



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO 547 OF 2014**

**OCHOLA KAMILI HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**GUARDIAN BANK LIMITED.....DEFENDANT**

**RULING**

1. The Applicant **GUARDIAN BANK LIMITED** through an application did dated 11/4/2018 brought to court pursuant to Order 5, Rules 1 and 2 and Order 40 Rules 6 and 7 of the Civil Procedure Rules seeking for the following orders:-

- 1) **THAT this suit be struck out for failure to serve summons to Enter Appearance and for want of prosecution.**
- 2) **THAT alternatively, the interim injunction granted on 27<sup>th</sup> November 2014 be deemed as discharged.**
- 3) **THAT costs be in the cause.**

2. The Application is based on the following grounds:-

1. **THAT the suit was filed on or about 25<sup>th</sup> November 2014 and service of the Notice of Motion effected on the Defendant on 27<sup>th</sup> November 2014.**
2. **THAT since then, the Plaintiff has not bothered to serve the Defendant with the Summons to Enter Appearance.**
3. **THAT further, an interim injunction was granted on 27<sup>th</sup> November 2014 by Lady Justice Amin with additional Orders that the parties comply with pre-trial compliance within 21 days.**
4. **THAT since then, the Plaintiff has not bothered to list the matter for hearing nor taken steps to complete pre-trial compliance.**
5. **THAT the interim Order has lapsed without the Plaintiff taking steps to prosecute the matter.**
6. **THAT the Borrower has admitted its indebtedness to the Defendant and it is only just and fair that the Defendant be allowed to recover its debt.**
7. **THAT other reasons to be adduced at the hearing and per the annexed affidavit of MARY OMULLO.**

3. The application is further supported by affidavit deposed upon by Mary Omullo, a legal officer of the defendant Bank in which it is briefly averred that on 21<sup>st</sup> March 2011, the suit property was charged by way of a third party charge to the bank to secure the facility of **Excel Logistics Limited and Guard force Security (K) Limited (the Borrower) (Exhibit MO-2)**; that the borrower did not service the loan facility and on 8<sup>th</sup> March 2011 informed the Borrower of the default and requested that the account be regularized (*Exhibit MO-3*) but account was not regularized promptly, leading to further demands (*Exhibit MO-4*); that by letter of 20<sup>th</sup> September 2011, the Borrower sought additional indulgence (*Exhibit MO-5*); that the Borrower has not cleared its indebtedness and has sought indulgence on payment (*Exhibit MO-6*); that when payment was not still received, the defendant instructed its advocates to issue the requisite statutory notices, (*copies of which are annexed and marked as Exhibit MO-7, MO-8 and MO-9*); that rather than effecting payment the plaintiff filed suit on 25<sup>th</sup> November 2014 and sought an interim injunction to restrain sale of the property (*Exhibit MO-10*).

4. It is further averred that the defendant whilst served with the Plaintiff and Notice of Motion was not served with summons to Enter Appearance, the defendant Advocate filed a notice of appointment on 8<sup>th</sup> December 2014 (*Exhibit MO-11*); that on 27<sup>th</sup> November 2014, Lady Justice Amin issued an interim injunction staying the sale of the suit property and inter alia, also ordered the parties to comply with pre-trial within 21 days thereof; it is further averred that to date the plaintiff has not bothered to serve the summons upon the defendant nor bothered to fix the matter for hearing; arguing he is advised the suit has abated and that the injunction has lapsed; that it is obvious the plaintiff having obtained interim injunctive orders is not interested in prosecuting the matter and the same ought to be dismissed for want of prosecution.

5. The Respondent/Plaintiff is opposed to the application and in doing so has filed a replying affidavit deposed upon by **KIPLANGAT CHARLES**, an Advocate acting for the plaintiff in which he has averred; that the defendant was served with summons to enter appearance on 5<sup>th</sup> August 2015 (*annexed thereto and marked KC-1*); that the defendant has not filed of defence; witness statements, list of witnesses, list and bundle of authorities; pleadings have not closed; that the plaintiff has not complied with pre-trial direction given by court on 25<sup>th</sup> November 2014 thus delaying the hearing and determination of the suit.

