



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 715 OF 2009

PRIDE PROPERTIES LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

CONSOLIDATED BANK LIMITED.....1ST DEFENDANT/RESPONDENT

GAMI PROPERTIES LIMITED.....2ND DEFENDANT /RESPONDENT

RULING

1. This ruling is in respect to the application dated 15th November 2019 wherein the plaintiff seeks orders that the suo moto orders dismissing the plaintiffs suit for want of prosecution during the service week be reviewed and vacated.

2. The application is supported by the affidavit of **Charles B.G. Ouma** advocate and is premised on the grounds that: -

1. That there is an error apparent on the face of the record.

2. That there are sufficient reasons for the review of the order of 11th September 2019.

3. That the suo moto dismissal of the plaintiff's suit was done when the case was being actively prosecuted and in fact was listed for further directions before Justice Okong'o as ELC 715 of 2009 on 12th November 2019.

4. That on the 12th November 2019 ELC of 2009 was fixed for hearing for the 8th December 2020 in the presence of all the parties.

5. That the notice of dismissal was not served on the plaintiff's advocate and the plaintiff's advocates did not see the online cause list for the 11th September 2019.

6. That the parties have complied with all the directions given on the 11th February 2019 and the case was ripe for hearing.

7. That the plaintiff is ready able and willing to prosecute the case expeditiously.

8. That despite the suo moto order of dismissal, the 2nd defendants' counterclaim is still live and directions was given on the same on the 12th of November 2019 when the matter came up for the hearing in the Environment and Land Court.

9. That it is in the interest of justice to reinstate the plaintiff's suit.

3. The respondents opposed the application through the replying affidavit of the 2nd respondents Director, **Mr. Bharat Ramji**, who avers that the applicant has not demonstrated any viable reasons to warrant the review of the orders of 11th September 2019. He states that the plaintiff had not prosecuted the case for almost 2 years prior to its dismissal for want of prosecution.

4. He further states that this court lacks jurisdiction to hear this suit under current constitutional dispensation as it relates to land and that the applicant has filed a Further Amended Plaintiff in the ELC Case No. 715 of 2009.

5. Parties canvassed the application by way of written submissions which I have considered.

6. The main issue for determination is whether the plaintiff's suit, having been dismissed suo moto on 11th September 2019, should be reinstated. Order 17 Rule 2 of the Civil Procedure Rules stipulates as follows: -

"[Order 17, rule 2] Notice to show cause why suit should not be dismissed. 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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."

7. The principles governing dismissal of suits for want of prosecution were discussed in *Argan Wekesa Okumu v Dima College Ltd & 2 Others* [2015] eKLR as follows:

"the principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay in inexcusable and that the defendant is likely to be prejudiced by such delay. Further to this, the decision of whether or not to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

8. In the present case, the respondents did not contest the applicant's claim that it was not served with the any notice prior to the dismissal of the suit for want of prosecution.

9. It was further not disputed that the instant suit was transferred to the Environment and Land Court in ELC Case No. 715 of 2009 and that upon such transfer, a skeleton file was prepared and retained in the High Court (Commercial Division) for record keeping purposes.

10. According to the applicant, dismissing the suit preserved in the skeleton form defeats the purpose of generating skeleton file as provided for under Clauses 2.3.10 and 3.1.5(c) of the High Court Registry Operation Manual (1st Division).

11. Having regard to the above uncontested facts, I am convinced that the dismissal of the suit herein for want of prosecution was done without the knowledge that the main file had been transferred to the Environment and Land Court and that all that was retained in the Commercial Division was a skeleton file.

12. I am persuaded that the applicant has made out a case for the granting of the orders sought in the application dated 15th November 2019.

13. Consequently, I allow the instant application with no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 15th day of October 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Olao for Omoiti for plaintiff/applicant.

No appearance for defendant.

Court Assistant: Silvia