



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

HCCC. NO 237 OF 2012

JANE WANJA MIRITI T/A SHARLIMON FOODS.....PLAINTIFF/ APPLICANT

VERSUS

BANK OF AFRICA KENYA LIMITEDDEFENDANT/ RESPONDENT

RULING

1. This ruling relates to an application dated 29th January 2018, brought under the provisions of; Order 10 Rule 11, Order 22 Rule 22 (1) and Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act and all other enabling provisions of the law.
2. The Applicant is seeking for orders that, the Honourable Court be pleased to set aside and vacate the ruling delivered by the court, on 28th April 2016 and the costs of the application be in the cause. The application is supported by an affidavit of the even date sworn by the Applicant.
3. The Applicant avers at the time the application for dismissal of the suit was heard and determined, she was depressed owing to the sale of her family home on; 4th July 2015 and was constantly seeking psychiatric help and counselling, therefore she was unable to instruct her advocates M/S Mohammed Madhani & Co. Advocates on record regarding the matter, and the Advocate, abandoned ship and applied leave to cease acting for her in this matter.
4. However, the application was opposed by the Respondent by filing, grounds of opposition stating: -
 - a. That this honourable court lacks jurisdiction to entertain this application as it is functus officio having delivered its ruling on 28th April 2016. As a consequence the orders sought in the application cannot issue;
 - b. That the application was a mere afterthought and has been brought with inordinate delay as the Applicant's suit was dismissed in April 2016. A period of over 18 months has lapsed since the Applicant's suit was dismissed;
 - c. That the grounds proffered in support of the application are not sufficient to entitle the Applicant to the orders sought;
 - d. That the Respondent stands to suffer prejudice if the suit is reinstated as litigation must come to an end;
 - e. That the application is without merit and should be dismissed with costs to the Respondent.
5. The factual background of this matter, are that, the Plaintiff filed this suit, vide a plaint dated 20th April, 2012, seeking for orders that;
 - a. A prohibitory injunction restraining the defendant whether by itself, its agents and/or servants from interfering with the plaintiff's quiet possession of her property known as L.R No. 3734/1101 or in any other manner whatsoever taking possession of, encroaching, advertising for sale, selling, alienating or dealing with the plaintiff's said property;
 - b. A prohibitory injunction restraining the defendant whether by itself, its agents and/or servants from listing the plaintiff as a defaulter with any credit reference bureau
 - c. A declaration that the non-contractual interest rate of 34% charged on the plaintiff's financial facilities is usurious, unlawful,

illegal, null and void;

- c. The taking of accounts between the plaintiff and the defendant to establish the exact amount due and owing from the plaintiff to the defendant;
- d. The costs of the suit together with interest therein at court rates from the date of filing to the suit until payment in full;
- e. General damages;
- f. Such other and further relief as the Honourable court may deem just and fit to grant.

6. The plaint was filed alongside a notice of motion application of the same date, seeking for restraining orders as aforesaid, save on temporary basis. Upon hearing the application, the court issued a temporary order of injunction on 23rd April 2012, restraining the sale of the property. The application was heard inter parties and a ruling delivered on 7th March, 2013, whereupon the Applicant was granted an injunction restraining the sale of the property until the Defendant serves a valid statutory notice in accordance with the law.

7. However, on the 31st July 2015, the Defendant filed a notice of motion application dated 29th July, 2015, seeking for dismissal of the suit for want of prosecution and costs of the application. The same was heard and a ruling delivered on 28th April 2016, whereby the suit was dismissed as prayed. On 30th January, 2018, the Plaintiff filed the subject application seeking for orders as aforesaid. Upon service of the application, the Defendant filed

8. The application was disposed by filing of submissions. The Applicant submitted that, the court has the jurisdiction to set aside the subject orders and revive the suit. That, the issue of; jurisdiction is very paramount in any litigation. Reliance was on the case of; Owners of the Motor Vessel "Lillian S" n Caltex Oil (Kenya) Limited (1989) KLR 1.

9. That, the dismissing a suit is not a final order, as stated in the case of; Peter Ngome v Plantex Company Limited (1983) eKLR.

10. That although she concedes that there was inordinate delay, but she has deposed to the reasons thereof. The court has discretionary powers to set aside a ruling or judgement, as stated in the case of; Shanzu Investment Limited v the Commissioner of Lands, Civil Appeal No. 100 of (1993) as quoted in; Rose Wanjiku Kamau v Tabitha N. Kamau & 3 Others (2014) eKLR.

11. That, there is a substantive risk to fair trial which she stands to suffer, reliance was placed on the case of; Mwangi S. Kaimenyi v Attorney General & another (2014) eKLR. The Respondent will not suffer any serious prejudice.

12. However, the Respondent submitted that, the court is *functus officio* and therefore it lacks jurisdiction to entertain the application. Reliance was put in the case of; Wangechi Kabiri & Another v Charled Ngirigacha Kabiri & Another (2006) eKLR. That, where there is inordinate delay, by the Applicant in pursuit of the case, she should not benefit from the orders sought, as held in the case of; Fran Investments Ltd v G4S Security Services Limited (2015) eKLR and James Kiplimo Rotich v Taprandich Chumo (2017) eKLR.