6. It is further averred by the plaintiff that he is ready to proceed with the hearing of this suit and prays for court to direct suit be set down for hearing and be determined on ex-parte basis, that the defendant is not interested to proceed with the suit (*exhibit KC-2*) and that the application is an abuse of the court process.

7. I have perused the application, the replying affidavit and rival submissions by both parties in support and against the application dated 11<sup>th</sup> April 2018. The issues arising thereto as I understand the application can be summarized as follows:-

**a) Whether this suit can be struck out for failure to serve summons to enter appearance and for want of prosecution?**

**b) Whether in the alternative, the interim injunction granted on 27<sup>th</sup> November 2014 can be deemed as discharged?**

**A. Whether this suit can be struck out for failure to serve summons to Enter Appearance and for want of prosecution?**

8. It is urged in the applicant's application that they were served with the plaintiff's application but not with summons to enter appearance and as such the plaintiff's suit should be struck out for failure of service of summons to enter appearance and for want of prosecution.

9. The plaintiff on the other hand contends that service was effected as per affidavit of service by Benson Mutinda on 5<sup>th</sup> August 2015 pursuant to order 5 Rule 15(1) of Civil Procedure Rules dated 10<sup>th</sup> May 2018 as per paragraph 3 of the Replying affidavit and marked *Exhibit KC-1*.

10. Order 5 Rule (1) (5) (6) of Civil Procedure provides:-

**"1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.**

**(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaintiff to be signed in accordance with sub rule (2) of this rule.**

**(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate."**

11. In the instant case summons to enter appearance were issued on 9<sup>th</sup> March 2015 and served on 5<sup>th</sup> August 2015, the date of collection of summons for service is not disclosed by the plaintiff but the process server indicated he received them for the plaintiff's counsel for service on 5<sup>th</sup> August 2015. The burden of proof that the summons to enter appearance were not collected within a month lies with the defendant, who has asserted they were not served with summons but have failed to prove that the summons were not collected within 30 days of issuance or notification for service for a suit to be declared to have abated.

12. The plaintiff through an affidavit of service annexure *marked KC-1* has proved that summons were served upon the defendants on 5<sup>th</sup> August 2015 and acknowledged receipt by stamping on the copy of summons to Enter appearance. I have perused the affidavit of service dated 10<sup>th</sup> May 2018 by Benson Mutinda, a licensed court process server, and attached copy of the summons and I am satisfied that summons to enter appearance were duly served. Further to the above, assuming that summons were not served together with a copy of the plaintiff and other documents were served, the defendant by having appeared before the trial Judge for an application for injunction two (2) times and having taken part in the proceedings and having been armed with a copy of the plaintiff, I find defendant cannot claim that it was not aware of the nature of the claim facing it and cannot further be heard to stay the suit as abated as it did not have copy of the summons served. I nevertheless find and hold summons to enter appearance were duly served as the affidavit of service drawn and filed by Benson Mutinda dated 10<sup>th</sup> May 2018 has not been challenged or controverted after the plaintiff filed their Replying affidavit.

13. I further agree with the plaintiff's submissions that there is no provision in the Civil Procedure for striking out a suit for failure to serve summons to enter appearance under order 5 Rule 6 of Civil Procedure Rules but the court can declare the suit to have abated.

14. I now turn to consider whether the plaintiff's suit can be dismissed for want of prosecution. The Defendant/Applicant urges since the suit was filed on 25<sup>th</sup> November 2014 the plaintiff has not bothered to take steps to prosecute the suit upon getting interim orders of injunction on 27<sup>th</sup> November 2014.

15. It is contended for the plaintiff that the defendant has failed to enter appearance and file defence despite service on 5<sup>th</sup> August 2015 and that it has flagrantly disobeyed the directions given by court on 3<sup>rd</sup> February 2016 by failing to file the agreed list of issues and case management check list. That the plaintiff has on his part complied with order 3 Rule 2 of Civil Procedure Rules.

16. It is further submitted that the defendant's failure to enter appearance and file a defence and in terms of order 2 Rule 13 of Civil Procedure Rules pleadings have not closed and that failure has frustrated the commence of the pre-trial conference in terms of order 11 of the Civil Procedure Rules and setting the suit down for hearing.

