



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 1 OF 2011

STEPHEN WANYEE ROKI.....PLAINTIFF

VERSUS

K-REP BANK LIMITED.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

DAVID WAWERU.....3RD DEFENDANT

RULING NO. 3

1. The plaintiff has asked the court to dismiss the applications dated 10th February 2015; 18th March 2015; and 7th July 2015.
2. He pointed out that all the 3 applications were more than one year old.
3. He also pointed out that the 3 applications were all seeking the setting aside of the Judgement which was entered on 9th October 2014. In effect, the Judgement was already more than 2.5 years old, by the time this application was being canvassed.
4. It was the plaintiff's assertion that **Mr. KARISA IHA**, the Director Legal Services at the City Council of Nairobi was committed to frustrating the plaintiff's efforts.
5. As an example of the frustration which the 2nd defendant was exerting on him, the plaintiff pointed out that there had been no attempt made to prosecute the pending applications. Therefore, he feels that justice can only be done if the pending applications were struck out.
6. The continued existence of the pending applications was said to be frustrating the plaintiff's attempt to obtain garnishee orders.
7. And even when the 2nd defendant sought to respond to this application, it is said to have made reference to something which did not exist in the plaintiff's application. In the event, the plaintiff sees the efforts of the 2nd defendant as an attempt to divert the court's attention from the reliefs which the plaintiff was seeking.
8. The plaintiff concluded his submissions by saying that the applications seeking to set aside the

Judgement were simply intended to defeat Justice and to frustrate his efforts to execute the Decree.

9. In answer to the application, the 2nd defendant submitted that the court lacked jurisdiction to dismiss an application on the grounds that there had been a want of prosecution.

10. It is the understanding of the 2nd defendant that it was only an entire suit which could be dismissed for want of prosecution.

11. However, in the event that the court had jurisdiction to dismiss an application for want of prosecution, the 2nd defendant asserted that a year had not yet lapsed since the applications were last in court.

12. In relation to the application dated 10th February 2015, the 2nd defendant said that it did not exist. It had been amended by the application dated 18th March 2015.

13. And in relation to the application dated 7th July 2015, the court was told that it had been scheduled for hearing on 5th October 2015. Regrettably, the application was omitted from the cause-list for that day, and could not therefore proceed.

14. I have perused the record of proceedings carefully.

15. First, it is noted that the application dated 10th February 2015 sought, *inter alia*, the setting aside of the Preliminary Decree ordering the 2nd defendant to pay Kshs. 78,709,174/95, to the plaintiff.

16. The 2nd defendant annexed a Draft Statement of Defence to his Replying Affidavit.

17. By the application dated 7th July 2015, the 2nd defendant sought the same reliefs.

18. In effect one of those 2 applications is superfluous. It would not be open to the 2nd defendant to canvass more than one application, seeking the same reliefs. Therefore, the 2nd defendant would have to make a choice of which of the similar applications it would withdraw or abandon.

19. But there is no provision in the Civil Procedure Act or the Civil Procedure Rules, which provides that when an application was more than one year old, it ought to be dismissed or struck out.

20. Order 17 Rule 2 of the Civil Procedure Rules empowers the court to dismiss a suit if no application has been made or if no step had been taken in the suit for one year. Such application or step in the suit could be taken by either party.

21. Before the suit can be dismissed under that rule, the court may give notice in writing to the parties, requiring them to show cause why the suit should not be dismissed.

22. First, as I have already indicated, there is no similar provision for the dismissal of applications.

23. Perhaps if there was such a provision, the court would be required to serve notice on the parties to show cause why the application should not be dismissed.

24. In my understanding and experience, when an applicant fails to prosecute his application, the respondent was at liberty to either let it remain dormant or he could have it set down for hearing.

25. The third option, especially when the applicant was enjoying some interlocutory relief, which was to the detriment of the respondent, it would be open to the respondent to ask the court to set aside, vacate or review the said interlocutory relief.

26. In this case, the parties have been very active in filing and canvassing applications. In other words,

the case has been far from dormant.

27. There is nothing to stop the plaintiff from seeking the setting aside, variation or review of any such interlocutory relief which could be causing him prejudice.

28. But I find no basis in law or in fact for either striking out or for dismissing the applications simply because they are more than one year old.

29. Accordingly, the application dated 28th November 2016 is dismissed.

30. Nonetheless, I order that the costs of the said application shall be in the cause. I so order because, although I have rejected the invitation to strike out the 2nd defendant's pending applications, I hold the considered view that the 2nd defendant cannot be rewarded with costs when it is not actively taking steps to prosecute its own applications.

DATED, SIGNED and DELIVERED at NAIROBI this 9th day of February 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Plaintiff in person for the Plaintiff

Pkania for Muriuki for 1st the Defendant

Mukua the 2nd Defendant

No appearance for the 3rd Defendant

No appearance for the Garnishee

Collins Odhiambo – Court clerk.