MINA ACHENDID** the **1st** Plaintiff/Applicant sought the following Orders: -

“1a. SPENT

b. SPENT

2. THAT the Honourable Court be pleased to review and or set aside the order made on 4th March 2019 (Hon. Lady Justice M. Odero) dismissing the Plaintiff’s suit.

3. THAT the Honourable Court be pleased to reinstate the Plaintiff’s suit commenced by way of Complaint dated 18th September 2017 to be heard on merits between the parties herein.

4. THAT the Honourable Court be pleased to reinstate the order of injunction previously issued by Hon. Lady Justice O. Sewe on 24th November 2017 to its fullest extent.

5. THAT pending hearing and determination of this Application, this Honourable Court be pleased to issue a temporary order of injunction to restrain the Defendant and or its agents from selling or offering for sale whether by public auction or private treaty, transferring, disposing of, interfering with and or in any other manner whatsoever altering or dealing with the properties known as Apartment Numbers 409, 509, 608, 709, 800,809, 909, 1000, 1008, 1009, 1100, 1101, 1108, 1109, 1200, 1208, and 1209 erected on a portion of land Reference Number 209/19835 Nairobi.

6. THAT the costs of this Application be provided for.”

(2) The application which was premised upon **Article 25(c) 50(c) and 159(2)(d)** of the **Constitution of Kenya, Sections 1A, 1B and 3A** of the **Civil Procedure Act, Order 8 Rule 5, Order 9 Rule 9 and Order 12 Rule 7** of the Civil Procedure Rules was supported by the Affidavit of even date sworn by the Plaintiff/Applicant as well as the Supplementary Affidavit dated **10th September 2019**.

(3) **NATIONAL BANK OF KENYA LIMITED**, the Defendant/Respondent filed in Grounds of Opposition to the application dated **22nd July 2019**. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed her written submissions on **20th September 2017** whilst the Defendant/Respondent filed its submissions on **19th November 2019**.

BACKGROUND

(4) The Plaintiff filed the suit therein on **19th September 2017**. On **24th November 2017** **Hon Lady Justice Olga Sewe** granted injunctive orders in favour of the Plaintiff/Applicant. Thereafter the matter went for Case Management and was certified as ready for hearing. On **4th March 2019** when the matter came up for hearing neither the Plaintiff nor her advocate were in court. Accordingly following an oral application by counsel for the Defendant the suit was dismissed for want of prosecution. The Plaintiff/Applicant then filed this application

seeking reinstatement of both the suit as well as the injunctive orders issued on 24th November 2017.

(5) Prayer 1(b) of this Amended Notice of Motion was allowed vide a consent order recorded on 4th July 2019 thus the firm of **Rachier & Amollo Advocates LLP** was granted leave to come on record for the Plaintiff/Applicant.

ANALYSIS AND DETERMINATION

(6) I have carefully considered the submissions filed by both parties in this matter. There are two issues which require determination by the court namely: -

(i) Should the suit filed on 19th September 2017 be reinstated?

(ii) Should the injunctive orders made on 24th November 2017 be reinstated?

(i) Reinstatement of suit

(7) In **NAHASHON MWANGI –VS- KENYA FINANCE BANK LTD (In liquidation) (2015)eKLR**, the Court held thus:-

“The decision of the court is purely a matter of discretion which as it has been said time and again should be exercised judicially on defined principles of law. The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution.

Article 50 coupled with Article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the Court.

Courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the Plaintiff in an arbitrary manner from the seat of judgment...the same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit, of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the plaintiff will suffer if the suit is not reinstated.[own emphasis]

(8) Likewise in the case of **MWANGI S. KIMENYI –VS- ATTORNEY GENERAL & ANOTHER [2014] eKLR**, the Court stated as follows:-

“The decision whether a suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. See the case of **IVITA Vs KYUMBU [1984]KLR 441, Chesoni J. (as he then was) that:-**

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.

The defendant must however satisfy the court that he 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.”

(9) This suit was set down for hearing on 21st March 2018. The Plaintiff/Applicant explains that she failed to attend court on that day because her lawyer did not inform her of the hearing date. The Plaintiff pleaded that the mistake of her Advocate at the time should not be visited upon her.