17. **Order 2 Rule 13** on close of the pleadings provides:-

**"The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with."**

In view of the provisions of the above order 2 Rule 13 of Civil Procedure Rules, pleadings in a suit are closed 14 days after service of the reply or defence to counterclaim, or if neither is served 14 days after service of defence. In the instant case service was done on 5<sup>th</sup> August 2015. 15 days lapsed on 20<sup>th</sup> August 2015 which meant the plaintiff should have moved court for entry of judgment which to date has not been done. It would be wrong to say the pleadings in this case has not closed simply because defence was not served. The suit closed 15 days after service of summons to enter appearance as no defence was served.

18. In the instant case, the plaintiff since filing of this suit has never taken any set to set the suit down for hearing since interim orders were granted on 27<sup>th</sup> November 2014. It is now close to 3 ½ years without any action on part of the plaintiff.

19. In the case of **Bernard Ochola Ngani & Others Vs Mathayo Ndo & 2 Others (2001)** it was held:-

**"The plaintiff ought to show sufficient and/or credible excuse if they want to resist an application for dismissal of their suit by the defendant and/or court. It is my opinion that the plaintiff must avail genuine reasons to enable the Court to exercise its discretion in their favour. It is the duty of the plaintiff and his advocate to bring the suit for trial and they cannot shift that primary burden to the defendant by saying the plaintiff has no lesser burden. Usually the burden is on their shoulders and failure to discharge that onus would be detrimental to their case."**

In case of **Nilani Vs Patel & Others [1969] EA** where it was held:-

**"It is only too trite to say that as in every civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the Court towards that end as soon as it is convenient by their applying for its dismissal or settling down the suit for hearing."**

20. It was held in the case of **Terry Wanjiru Kariuki Vs. Equity Bank Limited & Another [2012] eKLR**, it was held that:-

**"The test in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable ...justice is justice to both the plaintiff and the defendant...where the defendant satisfies the Court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the Court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed."**

21. In the instant case, the plaintiff has tried to shift the burden of proof to the defendant, whereas the law is clear that, in every civil suit, it is sole duty of the plaintiff seeking any remedy to take all necessary steps at his disposal to ensure just and expeditious disposal of his claim. He should not be guilty of laches. It is his duty to ensure he moves the court to have his case set down for hearing and exhaust all the relevant provisions of the law to his advantage. He cannot blame the delay on the defendant whose aim is primary to have the plaintiff's suit dismissed hence the defendant cannot be blamed for choosing the route of termination of the suit rather than sustaining the same. The plaintiff in this suit has failed to move court to hear his case by failing to have his suit expeditiously disposed of and by buying time after getting interim orders of injunction for close to 3 ½ years. I am satisfied the defendant has demonstrated the plaintiff suit should be dismissed for want of prosecution.

**B. Whether in the alternative, the interim injunction granted on 27<sup>th</sup> November 2014 can be deemed as discharged?**

22. **Under Order 40 Rule 6 and 7 of Civil Procedure Rules 2010** it is provided:

**"Order 40 Rule 6 - Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.**

**Order 40 Rule 7- Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."**

23. The court is alive to the fact that an interlocutory injunction, being an equitable remedy, would be discharged, upon being shown the person's conduct with respect to matter, pertinent to the suit does not meet the approval of the court which granted the orders which is the

subject matter and especially where a party upon getting the injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are mainly intended to preserve the subject matter with a view to have expeditious determination but not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was granted. No court would allow its orders to be used to defeat the ends of justice. Further by operation of the law the order obtained by the plaintiff has since lapsed as 12 months has lapsed since its issuance and no extension has been sought.

24. The upshot is that the application dated 11<sup>th</sup> April 2018 is merited and is allowed in the following terms:-

- a) **The plaintiff's suit dated 18<sup>th</sup> November 2014 be and is HEREBY dismissed for want of prosecution.**
- b) **The interim orders granted on 27<sup>th</sup> November 2014 be and are HEREBY discharged.**
- c) **Costs to the defendant.**

**Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of October, 2018.**

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**J .A. MAKAU**

**JUDGE**