



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 2594 OF 1997

POSTBANK CREDIT LIMITED.....PLAINTIFF/APPLICANT
(IN LIQUIDATION)

VERSUS

JOHN WACIRA WAMBUGU

T/A WAMBUGU & CO. ADVOCATES.....DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 28th September 2018, brought under the provisions of; Section 1A, 1B 3 and 3A of the Civil Procedure Act, Order 51 Rule 10(2) and Order 51 Rule 15 of the Civil Procedure Rules 2010 and all other enabling provisions of law.

2. The Applicant is seeking for orders;

(a) That the dismissal order made by the Honourable court on 9th July 2018 be set aside;

(b) That costs of the application be provided for.

3. The application is premised on the grounds on the face of it and an affidavit dated 28th September 2018, sworn by Winsome Kossom the Assistant Liquidation Agent, with the Kenya Deposit Insurance Corporation (herein “KDIC”), a statutory institution established under the Kenya Deposit Insurance Act (KDIC), 2012. He deposed that, KDIC was appointed to liquidate the Applicant and protect depositor’s funds.

4. That about midday on 9th July 2018, while going through the cause list for matters that may concern any of his tasked files, he noticed this matter was coming up for hearing of a notice to show cause why the suit should not be dismissed before Honourable court. He therefore brought up the file, traced the Advocates on record’s contact number and contacted them about the matter, to find out the outcome of the dismissal hearing.

5. The Advocates were unaware of the dismissal proceedings and stated that there was no service of a notice to show cause and requested for him to peruse his office file and find out if there was a notice served upon them, as the liquidating agent of the Applicant. He confirmed there was none. Thus there is no evidence that the Applicant or its agents were served with notice to show cause in this suit. Before the order dismissing the suit was made by the Honourable court on 9th July 2018.

6. The Applicant argues that, it is just and fair that the dismissal order given in default of appearance and all consequential orders arising therefrom be set aside and the Applicant be allowed to prosecute the suit herein. The Plaintiff/Applicant has a bona fide claim for recovery of a liquidated sum of Kshs. 166,157,688.05 owed by the Defendant/Respondent. That unless the dismissal order is set aside there will be an irrecoverable loss of depositors’ funds pushing the Applicant who is currently in liquidation into further financial constraints.

7. However the application was opposed by the Defendant (herein “the Respondent”) through an affidavit dated 27th November 2018 sworn by John Wacira Wambugu on behalf of the Respondent. He averred that, the plaint herein is dated 16th October 1997 and therefore has been pending in court for the last twenty one (21) years. That on 17th February 2000, the Deputy Registrar issued a notice why the suit should not be dismissed as the Applicant had not set down the matter for hearing within three (3) years after filing of the suit.

8. He averred that on several occasions when the matter was set for hearing, the Plaintiffs sought for an adjournment and indulgence from the

Defendant on the ground that they were not prepared to proceed with the hearing as they had not obtained certain crucial documents from their client. On 28th May 2014, the court ordered the parties to comply with order 11 and paginate a bundle of documents within twenty one (21) days of the date of the order. The Plaintiff did not comply until 4th September 2014. On 9th July 2016, the suit was dismissed after the court issued the parties with a notice to show cause.

9. The Respondent argues that, the alleged sum of Kshs. 166,157,688.05, which is the subject of the claim by the Applicant, is total falsehood as it is unsupported by any evidence or statement. Even then, the Plaintiff has not given closable reasons to enable the court vacate the order dismissing the suit. That the provisions of the Civil Procedure Rules do not require that the notice to show cause be “served” but it simply that it be “given.” The word given has been construed through judicial precedence that it’s accomplished when the notice is placed in the official website of the judiciary.

10. In response to a further affidavit sworn by George Brian Akelo, on 22nd November 2018 on behalf of the Applicant, whereby he alleged at paragraph (15) that the file had been missing from the court registry, the Respondent submitted that, that allegation has no basis and is meant to mislead the court in the absence of any evidence or official communication to show any efforts or an attempt to trace the file.

11. It was argued that, failure to prosecute the suit for a long time, has caused the Respondent immense, anxiety over time which is against the dictates of justice. That the Plaintiff’s failure to prosecute the suit is an exhibition of indolence inexcusable and the entire application is an afterthought and neither does the suit raise any triable issues.