(10) To this the Defendant retorts that the Plaintiff has not demonstrated having taken any action against her erstwhile Advocate for professional negligence. However, the fact that the Plaintiff had the right to take action against her Advocate and did not do so is not a bar to grant of the prayers being sought by this application. In the **Nahashon Mwangi case [supra] Justice Gikonyo** held that:-

“I have considered the possibility of the argument that the plaintiff could have done more or be more vigilant about the fate of his case especially given the amount of time which has passed by. But this is not a disciplinary cause against the counsels.. Courts of law have said time and again that mistake by counsel should not be visited on the client...In such cases, I should think, the remedy on negligence against counsels, if at all, should be in addition to, rather than in substitution of the remedy for reinstatement of suit. And therefore, an application to set aside a dismissal order should not be defeated simply because the Plaintiff may have another remedy against counsels based on professional negligence.[own emphasis]

(11) The Plaintiff went on to explain that on the next hearing date of 4th March 2019 (when the suit was dismissed for non-attendance). She failed to attend court due to a medical emergency. The Plaintiff has attached her medical record (Annexure **MA”4”**) to the Amended Notice of Motion dated 1st July 2019 as proof. Such medical emergencies can visit any person unexpectedly and in my view provide a satisfactory explanation for the Plaintiff’s failure to attend court on the hearing date.

(12) I note that following the dismissal of this suit on **4th March 2019** the Plaintiff moved to change Advocates and the present application seeking reinstatement of the suit was filed on **26th March 2019** about twenty one (21) days later. I am satisfied that the present application was made in a timeous manner.

(13) It is pertinent to note that the value of the suit property is about **Kshs.100 million**. This is a colossal amount and the Plaintiff deserves a chance to prosecute her case. Further I find that the Defendant/Respondent have failed to demonstrate any prejudice they stand to suffer due to reinstatement of the suit.

(14) Accordingly, I do direct that this suit be reinstated **subject** to the Plaintiff/Applicant paying to the Defendant/Respondent the sum of **Kshs.30,000** as throw away costs within thirty (3) days hereof.

(ii) Restoration of Injunctive Orders

(15) As stated earlier following arguments on a Notice of Motion dated **18th September 2017**, **Hon Justice Olga Sewe** did in her ruling dated **24th November 2017** grant injunctive orders in favour of the Plaintiff/Applicant stating as follows:-

“[30] In the instant matter, the path leading to the lower risk of injustice would be to stop the impugned auction pending the hearing and determination of the Applicant’s case. Accordingly, I find merit in the Plaintiff’s application and would grant orders in his favour in the following terms:-

THAT pending hearing and determination of this suit, a temporary injunction be issued restraining the Defendant/Respondent and/or its agents from selling or offering for sale whether by public auction or private treaty, transferring, disposing of, interfering with and or in any other manner whatsoever altering or dealing with the suit properties known as Apartment Numbers 409, 509, 608, 709, 800,809, 909, 1000, 1008, 1009, 1100, 1101, 1108, 1109, 1200, 1208, and 1209 erected on a portion of land Reference Number 209/19835 Nairobi (the suit properties).”

(16) These injunctive orders were to remain in force pending the hearing and determination of the suit. A judge of concurrent jurisdiction having been persuaded to make said injunctive orders I would be loath to interfere with the same. Given my orders reinstating the suit, it is my view is that the suit ought to be reinstated **together** with the injunctive orders already in place as those orders had not been set aside. Accordingly, I hereby restore the injunctive orders made on **24th November 2017**.

CONCLUSION

(17) Based on the foregoing, the application is allowed in the following terms:-

- i. The suit dated **19th September 2017** is hereby reinstated subject to the Plaintiff/Applicant paying to the Defendant/Respondent throw away costs in the amount of **Kshs.30,000/=** within thirty (30) days of the date of this Ruling.
- ii. The Injunctive orders issued by **Justice Olga Sewe** in her ruling dated **24th November 2017** are hereby restored and will remain in force pending the hearing and determination of the suit.
- iii. The suit to be set down for hearing within ninety (90) days hereof failing which the same will stand dismissed with no further reference to the Plaintiff/Applicant.
- iv. Failure to comply with **(i)** and **(iii)** above will lead to the automatic dismissal of this suit with no further reference to the Plaintiff.
- v. Costs of this Application to be met by Plaintiff/Applicant.

Dated in Nairobi this 5th day of June, 2020.

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Justice Maureen A. Odera