REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. CASE NO. 265 OF 2002

THOMAS ONYANCHA…….....…….PLAINTIF

VS.

HOUSING FINANCE COMPANY OF KENYA LTD…..……1ST DEFENDANT

JOSEPHAT MUTUNGA MUIAH…….....……2ND DEFENDANT

RULING

1. By a Motion dated 29.6.2015 the Plaintiff/ Applicant seeks reinstatement of the instant suit and extension of time of fixing hearing dated plus cost. The application is anchored on order 50 Rule 6 CPR & 53 A CPA.

2. The application is predicated on the grounds on the face of the motion and is supported by the affidavit of Leo Masore Nyangau sworn on 29.6.2015.

3. The application is opposed by the Defendant/Respondent via grounds of opposition filed on 25.9.2015 and a replying affidavit of Caroline Serem sworn on 22.9.2015.

4. The parties agreed to canvass the motion via written submissions which they filed and exchanged.

THE APPLICANT CASE

5. The court did on 12.11.2014 direct the instant suit to be fixed a hearing dates within 14 days and in default the same to stand dismissed. However, the Applicant made several attempts to fix a hearing date including writing to the Deputy Registrar but in vain. The Applicant was informed by the Registry that the then term diary was full. Subsequently the diary was opened but the court file could not be traced.

6. By the time the diary was traced, the court diary was full and by the time the file was traced, the 45 days span given by the court for fixing the case for hearing had lapsed.

7. The Applicant submits that Justice should be administered without undue regard to procedural technicalities and relies on Article 159 (e) (d) of the Constitution of Kenya. He further submits that it is the discretion on the part of court to grant an application, but the same discretion should not be exercised without giving Plaintiff an opportunity for remedying his default. The applicant cites the case of **HIGHLANDS MINERAL WATER CO.LTD VS. KCB LTD Nyeri HCC NO.184/2000,** and emphasizes that such discretion has to be exercised judicially. He also relies on the case of **TITUS**

NGATIA VS. DANYLA PEREIRA & ANOTHER NRB HCC NO 536/1970,son the same principles.

8. Other authorities relied on by the applicant on the same line of holding are ,namely **ET MONKS & CO. LTD VS. EVARLS (1925) KLR 584, EMILY JEROBON BETT VS. RAEL CHEROP MARTIM & 2 OTHERS (2014) KLR.** He prays for the orders sought.

RESPONDENT CASE

9. The Respondent avers that no sufficient reasons have been given to warrant exercise of the court's discretion in applicant's favour in setting aside the impugned order given on 12.11.2014.

10. The Applicant is guilty of delay in lodging the application to impugn the orders above. The application is meritless, defective, incompetent, bad in law, misconceived, frivolous, vexations and an abuse of the court process.

11. The Respondent submits that it had sought to strike out the instant suit for failure to comply with court directions sbut the court declined and directed that the suit be set down for hearing within 45 days and in default the same to stand dismissed. That was on 12.11.2014.

12. However, the same directive was not followed and thus 45 days span lapsed rendering the suit to stand dismissed. The Applicant has not shown any correspondence to demonstrate an attempt to fix hearing dates safe one for fixing dates on 2.12.2014. There is no correspondence to complain of frustration in fixing dates or even alleged loss of the court file.

13. The orders impugned were issued on 12.11.2014 and the instant application was lodged on 27.7.2015. This is a span of over 9 months. The delay is not satisfactorily explained. The Respondent prays for dismissal of the application.

ANALYSIS

14. After going through the application, affidavits and grounds of opposition on record and the parties submissions, I find issues to be determined are;

1) Whether there is justification for the applicant's failure to comply with the court's 45 days directions on fixing hearing dates?

2) What is the order as to costs?

15. The Plaint in the instant matter was lodged on 1.3.2002 (about 14 years ago). The matter has never been heard. On 6.12.2011 the court directed the parties to comply with Order 11 of CPR to unlock the case for hearing. The Plaintiff never took any step for about 2 years prompting the Defendant on 3.10.2013 to seek the orders for striking out of the suit for non-compliance by the Plaintiff.

16. The Court on a ruling dated 12.11.2014 declined to accede to the prayers sought but instead directed that the Plaintiff to comply with rules and fix hearing dates within 45 days and in default the suit to stand dismissed.

17. The Applicant laments that the diary was full thus it could not fix dates in the court's term the orders were made. Further the Applicant sought to have dates in new term but in vain even after seeking interventions by the Deputy Registrar. Further the court file got lost and the Applicant could not fix hearing dates.

18. However the respondent side conceded that it is aware that there was an attempt to fix hearing date on 2.12.2014, however, there is no evidence of the alleged attempts to fix hearing dates in any other instant. No letter indicating that at any time the diary was full.

19. The alleged loss of court file is not supported by any letter to the Deputy Registrar or from the Deputy Registrar to support the complaints. There is no attempt even to seek to reconstruct the court file. The court is alive to the contents of the provisions of Article 50 (1), 159 (2), (d) of the Constitution and the import of the overriding objectives entrenched in S. 1A and 1B of Cap 21.

20. However, the Applicant has shown no enthusiasm in seeing to it that the instant case lodged in 2002 is disposed off. There is no effort to even move court to give a date in view of the short span of time given for fixing hearing dates.

21. In the case of **Ivita vs Kyumbu (1984) KLR** Citing M**ukisa Biscuits manufacturing vs west end distributers (1969) EA 969** held that ;

> **"it is the plaintiff's duty to bring the suit to an early trial.."**

The applicant has not demonstrated the discharge of the said duty.

22. The court indulged the Applicant by giving it a second chance after a slumber of over 2 years after directions to comply with order 11 of the CPRs. The court thus finds no justification to disturb the Orders of 12.11.2014 and make the following Orders;

1) **The application is dismissed.**

2) **Parties bear their own costs.**

Dated, signed and delivered in court at Nairobi this 5th day of February, 2016.

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C. KARIUKI

JUDGE