13. That to grant orders sought would amount to exposing the Respondent to expending additional time, limited resources and costs in defending the suit. The subject matter has been disposed of and therefore overtaken by events, which will ultimately lead to the wasting of judicial time, in litigating over a subject matter which is no longer in existence.

14. I have considered the arguments advanced and I find that, the only main issue to consider is; whether the Applicant has advanced sufficient reasons for revival of the suit. In that regard, it suffices to note that, the suit herein was filed alongside a notice of motion dated 20th April 2012 and the Plaintiff was, in that subject application seeking for orders that:

- a. That the Honourable Court be pleased to grant a temporary injunction restraining the defendant whether by itself, its agents and/or servants from interfering with the plaintiff's quiet possession of her property known as L.R No. 3734/1101 or in any other manner whatsoever taking possession of, encroaching, advertising for sale, selling, alienating or dealing with the plaintiff's said property and/or listing the plaintiff as a defaulter with any credit reference bureau pending the hearing and determination of this application.
- b. That the Honourable Court be pleased to grant a temporary injunction restraining the Defendant whether by itself, its agents and/or servants from interfering with the Plaintiff's quiet possession of her property known as L.R No. 3734/1101 or in any other manner whatsoever taking possession of, encroaching, advertising for sale, selling, alienating or dealing with the Plaintiff's said property and/or listing the Plaintiff as a defaulter with any credit reference bureau pending the hearing and determination of this suit.
- c. That the cost of this application be borne by the defendant.

15. She was granted an injunction order which she enjoyed from 23rd April, 2012 until on 28th April 2016, a period of; four (4) years. It also took her from then to 30th January 2018 to file this application, which a period of approximately two (2) years. That is by all standard inordinate delay.

16. Be that as it were, the Applicant has relied on the provisions of; Order 10 Rule 11, and Order 22 Rule 22 (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The provisions of; Order 10, Rule 11 states;

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or

order upon such terms as are just.”

The provisions of; Order 22, Rule 22 (1), stipulates that,

“(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”

17. I have considered these provisions; however, it is note that, the paramount provisions are established under Article 48 and 50 of the Constitution whereby every person must be allowed access to justice and a right to be heard. In the same vein though, Article 159 (2), (b), whereby it stipulates that, justices shall not be delayed.

18. The court has the discretion to set aside the order dismissing the suit with costs, but in the case of; Mbogo & Another Vs Shah EALR 1908, it was held that,

“The court’s discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vain, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.”

19. Further, the discretion must be exercised fairly and judicially, based on sufficient and reasonable cause and not on mere allegations. The reasons for the reinstatement of the suit should be well set out, a mere request for the reinstatement is not enough, as stated in in the case of; Simon Wachira Nyaga v Patricia Wamwirwa (2018) eKLR.

20. In exercise of discretion the court will consider inter alia; the importance of the claim or subject matter to the parties, the rights of the parties, the nature of the case and the legal capacity of parties among others, as stated in the case of; Mwangi S. Kimenyi v Attorney General & another (2014) eKLR and in the case of; Allen V Alfred Mcalphine, Birket V James And Agip (Kenya) Ltd.

21. The law is now settled therefore that, to set and or vary an order dismissing a suit, the court should consider; whether the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both. The court may in its discretion dismiss the action straight away. However, prolonged delay alone should not prevent the court from doing justice to all the parties; the plaintiff or Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

22. As such, invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

- a. whether the delay has been intentional and contumelious;
- b. whether the delay or the conduct of the plaintiff amounts to an abuse of the court;
- c. whether the delay is inordinate and inexcusable;
- d. whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and
- e. what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.

23. In the instant matter, it is noteworthy that, the suit property has already been disposed of. Further, the application dismissing the suit was heard with the knowledge of the Applicant’s counsels on record. The Applicant had an opportunity to be heard but squandered it. The Applicant did not furnish the court with any medical reports to show that, she was under depression during the period, or at the time the application was dismissed or before, as she alleges. Thus, there is no medical report or document for the period of the year, 2016 when the suit was dismissed. The available medical report was prepared on, 15th January 2018, just before the filing of the application. This is not sufficient evidence that she was depressed and was visiting the doctors, as alleged.

24. It is also noteworthy that, the period taken to move the court on the same matter from 28th April 2016 to 29th January 2018, is over one year and six months. In law, “equity aids the vigilant and not the indolent”. The subject matter to be preserved having been disposed of and taking into account the prayers in the plaint reinstatement of the suit will serve no purpose.

25. The upshot thereof is that, I find there has been unexplained inordinate delay in filing the application and the explanation offered is not supported by evidence. The application is dismissed with costs to the Respondent.

26. It is so ordered

Dated, delivered and signed in an open court on this 3rd day of October, 2019.

GRACE L NZIOKA

JUDGE

In the presence of;

Mr Kyengo holding brief for Mr Kyalo Mbobu for the Applicant

Mr Kairu holding brief for Ms Ogula for the Respondent

Dennis----- Court Assistant