



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 241 OF 2016

ANDREW GIKUNI MUCHAIPLAINTIFF/RESPONDENT

VERSUS

CHASE BANK (KENYA) LIMITED1ST DEFENDANT/APPLICANT

KENYA DEPOSIT INSURANCE CORPORATION.....2ND DEFENDANT/APPLICANT

RULING

1. This ruling relates to a notice of motion Application dated 15th April 2019, brought under the provisions of; Section 1A & B of the Civil Procedure Act and Order 17 Rule 3 and 51 Rule 1 of the Civil Procedure Rules 2010, and all enabling provisions of the law.

2.The Applicants are seeking for orders that the suit be dismissed for want of prosecution and the costs of the application and the entire suit be borne by Respondent. The application is premised on the grounds on the face of it and an affidavit sworn by Edith Wambui, an Advocate of the High court of Kenya practicing as such in the firm of Oundo Muriuki& Company Advocates, which has conduct of this suit on behalf of the Applicants.

3. The Applicants aver that, in the month of January 2016, the Respondent instituted this suit concurrently with an application seeking for a temporary injunction to restrain them from disposing, selling, auctioning their property or properties; L.R. No. Dagoreti/Kinoo/4236/6, Massionette Number 6, on Land Title Number Dagoreti/Kinoo/4236, Liberty Gardens. (herein “the suit property”).

4. Subsequently, the Applicants filed a Preliminary objection seeking for orders that the suit and the Application filed be struck out for want of Court’s leave. The preliminary objection was heard alongside the Respondent application for injunction order and the Court delivered its ruling on 20th December 2016, dismissing the Respondent’s application. However the suit was not struck out.

5. The Applicants aver from the date of the ruling, the Respondent has not taken any step to set down the matter for hearing or prosecute it. That as there is no justifiable ground for the failure to prosecute the suit and/or the neglect in setting down the suit for hearing and the period of two years and four months having lapsed, since the last step taken, it is only fair and just that the suit be dismissed as prayed, as its continuance is causing the Applicants great prejudice.

6. The Application was fixed for hearing on 4th July 2019, but the Respondent did not appear in Court on the said date. However, the court noted that, the date had been taken ex parte and sought to know whether the Respondent had been served. It was informed that, the Respondent were served on 3rd May 2019, with Application and a hearing notice for the hearing thereof on 4th July 2019. That the Respondent accepted service by stamping, and signing on the principal copy of the document served. I noted from the filed in Court, copies thereof (annexed to the affidavit of service sworn by Catherine Maria Muvula), a stamp of receipt of the firm of; Ngwaya, Ngigi & Company Advocates.

7. I have therefore considered the Application as unopposed but on merit and I find that, the suit herein was filed in Court on 27th June 2016 vide a Plaint of the same date. It was filed alongside a notice of motion application referred to herein of the same date. The Applicants were served on the same date with the Plaint, the Verifying affidavit, list of witnesses and a bundle of documents. The Summons was extracted on 3rd August 2016 and the Applicants entered appearance on 14th November 2016. The Preliminary objection referred to herein, was filed in Court on 27th July 2016. The Respondent filed a Replying affidavit on 30th of August 2016 and the ruling delivered on 20th December 2016, wherein the Respondent’s Application was found to be incompetent and struck out.

8. However on 25th January 2017, the Respondent filed a notice of motion Application of the same date, seeking for leave to commence and continue the suit against the Applicants and an injunction order to restrain them from disposing off the suit property. The Application was

heard ex parte and the Court ordered that it be served for directions on 31st January 2017. The parties appeared before the Court on that date and directions on the disposal of thereof were given and the matter stood over to 14th March 2017. On that date, the parties entered a consent whereby prayer (ii) of the Application was allowed.

9. However on 20th March 2017, the Plaintiff filed another notice of motion Application dated 15th March 2017, seeking for orders to similarly restrain the Applicants from disposing of the suit property pending hearing and determination of the suit. The Application was heard ex parte in the first instant and fixed for hearing on 24th March 2017. On that date, the parties took directions on the hearing of the application and the matter was stood over to 28th March 2017 for confirmation of compliance.

10. On that date, the parties entered into a consent to the effect that, the auction that was scheduled to take place on the 29th March 2017, to be stopped on condition that the Respondent would pay the arrears of Kenya shillings eight million two hundred thousand (Kshs. 8.2 million) within ninety days (90) of the date of the order, failure of which the Applicant Bank would be at liberty to continue with the sale. The matter was stood over to 30th June 2017.

11. On that date, the court was informed that the Respondent had not complied with the order requiring him to pay the Kenya shillings eight million two hundred thousand (Kshs. 8.2 million) and even then, the Respondent did not appear in court on that date. The Applicants then applied that the suit be stood over generally. However the Court observed that as the Respondent was absent; the file should go back to the registry and await the next action. The matter remained dormant from then until this subject application was filed on 24th April 2019. As aforesaid, though served, the Respondent did not defend and/or oppose it.

12. Based on the above facts, it is clear that, this suit has been in Court for a period of three (3) years eight (8) days, since its institution on 27th June 2016 and two (2) years and four (4) months, since the last appearance by the Respondent.

13. The provisions of Order 17 rule 2(3) of the Civil Procedure Rules, clearly stipulates that, any party to a suit may apply for its dismissal where no application has been made or step taken by either party for a period of one year. As stated above, this suit has been inactive for a period of over one year. Therefore, it is ripe for dismissal under the provisions of order 17 Rule 2(3) of the Rules.

14. I therefore allow the application as prayed and order that the suit be and is hereby dismissed with costs and the costs of this Application to the Applicants.

Dated, delivered and signed in an open court this 16th day of June 2019.

G.L. NZIOKA

JUDGE

In the presence of:

No appearance for the plaintiff/Respondent

No appearance for the defendant/Applicant

Dennis.....Court Assistant