



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE NO. 126 OF 2011

SHIPHILA WAIRIRE GAKAARA.....PLAINTIFF/RESPONDENT

VERSUS

INDUSTRIAL & COMMERCIAL DEV CORPORATION.....1STDEFENDANT/APPLICANT

GEORGE KIGAMBI MAGONDU.....2ND DEFENDANT/RESPONDENT

RULING

Before me for determination are two applications, these are application dated 23rd March 2015 filed by counsel for the first defendant (hereinafter referred to as the first application) seeking orders that the injunction granted on 2nd August 2012 be lifted/discharged and a further order that this suit be dismissed for want of prosecution.

The other application is dated 3rd July 2015 (hereinafter referred to as the second application) filed by counsel for the plaintiff seeking orders to substitute the plaintiff with a one **Joseph Gakuira Gakaara** on account of her advanced age and serious ailment.

Briefly, the plaintiff as administratrix of the estate of the estate of a one **Gakaara Wanjau**-deceased instituted this suit against the defendants jointly and severally on 21st September 2011 claiming that the deceased borrowed some money from the first defendant and used as collateral **L.R. No. Nyeri/Watuka/657**. The crux of the plaintiffs case is that the said loan was fully repaid, though the titles were never collected from the lender, and notwithstanding the repayment, the first defendant attempted to sell the security, and undertook not to sell if a sum of **Ksh. 5,500,000/=** was paid, that the plaintiff agreed to deposit **Ksh. 2,700,000/=** and sub-divide the said land and sell a portion, but in total disregard of the said arrangement the first defendant proceeded to auction the property necessitating this case.

The plaint was accompanied by an application seeking restraining orders which were granted *ex-parte* on 21st September 2011. The said application was heard *inter partes* and on 2nd August 2012, the court granted injunction orders in terms of prayer two of the application dated 21st September 2011.

After obtaining the above injunction, the plaintiff did not take any other or further action in this case. On 24th March 2015, the first defendant moved this court seeking orders that the above injunction be lifted and that this suit be dismissed for want of prosecution on grounds that the plaintiff has not taken any steps for over four years, that the injunction order is oppressive and that there is lack of willingness to prosecute this suit.

The application is opposed. The Respondent avers that the injunction was given on merits, that the plaintiff has been inhibited from proceeding with the case on account of serious ill health and has

exhibited documents showing that the plaintiff has been hospitalized between 2008 and 2010, that the plaintiff suffers from senile dementia, diabetes and hypertension and that she is confined to a wheel chair and bed ridden. The medical report also states that due to her condition her mental/physical capacity and social orientation are greatly impaired.

The plaintiff filed the second application on 7th July 2015 seeking orders that on account of the aforesaid ailment, a one **Joseph Gatuira Gakaara** be substituted in her place. A power of attorney duly signed by the plaintiff though not registered as required has been annexed to the supporting affidavit. However, a duly registered power of attorney was annexed to the further affidavit filed on 19th August 2015.

Also on record is the affidavit of the second defendant, (but the name of the deponent differs from the name in the pleadings) stating that he deposited money towards the purchase of the property and that he stands to suffer loss due to the delay in this case.

Counsels for all the parties filed written submissions which I have considered. I have no doubts that there has been delay in prosecuting this case. The fundamental issue that arises is whether the delay has sufficiently been explained and whether the reason(s) offered for the delay are excusable.

In resolving the above issue, I find it fit to recall the words expressed by the court in *Utalii Transporters Co. Ltd & Others vs NIC Bank & Another*^[1] where it was stated *inter alia* that:-

"the first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court from such impulsive inclination, and requires it to make further inquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgement seat.

.....the principles which the law has developed to guide the exercise of discretion by the court in an application for dismissal of suit for want of prosecution.