12. As aforesaid, the application was supported by further affidavit sworn by George Brian Akelo the Advocate of the High court who has conduct of this matter. He deposed that this file has a chequered history of interference and disappearance from the registry resulting in an order that it be kept in the strong room in the year 2007.

13. That despite the file being kept in the strong room, still it could not be traced whereupon on 29th October 2010 the court gave an order that it be reconstructed, but it resurfaced and the matter fixed for mention on 25th March 2012. During all this while, the Plaintiff brought several letters to the Deputy Registrar over the missing file. Eventually on 28th May 2014, the court made an order that the parties comply with order 11 of the Civil Procedure Rules. That before the suit was dismissed, the Plaintiff had not been served with the notice to show cause.

14. The application was disposed of through submissions filed by the parties. The Applicant submitted that, the court should uphold the principle of *audi alteram partem*. That no person should be charged without a fair hearing as supported by Article 50 of the Constitution of Kenya 2010 which stipulates that, every person has a right to have any dispute that can be resolved by application of law in a fair and public hearing before a court independent or impartial body. Reference was made to the case of; Richard Ncharpi Leyagu vs IEBC & 2 Others. It was further submitted that, the act of dismissal of suit is harsh and draconian which should only be resorted to in the most extreme cases. That even if the court found that the Applicant had not been vigilant in prosecuting the suit, then the mistake of the Counsel should not be visited upon it. Reference was made to the case of; Belinda Murayi & 9 Others vs Amos Wainaina (1979) eKLR.

15. However, the Respondent filed their submissions and argued that, there has been inordinate delay in prosecuting the suit and reiterated that the suit has been in court for twenty one (21) years. Reference was made to the case of; Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & Another (2014) eKLR, and the case of Allen vs Alfred Mc’Alpin and Sons (1968) E.R 543 to argue that justice delayed is justice denied. Further reference was made to Article 159(2)(b) of the Constitution that stressed the point that justice shall not be delayed.

16. The Respondent reiterated that under Order 17 Rule of the Civil Procedure Rules, there is no requirement to serve a notice to show cause. Reference was made to the case of; Mwangi S. Kilemi vs The Honourable Attorney General and Another (2014) eKLR.

17. I have considered the application, the affidavits in support and opposition thereto, the arguments and the submissions filed. I have also considered the court record and I note that, this matter commenced herein vide a plaint dated 16th October 1997. The statement of defence was filed on 12th November 1997. A perusal of the court record does not assist the court much as the handwritten proceedings’ found on the file relate to matter HCCC 2700 of 1997. The only proceedings relevant to this matter commenced from 20th December 2011 and those proceedings relate to a notice to show cause for dismissal of the suit which was not upheld instead the parties were ordered to comply with order 11 within forty five (45) of the date of the order. There was no activity in the matter from 9th February 2012 to 17th September 2014, when the Plaintiff took a mention date a fixed the matter for further orders on 28th May 2014. The parties were further ordered to comply with order 11 of the Civil Procedure Rules within twenty one (21) days. Again no action was taken until the matter was listed for dismissal on 9th July 2018 and subsequently dismissed. On that date, the court record shows that, both parties were absent. The Plaintiff alleges that they were not served with the notice issued under order 17 Rule 2 of the Civil Procedure Rules, but a perusal of the court file reveals a notice of dismissal dated 5th July 2018 which was served on both the Plaintiff and the Defendant’s law firms and duly acknowledged.

18. In view of the denial by the Plaintiff, it will be important that the signature of the recipient of the notice on behalf of the firm of Okoth and Kiplagat Advocates be verified before any further orders can be made. In that regard, I direct that, the Honourable Deputy Registrar takes up the matter with a view of establishing whether the process server indicated on the notice duly served the notice upon the said firm.

19. The report of that investigation will be availed to the court within a period of seven (7) days from the date of this order and the matter to come for mention thereafter.

20. Those are the orders of the court.

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

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Munyeri for the Plaintiff/Respondent

Ms. Karani holding brief for Kimami for the Defendant/Applicant

Dennis -----court Assistant