



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. 108 OF 2016**

**KENNEDY ODHIAMBO KAWALA.....PLAINTIFF**

**-VERSUS-**

**HOUSING FINANCE COMPANY LIMITED.....DEFENDANT**

**RULING**

1. Before this court is a **Notice of Motion** application dated 7<sup>th</sup> July, 2020 by which **Kennedy Odhiambo Kawala**, the Plaintiff/ Applicant sought the following orders:-

a) Spent.

b) *That Leave be and is hereby granted to the Firm of Ngonze and Ngonze Advocate to come on record for the Plaintiff.*

c) *That this Honourable Court be pleased to reinstate this suit.*

d) *That a temporary injunction do issue, restraining the Defendant whether by itself, its agents/servants/employees, successors in title and/or assignees, and/or anyone claiming through them, from disposing, transferring, alienating, interfering with and/or otherwise howsoever dealing with all that property L.R No. MN.Sec1/5976 situated within Mombasa, pending the hearing and determination of this application.*

e) *That the Honourable Court do direct the taking of accounts as between the parties, to determine the exact amount due to either of them, on account of the loan facility advanced by the Defendant to the Plaintiff w.e.f 11/11/2011.*

f) *That a temporary injunction do issue pending the conclusion of the exercise contemplated in prayer 3 herein above, and, ultimately, the conclusion of the suit.*

g) *That the Honourable Court do issue an order suspending the levying of any further charges and/or penalties and/or penalty interest on the balance due on the mortgage facility pending the conclusion of the exercise contemplated by prayer 3 herein above.*

h) *That the costs of this application be provided for.*

2. The application was premised upon the grounds on its face and supported by an affidavit of even date sworn by the Plaintiff/Applicant. He averred that:

a) *He had instituted the instant suit vide a plaint dated 3.11.2016 seeking for an order of injunction to restraining the defendant or its servant/agents from interfering with the Plaintiff's parcel of land known as L.R N.o MN/1/5976 (hereinafter the "the suit property") and further a declaration that the Defendant's intended sale is illegal and ought to be stopped.*

b) *The court then on 13/6/2017 directed that the Plaintiff does file and serve the witness statement and seven (7) days thereafter that parties do file statement of agreed issues. The court further directed in the event that the Plaintiff would fail to file and serve the witness statement, then the suit against Defendant would stand dismissed. A date to confirm compliance with those directions was then set for 23.08.2017.*

c) *However, the Plaintiff did not comply with the orders of 13.06.2017 a result of which the suit was dismissed. He now avers that failure to comply with the orders was not by his fault but due to illness which had affected his health and finances.*

**d) Further that he had acquired a loan facility from the defendant on 11.11.2011 for a tune of Kshs.23,400,000/= to be paid over a period of 15 years. Since then the Plaintiff avers that he has repaid upto Kshs.17,008,152.30 whilst the Defendant threatens to sell the suit property by way of public auction to offset an outstanding loan balance of Kshs.51,896,512.70 as at 31<sup>st</sup> May 2020. According to the Plaintiff, the amount claimed by the Defendant is exorbitant and against the duplum rule of banking law hence the court should intervene to ensure fairness.**

3. The application is opposed by the Defendant on grounds of a Replying Affidavit sworn by its bank manager, Amos Wachira Mwangi on 8.07.2020. Mr. Wachira deponed that the application should fail for among other reasons that; there is nothing on record to show that the Plaintiff has been unwell since June 2017, that the application is an abuse of the court process in that the Plaintiff is seeking to resurrect this suit after failing to obtain an injunction in Mombasa ELC No. 7 of 2020 and that the court lacks jurisdiction to order the taking of accounts absent of a similar relief sought in the Plaintiff.

4. According to the Defendant, the Applicant's contentions that he has been of bad health is misplaced since he has been appearing as a co-Defendant in Mombasa E.L.C No. 7 of 2020 wherein the Applicant's wife had moved the court vide an application seeking injunction to restrain the sale of the suit property on ground that it is a matrimonial home. The application was however dismissed but later the court considered an ex-parte application by the Applicant in E.L.C No. 7 of 2020 and allowed the injunction pending appeal on condition that the Applicant deposits Kshs.5,000,000/=. The Applicant's wife sought to have the conditional orders reviewed but the same was declined by the court. And by the instant application, the Respondent contends that it is an effort by the Applicant to revive the suit and attempt to obtain injunctive orders through shortcuts.

5. It is further averred that the continued default by the Applicant in servicing the loan facility was the basis of imposing the condition in ELC No. 7 of 2020 and as such the Applicant deserves no injunctive orders herein.

6. On 9/7/2020, the court directed the Notice of Motion Application be canvassed by way of written submissions and a date for highlighting set. In compliance thereof, the parties did file their respective written submissions which were highlighted on 16/7/2020. Mr. Odour appeared for the Plaintiff/Applicant whilst Mr. Kongere appeared for the Defendant/Respondent. I will briefly state the submissions by each party as below.

