



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 352 OF 2009

PURBAI GOPAL RAMJI PATEL.....PLAINTIFF

- VERSUS -

ASSET RECOVERY COMPANY LTED.....1ST DEFENDANT

JOSEPH MUNGAI GIKONYO T/A

GARAM INVESTMENTS.....2ND DEFENDANT

RULING

1. The plaintiff's application dated 14th March 2016 seeks the reinstatement of the suit.
2. It is common ground that the suit was dismissed by Kimondo J. on 29th February 2012.
3. A perusal of the court records shows that on the material date, none of the parties attended court.
4. The learned Judge dismissed the suit because no cause had been shown, presumably as to why the suit should not be dismissed.
5. The plaintiff explained that she had never been served with any Notice requiring her to show cause.
6. The defendants have not challenged that fact, and I therefore find that the plaintiff had never been served with a Notice requiring her to show cause why the suit should not be dismissed.
7. In the light of the fact that the plaintiff was seeking the reinstatement of the suit almost 4 years after it had been dismissed, the defendants submitted that there had been an un-explained long delay before the plaintiff sought the reinstatement of the suit.
8. It cannot be denied that a 4 year period of inaction, of itself, constitutes a long period. Therefore, if such a long period of inaction is not explained satisfactorily, the court would not be inclined to exercise its discretion in favour of the party seeking the setting aside of an order of dismissal of a suit.
9. The plaintiff explained that during the period of 4 years, she had filed an application in the Court of Appeal, seeking an injunction pending the hearing and determination of her appeal.
10. The plaintiff also explained that the Court of Appeal had granted an injunction to restrain the

defendants from realizing the security, until the appeal was determined.

11. Meanwhile, the defendants pointed out that although the Court of Appeal had granted the injunction order, there had been no order for stay of proceedings. In that respect, the defendants are right, as the Court of Appeal did not stay the proceedings before the High Court.

12. The defendants concede that the Court of Appeal delivered its judgement on 29th January 2016.

13. By its Judgement, the Court of Appeal held that the decision of the High Court, in which it had dismissed the plaintiff's application for an injunction, was erroneous.

14. According to the defendant, the Court of Appeal had already made a determination on the only issue between the parties. The court had held that the 1st defendant cannot exercise the Statutory Powers of Sale since the Legal Charge under which the 1st defendant had issued a statutory notice of sale, had not been issued to the said 1st defendant.

15. The chargee is **CITY FINANCE LIMITED**.

16. The said chargee had assigned to the 1st defendant, **ASSET RECOVERY COMPANY LIMITED**, the debts allegedly owed by **RAMJI PATEL (Deceased)**.

17. The plaintiff was the personal Representative of the Estate of the late **RAMJI PATEL**.

18. Although the chargee had assigned the debt to the 1st defendant, the Court of Appeal held that the failure to assign the Legal Charge to the 1st defendant, implied that the 1st defendant did not have the statutory power of the sale.

19. In the light of that determination, the defendants submitted that the reinstatement of the suit would serve no useful purpose.

20. Having given due consideration to the submissions by both sides, I find that the plaintiff has provided sufficient explanation about the action which she had been taking in connection with this suit. She was not inactive. She did not fall asleep.

21. She successfully prosecuted an application before the Court of Appeal, for an interlocutory injunction pending the hearing of her appeal.

22. Thereafter, the plaintiff also successfully prosecuted her appeal.

23. I hold the considered view that the steps taken by the plaintiff actually helped to secure the subject matter of the suit. If the said subject matter had not been conserved, the prosecution of the suit at the High Court may well have been nothing more than an academic exercise.

24. I also find that the determination by the Court of Appeal gives this court every reason for the revival of the suit which had been dismissed whilst the plaintiff was still pursuing her rights at the Court of Appeal. I so find because if the suit remains dismissed, the plaintiff would be unable to prosecute her case, which the Court of Appeal appears to suggest, has a probability of success.

25. In my considered opinion, the decision by the Court of Appeal provides this court with an important reason, for the reinstatement of the case.

26. Accordingly, I now set aside the order made on 29th February 2012, and order that the suit be reinstated forthwith.

27. However, the costs of the application dated 14th February 2016 shall be in the cause. I so order because although the application was successful, there is no justification for loading the costs onto the defendants as they played no role in the earlier dismissal of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of January 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Mureithi for Imanyara for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

Collins Odhiambo – Court clerk.