



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 527 OF 2002

PETER MBUGUA.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT

(Consolidated with HCCC No.881 of 2002)

YARNKEN INDUSTRIES LIMITED.....PLAINTIFF

-VS-

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

(And By Way of Counter-Claim)

NATIONAL BANK OF KENYA LIMITED.....COUNTER-CLAIMANT

-VS-

YARNKEN INDUSTRIES LIMITED

WILSON KURIA

PETER MBUGUA WAINAINA.....DEFENDANTS

RULING

1. Before this Court is a Notice of Motion dated 2nd June 2016 for the following orders:-

1. The Honourable Court be pleased to set aside the orders of 7th February 2012 made in HCCC No.881 of 2002 and 16th June 2015 made in HCCC No. 527 of 2002.

2. The Honourable Court be pleased to grant a temporary order of injunction restraining the Defendant/Respondent whether by itself or by its servants, agents, advocates, auctioneers or any of them or otherwise from doing the following acts or any of them that is to say from

advertising for sale, selling by public auction or private treaty or completing by conveyance or transfer of any sale conducted by Public auction or private Treaty or otherwise howsoever the Plaintiff's/Applicant's property known as Title No. Nairobi/Block 90/14 until the hearing of this application inter-parties.

3. The Honourable Court be pleased to grant an order of injunction restraining the Defendant/Respondent whether by itself or by its servants, agents, advocates, auctioneers or any of them or otherwise from doing the following acts or any of them that is to say, from further advertising for sale, selling by public auction of private treaty or completing by conveyance or transfer of any sale conducted by public auction or private treaty or otherwise howsoever the Plaintiffs/Applicant's property known as Title No. Nairobi/Block 90/14 until the hearing and determination of this application.

4. The consolidated suit herein be reinstated for hearing on merit.

2. A short background herein will show why this would be a matter for quick disposal. This matter involves HCC. Civil Suit No. 881 of 2002 **YARNKEN INDUSTRIES LIMITED Vs. NATIONAL BANK OF KENYA LTD** and Civil Suit No.522 of 2002 **PETER MBUGUA Vs. NATIONAL BANK LTD**, which were consolidated by an Order of Ibrahim J. (as he then was) on 17th November 2003. Although the Order was silent as to which of the two suits would be the lead file, the Application for Consolidation was made in Civil Suit No. 527 of 2002. And looking at the proceedings in the two files, the parties appear to have taken Civil suit No. 527 of 2002, in which the present application is filed as the lead file.

3. The Order for Consolidation was made by Court after the Defendant herein had moved Court through an Application of 11th July 2003 which had a second Prayer for Stay. The Application read:-

1. THAT this suit be consolidated with the High Court Civil Suit No.881 of 2002, Milimani Commercial Courts, Nairobi between Yarnken Industries Limited and National Bank of Kenya Limited and Peter Mbugua Wainaina and Wilson Kuria at this Court for trial and disposal of both cases.

2. THAT there be stay of proceedings of this suit pending the hearing and determination of this Application.

4. In the Ruling of 17th November 2003, the Judge did not make an Order, one way or other, in respect to the Prayer for Stay and the parties herein appreciated this because the Order which was extracted by the Defence Counsel (and approved by Counsel for the Plaintiff) was silent on the Prayer for Stay.

5. The Provisions of Order XI Rule 1 and 2 of the Retired Civil Procedure Rules under which the Application was brought reads:...

"1. Where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved in court may either, upon the application of one of the parties, or of its own motion, at its discretion, and upon such terms as may seem fit-

(a) Direct a consolidation of such suits, and

(b) Direct that further proceedings in any of such suits be stayed until further order.

2. Applications under this Order may be made by summons in chambers or orally in court."

This Court takes a view that since no Order for Stay was granted, the effect of the Order was that the suits were from the date of the Order consolidated into one. And by the conduct of the parties, the lead file would be 527 of 2002.

6. The observation I have made has a significant effect on the Order made by Odunga J. on 7th February 2012 in the file to Civil Suit No. 881 of 2003. The Judge stated:

“On 16th July 2003 which is more than 8 years ago the hearing of this suit was adjourned to enable substitution of the 2nd Defendant who was reportedly deceased. No step has been taken since then a clear indication of lack of interest in the matter. Accordingly the suit is dismissed”.

Before that day, the last action in that file was on 16th July 2003. The file had been inactive from the date of consolidation.

7. The Coram for the day shows that none of the parties were before the Judge when he made that Order. This Court agrees with the submissions made by Counsel for the Applicant that as the two suits were now one, the two could not be dealt with separately before an Order deconsolidating them had been made. The Order for Consolidation was not brought to the attention of the Judge and consolidation was not apparent as there was no entry of the Order in the proceedings. The Order of 7.2.2012 was therefore irregular. Whether the Court should set aside those Orders will depend on what the Court makes of the Respondents argument that the present Application has been brought after long and unexplained delay. And that the Plaintiff has been extremely indolent in the prosecution of the suit.

8. But first this Court considers the Order of 16th June 2015 in which Githinji J. ordered,

“After the inordinate delay of 3 years since the last step was taken on 6.11.2012 with view to proceeding with the suit, and service of Notice having been effected to show cause why this suit should not be dismissed and there being no satisfactory response, the Court in exercising of the powers conferred upon it by Order 17 Rule 2 of the Civil Procedure rules hereby orders this suit dismissed/closed”.

