



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NUMBER 56 OF 2006

PHYLIS JEROTICH KIMUTAI.....PLAINTIFF/RESPONDENT

(suing as the Personal Representative

of the Estate of JEREMIAH CHERUIYOT KIMUTAI)

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED.....DEFENDANT/APPLICANT

RULING

1. There are two applications for determination by this court. The first one is dated 1st March 2016 and filed by the Defendant, Kenindia Assurance Company Limited. It seeks an order of dismissal of the suit for want of prosecution and is brought under the **Provisions of Order 17 Rule 2(1)** of the **Civil Procedure Rules**.

It is based on the grounds that since 15th September 2014, the plaintiff has failed to take any action to prosecute the suit in disobedience to court orders of even date that the suit be fixed for hearing within six months of the order.

2. The second application is dated 14th July 2016 and is filed by the plaintiff on even date. It is premised on the provisions of **Article 159** of the **Kenya Constitution and Section 3A, 1B, and 1A** of the **Civil Procedure Rules**.

It is sought that the suit be reinstated for hearing after being dismissed on the 31st May 2016 when interim orders granted on the 15th September 2014 were in place.

3. I have perused the court proceedings of the 15th September 2014 and the 31st May 2016. The Hon. Justice Mshilla J. upon hearing an application dated 26th June 2014 made the following orders:

*(a) The orders granted by Hon. Justice Wendo on the 27th July 2012 be reinstated and a temporary order of injunction do issue restraining the defendant by itself, servants, agents or employees from advertising for sale, selling, wasting dealing or in any other way interfering with the property title **No. Nakuru Municipality Block 11/125** pending hearing and determination of this suit or until further orders of the court.*

(b) That the order granted on the 27th July 2012 is reinstated and extended for a period of 30 days upon the following grounds.

(c) The applicant shall deposit a sum of Kshs.4 Million with his counsel who shall open joint interest earning account in the joint names of counsel for the applicant and the Respondent.

(d) The sum of Kshs.360,000/= deposited in court to be held in court pending determination of this case as security for costs and damages.

(e) The respondent shall have costs of the application assessed at Kshs.15,000/=.

4. The plaintiffs in their application dated 14th July 2016 aver that the above court orders were complied with, that the sum of Kshs.4 Million and Kshs.360,000/= were duly deposited in court and that the failure by the then advocates on record to fix this case for hearing within the 6 months period should not be visited upon the plaintiffs who have been seriously following up their case, and that though failure to attend court on the 31st May 2016 was not sufficiently explained, they urge that the suit be reinstated for hearing on merits.

5. In their submissions, it is urged that the delay in fixing the case for hearing was not intentional and is excusable. It is further submitted that the defendant will not suffer prejudice if the suit is reinstated as interest continues to accrue on the sum of Kshs.259 Million which is in controversy. It is further stated that the application was brought to court without delay.

6. In opposing the application, the defendant through its advocates submitted that despite having been served with the application, the plaintiff failed to file its response and also failed to attend court by its advocates without reasonable explanation.

To that end, it was submitted that the court was justified to dismiss the suit that was filed in 1996 as no serious attempts having been taken to set down the suit for hearing – despite court orders on the 15th September 2014 that the suit be heard within 6 months.

7. I have considered the affidavit evidence by both parties as well as oral submissions by counsel, as well as authorities submitted by the plaintiff.

There is no doubt that the plaintiffs are guilty of laches. They failed to comply with court orders to fix the case for hearing within six months. They however deposited the monies in joint accounts of both counsel and also the sum of Ksh.360,000/= as security for costs and damages in court. They blame the advocates for not taking any steps or even to respond to the application for dismissal dated 1st March 2016 and for failure to attend court though they were in court in person – when the suit was dismissed for want of prosecution and failure to comply with court orders – See **Order 17 Rule 4 of Civil Procedure Rules**.

8. The amount involved in the suit is large. The prejudice that the plaintiffs may suffer if suit is not reinstated is equally large. The court will not be swayed by the large amount of the claim but by the justice of the case. The defendant was dragged to court ten years ago. The plaintiffs have been enjoying an order of *status quo* since. I agree that dismissal of a suit is draconian. If a party is not interested in prosecuting its case, it cannot rely on the provisions of **Article 159 of the Constitution or Section 1A, 1B and 3A of the Civil Procedure Act** to claim loss, damage and prejudice to the rival party. That other party too has protection from the Constitution. The court and the parties to a suit are enjoined by law to dispose off court cases expeditiously and as such, for the Oxygen principles to be enforced, a party who decides to sleep on his case should be awakened by a dismissal order. A court at all times seeks to do substantial justice without undue regard to technical and procedural rules.

See **Consolata Ndunda Owira & Others -vs- Banuel Boris Omambia (2005) e KLR.**

9. There is no doubt that the Defendant will be prejudiced by reinstatement of the case that has been in court since 2006.

It claims it has been denied enjoyment of the monies in the property and their remedy to realise the security due to the prolonged pendency of the case. These arguments are correct and valid. The interest of the plaintiffs on the other hand must also be considered. It is a balancing act of interests of both parties. Denial of the orders of reinstatement will cause more prejudice to the plaintiff for faults not of their own making but by their legal counsel.

See **John Nahashon Mwangi -vs- Kenya Finance Bank Ltd** (in liquidation) (2015) e **KLR**.

There is no doubt that the plaintiff inertia runs contra to the overriding objective of the courts as stated in **Sections 1A, 1B and 3A of the Act**.

10. In **Ivita -vs- Kyumbu (1984) e KLR**, the test on whether to dismiss and/or reinstate a case for hearing were stated. The test is whether the delay is prolonged and inexcusable, and if it is whether Justice can be done despite the delay.

I take the view that each case must be considered on its peculiar circumstances but not losing sight of the cardinal principles.

11. I have carefully considered the interests of both parties. I am satisfied that justice would be done and be seen to be done if the application for reinstatement of this suit is allowed, but upon conditions. Circumstances of the case present to me that the failure to fixed the case for hearing within the 6 months directed by the court was not of the plaintiff's making, evidenced by compliance of all the other conditions set by the court's orders of the 15th September 2015.

For those reasons, I shall exercise my discretion and allow the plaintiff's application dated 14th July 2016. The suit is hereby reinstated.

Having said so, I now consider the Defendants application dated 1st March 2016. It is evident that the said application was overtaken by events. I say so because the suit was dismissed on the 31st May 2016 under the provisions of **Order 17 Rule 4** of the **Civil Procedure Rules** during the pendency of this application which the application failed to prosecute before the one dated 14th July 2016.

For the reasons stated in the body of the ruling, the application dated 14th July 2016 is allowed upon the following conditions:

- 1. That this suit is hereby reinstated for hearing upon the following conditions.*
- 2. That the plaintiffs shall take steps to have the suit fixed for hearing within 45 days of the ruling.*
- 3. That the plaintiffs shall pay to the defendant the sum of Kshs.20,000/= being thrown away costs before the hearing of the suit.*
- 4. That failure to comply with the above conditions will cause the suit to automatically stand dismissed with costs.*

Dated, signed and delivered in open court this 15th day of September, 2016.

JANET MULWA

JUDGE