#### **Plaintiff's Submissions**

7. Mr. Odour, Counsel for the Plaintiff/Applicant identified four issues for submissions, that is;

**a) Whether the firm of Ngonze & Ngonze Advocates should be granted leave to come on record for the Plaintiff,**

**b) Whether this court should make an order for taking of accounts,**

**c) Whether the suit should be reinstated,**

**d) Whether orders of injunctions should issue, Who should bear the costs of this suit.**

8. On the first issue, it was submitted that by dint of Order 9 Rule 9 of the Civil Procedure Rules, after a Judgment in a matter, the change of advocates has to be done by an application to the court. As such, the orders of 13.07.2017 was a judgment of this court dismissing the suit hence there was need of seeking for Leave for the Firm of M/S Ngonze & Ngonze & Co. Advocates to come on record. It was Mr. Odour's view that this prayer is unopposed and should be allowed.

9. On the issue of whether the suit should be reinstated, it is submitted that this court should exercise its discretion to reinstate the suit for the reason that the Respondent dismissed the averments made by the Applicant on oath that he has been unwell without any basis. Mr. Odour counsel for the Applicant submitted that the veracity of statements made under oath can be tested by cross-examining the deponent to establish the credibility of the allegations. The Counsel, further added that no prejudice will befall on the Defendant/Respondent as opposed to damage which the Applicant stands to suffer. In support of this line of argument the counsel relied on the cases of **Mbogo Another -vs- Shah Ealr 1908, Philip Chemwolo & another -vs-Augustine Kubede (1982-88) KAR 103, Ivita -vs- Kyumbu[1984] KLR 441 Jimmy Rodgers Gitonga Njeru -vs- Al-Hussein Motor Limited & 2 others [2018] eKLR.**

10. As for whether this court should order the taking of accounts, the Counsel for the Applicant submitted that Order 20 Rule 1 of the Civil Procedure Rules, 2010 clothes the court with jurisdiction to order for the taking of accounts which is in itself not a final order but an interlocutory relief to ensure smooth trial. The Counsel argued that the Plaintiff challenges the Defendant's statutory power of sale and the same cannot be granted without making the order for taking of accounts. The Counsel went on to submit that a similar circumstance was considered and upheld in the cases of **Samwel Mwangi Kingori & another -vs- Standard Chartered Bank (K) Ltd [2014] eKLR and National Bank of Kenya Ltd -vs- Pipeplastic Samkolit Ltd & another [2001] eKLR.**

11. Lastly, on the issue of whether this court should issue an injunction, it is submitted that the Plaintiff/Applicant's case has met the threshold for granting an injunction, to wit, that the Applicant has established a *prima facie* case, shown that he might suffer irreparable injury and; lastly, that the scale on balance of convenience tilts in his favour. The learned Counsel further submitted that the court should always intervene where a financier charges excessive, unlawful and usurious interests as in the instant case a position which according to the Counsel has been adopted in the case of **John Nahashon Mwangi -vs- Kenya Finance Bank Limited (in liquidation) [2015] eKLR.**

#### **Defendant/Respondent's Submissions**

12. Mr. Kongere, Counsel for the Defendant on the other hand submitted on the following issues;

- a) *Whether the suit should be reinstated,*
- b) *Whether the court should order the taking of accounts, and;*
- c) *Whether the court should issue a temporary injunction as sought;*

13. With regard to the issue of whether the suit should be reinstated, Mr. Kongere argued that the suit was dismissed on 13<sup>th</sup> June, 2017 whilst the application for reinstatement was brought on 7<sup>th</sup> July, 2020. He submitted that the only explanation given is that the Plaintiff has been unwell but the same is not supported by any evidence. The counsel further added that the Plaintiff has not explained the delay of 3 years since the suit was dismissed and by alleging that he was sick, the Plaintiff is demonstrating bad faith because he has been appearing in Mombasa ELC No. 7 of 2020. On the foregoing, Counsel concluded that the instant application is yet another effort by the Plaintiff/Applicant to frustrate the Defendant's effort in realizing its statutory power of sale. In support of its case, the counsel relied on the cases of John Simiyu Khaemba & another –vs- Cooperative Bank of Kenya & another [2020] eKLR, Joel Tirop Busienei –vs- David Randichi [2016] eKLR, Simon Waiti Kimani & 3 others –vs- Equity Building Society [2010] eKLR and Eric Oluoch Olele –vs- Kenneth O. Obae [2013] eKLR.

14. On the second issue of whether the court should order taking of accounts, Mr. Kongere reiterated that there is no jurisdiction to order the taking of accounts since no such relief is sought in the Plaint. The Counsel buttressed this argument by relying on the case of National Bank of Kenya Ltd-vs- Pipeplastic (supra).

15. The third issue on whether the court should issue an injunction, Mr. Kongere submitted that the prayer is not clear in the sense that it only seeks for a temporary injunction without specifying what the Applicant meant to stop with that injunction. As such, the Counsel argued that it is not upon the court to speculate on what the parties mean by their prayers where such prayers are vague. In the same vein, the counsel submitted that an injunction will not ordinarily issue where an award of damages would be an adequate remedy like in the case here. Based on those arguments, the counsel sought the court to dismiss the application and further invited the court to consider the findings of other courts in similar circumstances specifically the cases of Chairman/Secretary Bog Lubinu Boys High School & another –vs-Hezron Amakobe & 2 others [2019] eKLR, Ole Nganai –vs- Arap Bor [1982] eKLR, Francis J.K Ichatha –vs- Housing Finance Company of Kenya Ltd [2005] eKLR and Ndungu Gatigithu & 5 others –vs- Kiambiriria Investment Company Ltd [2019] eKLR.

