



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 416 OF 2006

GEOFFREY MACHARIA MURAYA.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY (K) LIMITED.....DEFENDANT

RULING

1. The Plaintiff in this matter was filed on 28th July 2006. The Plaintiff filed an interlocutory application, simultaneously with the Plaintiff where he sought for an injunction. The application was heard and a Ruling delivered on 23rd May 2008.

2. This suit was dismissed for want of prosecution on 20th September 2018. The Plaintiff by Notice of Motion application dated 15th January 2019 prays for the reinstatement of this suit. The application is based on the grounds that the Plaintiff's Advocate has been unable to trace the Court file; and that the Plaintiff's Advocate was not served with Notice to Show Cause before this suit was dismissed for want of prosecution.

3. The application is opposed by the Defendant on the ground that the Plaintiff's Advocate was served with Notice to Show Cause; and that the Plaintiff had failed to explain why after 12 years the suit had not been prosecuted.

ANALYSIS

4. I will begin to consider the application on the premise that the Plaintiff is now showing cause why his suit should be reinstated. The principles to guide me are similar to those which guide the Court considering an application to dismiss a suit for want of prosecution. I will be guided by the case **AZHAR MOHAMMED SHEIKH & 8 OTHERS V VELJI WARSHI SHAH AND ANOTHER (2017) eKLR** thus:

*"Thus I would endorse the expressions of Visram, J. (as he then was) in **Agip (Kenya) Limited-v-Highlands Tyres Limited [2001] KLR 630**, that:*

"Where a reason for the delay is offered, the Court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The Court must also consider whether the Defendant has been prejudiced by the delay."

5. What has been offered by the Plaintiff as a reason for delay in prosecution of this case from 2008 to date?

6. The Plaintiff through the affidavit dated 26th March 2019 deponed that his Advocate, the firm of Soita and Saende, were unable to fix this case for hearing on 4th August 2014 because the Court diary was closed. That there after his Advocate experienced difficulty in tracing the Court file. In this regard the Plaintiff relied on the Defendant's Advocate letter which letter was making inquiry from the Plaintiff's Advocate on the status of the file. The other two letters relied upon by the Plaintiff marked as GMM-4 and -5 do not prove that the Court file was missing as submitted by the Plaintiff.

7. This is my finding in my perusal of the Court file. The ruling on the Plaintiff's interlocutory application was delivered on 23rd May 2008. The firm of Soita & Saende Advocates, for the Plaintiff, thereafter attended Court on 21st November, 14th December 2011 when directions were given for parties to comply with pretrial process. The Advocate also appeared on 31st January 2012. There after the Plaintiff's Advocate failed to attend Court on 16th May 2013, 9th December 2013 and finally on 16th June 2015. The Plaintiff has patently failed to explain failure to prosecute his case during that period and upto 20th September 2018 when this suit was dismissed for want of prosecution. There is my view a possible reason why the Plaintiff capitulated in prosecution of this case. My inclination is that the Plaintiff having obtained an injunction restraining the Defendant, a financial institution, from realizing its security, the property of the Plaintiff, the Plaintiff

was reluctant to proceed with this case. There seems to be no other plausible explanation for the Plaintiff dragging its feet on the conclusion of this case.

8. The Plaintiff has stated in seeking reinstatement of this case that its case is merited and should proceed for trial. I would respond by saying justice is for both the Plaintiff and the Defendant. See the case **IVITA V KYUMBU [1975] eKLR** thus:

“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.”

9. It does seem possibly that the Plaintiff may have not been served with a Notice to Show Cause before the suit was dismissed for want of prosecution but given the opportunity to show cause, by this present application, why from January 2012 to September 2018 the Plaintiff’s Advocate failed to attend Court and why he failed to prosecute this case I find that there is no basis for setting aside the dismissal of the suit.

CONCLUSION

10. The Notice of Motion dated 15th January 2019, for the reasons set aside, is dismissed with costs to the Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 4TH day of OCTOBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....**COURT ASSISTANT**

.....**FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**