9. The grievance of the Applicant is that his lawyers were not served with a Notice to Show Cause. Counsel Adipo in the Affidavit in support of the Application sworn on 2nd June 2016 depones:-

“9. That to the best of my knowledge, my law firm was not served with a Notice to Show Cause why the suit should not be dismissed in accordance with the provisions of Order 17 Rule (2) of The Civil Procedure Rules prior to dismissal of suit”

10. While there is no challenge to the said averment, Counsel for the Respondent submits that the Court is not under obligation to serve a Notice to Show Cause why a suit should not be dismissed under the provisions of Order 17 Rule 2. Counsel argued that the Court has discretion to issue or not to issue Notice. Counsel then cited the following passage from the Decision in MWANGI S. KIMENYI vs. ATTORNEY GENERAL & ANOTHER[2014] eKLR in which Gikonyo J. held:-

“There is no mandatory requirement under Order 17 rule 2 of the Civil Procedure Rules that a notice should be give to the Plaintiff before a suit which offends the order is dismissed for want of prosecution. Equally, Order 17 rule 2 of the CPR used the word “give” and not “serve”. To give notice is not the same thing as to serve notice within the context of the civil procedure. The distinction between the two terms is important because both are legal well as technical but bear different meanings and entail different mechanisms albeit, however, both are intended to bring the matter at hand to the notice or attention of the party to be affected by the proceeding. “Give” in the context of Order 17 rule 2 of the Civil Procedure Rules denotes ‘to impart or confer b a formal act’ whereas “serve’ in the legal sense denotes ‘to make legal delivery of the court processes”. See Black’s Law Dictionary, Ninth Edition on this. My own view, therefore, is that a Notice under Order 17 rule 2 of the Civil Procedure Rules is deemed to have been given by the Court when it is placed in the official website of the Judiciary or in the cause list for 29th February, 2012”.

11. The Applicant took a different view and relied on the case of **ASSOCIATED WAREHOUSE COMPANY LTD & 2 OTHERS VS. TRUST BANK LTD** (Under CBK Statutory Management [2004] eKLR where Azangalala J. (as he then was) said of the equivalent to Order 17 Rule (2) in the Pre-2010 Civil Procedure Rules:-

“The Plaintiffs state that they did not receive the Notice to Show Cause why their suit should be dismissed. Their Advocates were also not served with the Notice. It is not alleged that the letter dated 7th January 2004 from M/S Waruhiu K’owade and Ng’ang’a Advocates to the present Advocates for the Plaintiffs is a forgery. In the absence of any challenge to this letter I believe that the Notice to Show Cause was not served upon the Plaintiffs of their advocates. The dismissal order was therefore made without the knowledge of the Plaintiffs or their agents. There is no affidavit of service. The exparte dismissal of the Plaintiffs’ suit was therefore irregular. Rule 2(1) of Order 16 presupposes service before dismissal. It is also clear under this rule that even where cause is not shown, dismissal is not mandatory as the rule is permissive”.

12. The Provisions of Order 17 Rule 2(1) are as follows:

“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.”

I prefer the view of Gikonyo J. that whilst the law does not require the Court to serve a Notice to Show Cause on a party, the Court must nevertheless bring the Notice to the attention of the party to be affected. Indeed on reading the Order of 16.6.2015, the Court had proceeded on the premise that the Notice to Show Cause had been served on the parties. As it is not demonstrated that the Notice was served or by other means brought to the attention of the Applicant, this Court must accept that the Applicant had no Notice of the “Show Cause” proceedings.

13. But this Court is asked to reject the Application because, in addition, the Applicant has abandoned the duty to prosecute the suit with expedition while enjoying an order of Injunction for the last 14 years.

14. The Applicants Counsel explains that the Plaintiff was not able to take further steps in the Consolidated Suit after 23rd December 2012 as the Court files were not available in the Registry. That Counsel only got to know of the dismissal of the suit after he spoke to the Respondent’s Counsel on 18th May 2016. This being prompted by news received from the Applicant to the effect that the Respondent had sent Valuers to the suit property with a view to commencing realization. This explanation is not challenged and the Court holds that there was no undue delay when the Applicant presented this Application about two weeks later on 2nd June 2016.

15. While there is merit in the contention by the Respondent that the Applicant has been extremely lax in prosecuting the suit, the same cannot be said about the Applicants speed in questioning the regularity of the two impugned Court Orders. In so far as the Applicant moved promptly after knowing of their existence and in so far as the Orders are obviously irregular, this Court allows the Prayer that both Orders be set aside.

16. That holding by this Court does not foreclose the Defendant from taking up the conduct of the Plaintiff in future Applications. What the Court is saying is that in respect to the two Orders, the Applicant has acted diligently after the Orders were brought to his Lawyer’s attention and that his otherwise lethargic conduct in the prosecution of the suit is not to be considered in the determination of the matter at hand.

17. Once the suits have been reinstated then the Order of Injunction subsisting before the dismissals must necessarily be restored.

18. The Notice of Motion dated 2nd June, 2016 is allowed as prayed. Costs in the Cause.

Dated, Signed and Delivered in Court at Nairobi this 1st day of December, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Thuita h/b for Adipo for Applicant

N/A for Respondent

Alex - Court clerk