



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 494 OF 2013

FLORENCE NJERI KARANJA.....PLAINTIFF

VERSUS

MOLYN CREDIT LIMITED.....1ST DEFENDANT

PETER NGOTHO.....2ND DEFENDANT

RULING

1. The Notice of Motion dated **28 January 2016** was filed by the 1st Defendant/Applicant, for orders that the court be pleased to dismiss this suit with costs for want of prosecution; or in the alternative, the interim orders granted on **4 December 2014** be discharged as they have been in force for more than one year. It was also sought that the costs of the application be provided for. The application was filed under **Order 17 Rule 2(3) of the Civil Procedure Rules, 2010**, and is predicated on the following grounds:

- a) That the matter was last in Court on **4 December 2014** when a ruling was given on the Plaintiff's Notice of Motion application for interim orders.
- b) That for a period exceeding one year now, the Plaintiff has neither made any step towards the prosecution of the suit nor set it for pre-trial.
- c) That the Plaintiff has apparently lost interest in the suit.
- d) That the continued pendency of this suit when no active steps are being taken to prosecute it is prejudicial to the 1st Defendant as the Plaintiff continues to enjoy interim orders to its detriment.
- e) That since the temporary injunction was issued on **4 December 2014**, the Plaintiff has never made any payments to settle the loans and has since declined to settle the loan arrears.
- f) That the suit herein is now an abuse of the Court process.

2. The Application is supported by the affidavit of **Moses Anyangu** sworn on **28 January 2016** in which the foregoing grounds were explicated. It was thus reiterated that a period exceeding one year has elapsed since the matter was last in Court, and that the continued pendency of this suit is prejudicial to the 1st

Defendant who continues to suffer the anxiety of defending the suit at the risk of losing potential witnesses and evidence due to lapse of time; hence the prayer for the dismissal of this suit with costs for want of prosecution.

3. In response to the application, the Plaintiff relied on her Replying Affidavit sworn on **26 February 2016** in which she deposed that this suit was filed along with a Notice of Motion under certificate of urgency for interim orders to restrain the Defendants from selling or otherwise disposing of **LR No. Githunguri/Nyaga/T.437** pending the hearing and determination of the application *inter partes*. It was further the contention of the Plaintiff that while the application was pending *inter partes* hearing, there was an attempt to settle the matter amicably; and that it was only when the parties failed to agree that the Notice of Motion was argued and a ruling delivered on **4 December 2014**, granting her the prayers sought. She thereafter continued with the negotiations until **20 November 2015** when it became plain that settlement was unlikely.

4. She further averred that her advocate thereafter advised in favour of the amendment of the Plaint to include the 2nd Defendant, which amendment was accordingly effected, granted that the Defendants were yet to file their responses to the Plaint. According to her, the pleadings had not closed by the time she filed her Amended Plaint. She therefore contended that the instant application is an attempt to prevent her from having her case heard and determined on the merits, adding that she has so far paid a total of **Kshs. 1,367,237** to the 1st Defendant and would suffer irreparable loss were the suit to be dismissed as is proposed by the 1st Defendant. It was therefore the Plaintiff's prayer that the instant application be dismissed with costs.

5. The court record does show that when this suit was filed, the Plaintiff contemporaneously asked for an interim order of injunction to restrain the 1st Defendant from proceeding with a scheduled sale of the suit property. Thus, upon due service of the application, the Court granted a status quo order on **13 November 2013**. It was a condition of the order that the application be fixed for *inter partes* hearing within 10 days failing which the temporary injunctive orders would automatically lapse. It is manifest therefore that to the extent that the aforementioned condition was not complied with by **23 November 2013**, the temporary order of injunction automatically lapsed. In any event, **Order 40 Rule 6 of the Civil Procedure Rules** is explicit that:

"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."

Accordingly, the order of injunction issued herein on lapsed, by operation of the law, on **4 December 2015**. There would be no need, in my view, for any further intervention pursuant to **Rule 7 of Order 40 of the Civil Procedure Rules**, as has been sought herein by the 1st Defendant.

6. As to whether the suit warrants dismissal for want of prosecution, **Order 17 Rule 2 of the Civil Procedure Rules** provides that:

"(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1."

7. Thus, the applicant must, first and foremost, demonstrate that there is evidence of inaction for a period of over one year from the date of the last action or step taken by parties in the matter. The parties are in agreement and indeed the court record confirms that the last action, for purposes of the 1st Defendant's

application, is the Court's ruling of **4 December 2014**. It would therefore seem that the Plaintiff was in a state of indolence for a period of about two years. The record however also shows that while the application was pending hearing, the Plaintiff proceeded to file an Amended Plaintiff which was thereafter served and a default judgment entered on the basis thereof on the **23 February 2016** against the Defendants. It is therefore evident that the application has been overtaken by events; and although the 1st Defendant posited that the suit had abated for failure to serve summons within the prescribed period, those arguments are untenable, granted that a fresh Summons to Enter Appearance was issued on **9 December 2015** upon amendment of Plaintiff. Thereupon, the 2nd Defendant proceeded to file a Defence and Counterclaim on **14 January 2016**.

8. The record further shows that although the 1st Defendant was duly served with the Amended Plaintiff together with the fresh Summons to Enter Appearance on **18 January 2016**, it did not respond thereto within the prescribed period; hence the default judgment of **23 February 2016**. It is similarly evident that the Plaintiff did not respond to the 2nd Defendant's Defence and Counterclaim until **8 March 2016**. In the meantime, the 2nd Defendant had also put in a Request for Judgment on his Counterclaim. For the foregoing reasons, I take the view that the interests of justice herein would not best be served by a dismissal of the suit as has been proposed by the 1st Defendant. Indeed in the case of **Ivita vs. Kyumbu [1984] KLR 441** it was held thus:

"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered...The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

9. Applying the foregoing test, I would take the view that the best course, and the course that would serve the interests of justice herein, would be to recognize that there is a default judgment on record that supersedes the instant application. The foregoing being my view, I would dismiss the Notice of Motion dated **28 January 2016** with costs.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF FEBRUARY 2017

OLGA SEWE

JUDGE