#### Analysis and Determination

16. Having taken into consideration the pleadings on record and the submissions by counsels, the issues for determination in this application are fairly simple and straightforward;

- a) *Should the suit herein be reinstated?*
- b) *Should the court grant injunctive orders as sought?*
- c) *Whether the court can order for the taking of accounts.*
- d) *Whether to allow the Firm of Ngonze & Ngonze Co. Advocates to come on record for the Plaintiff.*
- e) *Who should bear costs*

17. The reinstatement of the court is the major issue for consideration, and the issues of whether the court can grant an injunction and an order for taking accounts will only be considered if the suit is reinstated. The decision of the court to reinstating a suit is purely a matter of discretion which as it has been said time and again should be exercised judicially on defined principles of law. Article 50 of the Constitution 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.

18. Considering a similar application the court in the case of Mina Achendid v National Bank of Kenya Limited [2020] eKLR cited with approval the case of In Nahashon Mwangi –Vs- Kenya Finance Bank Ltd (In liquidation) (2015)eKLR, where the Court held thus:-

**“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.”**

19. 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.* [own emphasis]

20. There is no dispute that this suit was dismissed on basis of orders issued by this court on 13.06.2017. The Plaintiff had been directed to file his witness statement(s) within 14 days failure to which the suit would stand dismissed. Fourteen days ended on 27.06.2017, by the then Plaintiff ought to have filed the statement(s) as directed. The Plaintiff failed to comply with the orders and the suit was deemed to have been dismissed as from 27.06.2017. No further action was undertaken by the Plaintiff save for the filing of the instant application which was filed on 8.07.2020 seeking *inter alia*, a prayer to reinstate the suit. The explanations being given now is that the Plaintiff failed to comply with the conditional orders not because of his fault but owing to sickness which had befallen him.

21. The Defendant on the other hand submitted that the contentions by the Plaintiff have not been supported by any material evidence or any medical evidence. The Defendant was very critical of the contentions that the Plaintiff/Applicant has always been sick for the reasons that the he attended court in ELC No.7 of 2020 which was also substantially dealt with the suit property. The Defendant retorts that the instant application is meant to secure injunctive orders which were denied in Mombasa E.L.C No 7 of 2020 vide a ruling delivered on 20.05.2020.

22. Applying the principles in the case of **Mwangi S. Kimenyi –Vs- Attorney General** (Supra) to the circumstances of this case, it is noteworthy that the instant motion was filed 8.07.2020 barely three years after the suit was dismissed. I must hasten to state that it is incumbent upon the Applicant to explain the reasons for delay in making an application for reinstatement of a suit and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

23. A three years delay in seeking to reinstate a suit is unreasonable and **no attempt has** been made at all, to **explain** it rather than alleging that the Applicant has been unwell. I do not find this explanation that sufficient for two reasons. First, the Applicant's allegation that he was sick has not been supported by any documentary evidence. The Applicant was obliged in law to prove the allegation that he was sick; after the legal adage that he who asserts or alleges must prove. Secondly, in circumstance of this case, the Respondent bore no burden of proof whatsoever in relation to establishing the health condition of the Plaintiff/Applicant. By way of speaking, the Applicant's attempt in shifting the burden to the Respondent by alleging that the Respondent never cross-examined the Plaintiff/Applicant on his health condition cannot stand.

24. This court also notes that the Plaintiff/Applicant did not respond to the facts deponed by the Respondent that there was a similar application for injunction in the case of **Mombasa ELC No.7 of 2020** with regard to same suit. A Ruling in which the ELC Court declined the prayer for injunctive orders was annexed in the replying affidavit as "AM-2". The Applicant has not deponed any change of circumstances from 20.05.2020, the date when Ruling in the case of **ELC No.7 of 2020** was delivered. The Plaintiff/Applicant ought to demonstrate that the application was brought in good faith. His point of anchor as this court understands is the allegation that there is some disparity on the amount that was charged as interest by the Respondent which in view of this court is not a good ground for granting the orders being sought.

25. Even if this court were to exercise its discretion in favour of the Plaintiff that would be against the principle of equity which does not aid the indolent but aids the vigilant. The inevitable end result is that the court finds not plausible explanation has been offered to explain the delay in bringing the instant application to warrant the exercise of this court's jurisdiction to reinstate the suit.

26. That being the case, I need not to delve into the other issues set out for determination as stated above. In the upshot, I find no merit in the application dated, 7<sup>th</sup> July, 2020 and the same is accordingly dismissed with costs to the Defendant/Respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 7<sup>th</sup> day of October, 2020**

**D. O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their Consent. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules** which requires that all Judgments and Rulings be pronounced in open Court.

**D. O. CHEPKWONY**

**JUDGE**