These principles are:-

- a. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;*
- b. Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- c. whether the delay is an abuse of the court process;*
- d. whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;*
- e. what prejudice will the dismissal occasion the plaintiff?;*
- f. whether the plaintiff has offered a reasonable explanation for the delay;*
- g. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?*

Section 3A of the Civil Procedure Act^[2] provides that 'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'

In my view, the court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.^[3] The inherent power, as observed by the Supreme Court of India^[4] *"has not been conferred on the court; it is a power inherent in the court*

by virtue of its duty to do justice between the parties before it." **Lord Cairns**[5] stated as follows:-

"One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside. Discussing the nature and objects of the inherent powers of the court, *Sir Dinshah Mulla*[6] observes that:-

*"..... The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act **ex debito justitiae**, and to do real and substantial justice for the administration, for which alone, it exists. However, the power, under this section, relates to matters of procedure. If ordinary rules of procedure result in injustice, and there is no other remedy, they can be broken in order to achieve the ends of justice....."*

Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit.[7] Discretion must be exercised in accordance with sound and reasonable judicial principles.

The King's Bench in *Rookey's Case*[8] stated as follows:-

"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."

As was held in *Agip Kenya Ltd vs Highlands Tyres Ltd*[9] the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. The following observation by the Privy Council[10] has been consistently accepted by the courts as correct statement of law. The Privy Council observed:-

"All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose,....."

Writing on judicial power, Chief Justice **John Marshall** wrote the following on the subject:-

"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.[11]"

I am persuaded by the principles laid down in the case of *Utalii Transporters Co. Ltd & Others vs NIC*

Bank & Another[12] cited above. True, there has been inordinate delay on the part of the appellant in prosecuting the appeal; However, she has produced medical evidence which has not been rebutted showing that she has been ailing, hence her inability to prosecute this case.

To my mind the delay has been sufficiently explained. I find nothing to show that the delay is intentional, contumelious and, therefore, inexcusable nor is there anything to suggest abuse of the court process. I hold the view that dismissing the case under such clear circumstances and without affording the plaintiff an opportunity to be heard will occasion serious prejudice to the plaintiff and will amount to driving a litigant from the seat of justice without hearing them. I have already stated that the delay has not been satisfactorily explained. I hold the view that the interests of justice dictate lenient exercise of the discretion of the court in favour of the plaintiff due to the above reasons.

I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of being heard especially so when the party has expressed a desire to be heard and has clearly explained the reasons for her inability to prosecute the case. In this regard I find useful guidance in the decision rendered in the case of *Richard Nchapai Leiyangu vs IEBC & 2 others*[13] as follows:-

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”

I find that the delay in prosecuting this case is excusable. I am persuaded that disputes ought to be determined on merits and that a litigant who has been unable to prosecute her case on account of such serious illness ought to be permitted to pursue his/her rights.

In conclusion, I find that this is a proper case for this court to exercise its discretion in favour of the plaintiff and decline to dismiss this suit for want of prosecution.

As for the second, I am persuaded that the same is merited and I find no reason to refuse the orders for substitution as prayed .

Accordingly, I refuse the application dated 23rd March 2015 and allow the application dated 3rd July 2015 and make the following orders:-

- a) That** the first defendants application dated 23rd March 2015 be and is hereby dismissed.
- b) That** the plaintiffs' application dated 3rd July 2015 be and is hereby allowed.
- c) That Joseph Gatwira Gakaara** be and is hereby substituted as the plaintiff in this suit in place of **Shiphila Wairire Gakaara.**
- d) That** the plaintiff be and is hereby directed to fix a date for hearing of this suit within 90 days from the date of this judgement in default of which this suit shall stand dismissed.
- e) That** no orders as to costs.

Orders accordingly. Right of appeal **30** days

Signed and Dated at Nyeri this **15th** day of **November**, 2016

John M. Mativo

Judge

Delivered at Nyeri this 15th day of **November**, 2016

Hon. Justice Jairus Ngaah

Judge

[1] {2014}eKLR

[2] Cap 21, Laws of Kenya

[3] See Mamraj vs Sabri Devi, AIR 1999 P & H 96

[4] In Raj Bahadur Ras Raja vs Seth Hiralal AIR {1962} AC 527

[5] In Roger Vs Comptoir D' Escompts De Paris

[6] The Code of Civil Procedure 18th Edition Reprint 2012

[7] See Sir Dinshah F. Mulla, Supra, at page 1381.

[8] [77 ER 209; (1597) 5 Co.Rep.99]

[9]{2001} KLR 630

[10]Ma Shwe Mya v. Maung Mo Hnaung (1933) 35 Bom. L.R. 569

[11]Osborn V. Bank of the United States, 22 U. S. 738 {1824}.

[12] {2014}eKLR

[13] Civil Appeal No. 18 of 2013