



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 89B OF 2015

TOM OTIENO.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT

RULING

1. On 23rd November, 2017 the plaintiff/applicant filed an application under the provisions of Order 40 rule 10(1)(a) of the Civil Procedure Rules, Section 63(e) of the Civil Procedure Act and Section 68 of the Land Registration Act (No. 3 of 2012), seeking the following orders:-

(i) Spent;

(ii) That proceedings and orders of this court made on 7th day of September, 2016 be set aside and the plaintiff be granted an opportunity to testify in this case;

(iii) That the costs of this application be provided for.

2. The application is supported by the affidavit of the applicant Tom Otieno Omboya sworn on 23rd November, 2017. The defendant/respondent through its Advocate filed a replying affidavit that was sworn on 8th February, 2018, to oppose the application.

3. Mr. Atancha, Learned Counsel for the applicant submitted that the case herein was dismissed on 7th September, 2016 for want of prosecution when the applicant failed to attend court after being admitted to Homabay County Referral Hospital. Counsel referred to the letter dated 3rd September, 2016 which shows that the applicant was admitted to the said hospital. The applicant also attached other documents to his affidavit to show his medical history.

4. Counsel therefore prayed for the order of 7th September, 2016 to be set aside and for the case to be listed for hearing. He submitted that if the case is not heard, the plaintiff stands to lose his home in Mombasa. Mr. Atancha further stated that the applicant was willing to pay costs to the respondent for the day he failed to attend court.

5. Mr. Wafula, Learned Counsel for the respondent opposed the application by stating that it was an abuse of the court process. He submitted that the applicant was given a fair chance to prosecute the case but on 7th September, 2016, the applicant's Counsel made an application for adjournment on the basis that his client was unwell but no document was availed to support the said position. Counsel for the respondent indicated that was the third time the applicant's Counsel had applied for an adjournment on behalf of his client.

6. It was submitted that after the case was dismissed on 7th September, 2016, the present application was filed on 23rd November, 2017, which was 14 months later, but no explanation was given for the delay in filing the said application.

7. Mr. Wafula argued that the letter dated 11th July, 2016 attached to the applicant's affidavit was not relevant to this matter as it did not state when the plaintiff was admitted to hospital.

8. With regard to the letter dated 3rd September, 2016, it was submitted that it indicates that the plaintiff was admitted to hospital on 8th September, 2016. Counsel questioned the authenticity of the signatures on the two letters which appear different, yet the signatory is alleged to be the same. He prayed for the application to be dismissed.

ANALYSIS AND DETERMINATION

The issue for determination is if the suit herein should be reinstated

9. The suit herein was filed on 27th April, 2011. That is 7 years ago. The applicant was granted an interim injunction on 19th April, 2012 pending the hearing and determination of this case.

10. The case was listed for hearing on 6th June, 2016 but on the said date, Mr. Atancha informed this court that his client was admitted to Homabay Referral Hospital. The court adjourned the case.

11. On 11th July, 2016 when the matter came up for hearing, Mr. Atancha informed the court that the applicant had been taken ill. He handed to the court a letter to that effect. On the said date the court granted the plaintiff the last adjournment and fixed the case for hearing on 7th September, 2016.

12. On the said date Mr. Atancha stated that the applicant was admitted to Homabay County Referral Hospital. He however presented no document to the court to prove the claim made. The court therefore declined to adjourn the case and proceeded to dismiss it under the provisions of Order 12 rule 3(1) of the Civil Procedure Rules.

13. There is nothing new that is captured in the affidavit of the applicant regarding his absence from court on 7th September, 2016. In this new era of technological advancement, nothing stopped the applicant from sending a copy of his medical notes or a letter from Homabay County Referral Hospital to his Advocate through email, WhatsApp, or any other technological platform to prove that he was admitted to the said hospital on the day the case came up for hearing.

14. The medical notes attached to the applicant's affidavit and marked as exhibit T-1 indicate that the applicant was admitted to hospital on **9th September, 2016** which was two days after **7th September, 2016**, when the case was scheduled for hearing. The letter dated **3rd September, 2016** indicates that as at the time that it was written, the applicant was admitted to hospital. The foregoing information therefore contradicts the contents of the medical notes marked as annexure T-1 which give the date of admission to Homabay County Referral Hospital as **9th September, 2016** with a discharge date of **16th September, 2016**. This court places heavier weight on the medical notes as they are the ones which inform the contents of a medical report. I am therefore convinced that as at the time this case came up for hearing on **7th September, 2016**, the applicant was not hospitalized.

15. When an applicant tries to appeal to the discretionary powers of the court but relies on documents with conflicting information, his request cannot be resolved in his favour. I am therefore not convinced that the applicant is being candid, based on the documentation he has relied on and I am of the view that the present application is an abuse of the court process. The definition of abuse of court process was given in **Beinosi v Wyley 1973 (SA 721 [SCA]** at page 734F-G) and adopted by the court in **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR**, as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of ‘abuse of process.’ It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.” (emphasis added).

16. It is clear that the applicant stalled the progress of this case as he has been enjoying injunctive orders since 19th April, 2012 which were supposed to last until the hearing and determination of the case.

17. I thereof decline to exercise my discretion in the applicant's favour. The application is hereby dismissed. Costs are awarded to the respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of October, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Atancha for the plaintiff/applicant

Mr. Wafula Advocate for defendant/respondent

Mr. Oliver Musundi - Court Assistant