REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 128 OF 1995

NATIONAL BANK OF KENYA LTD.....PLAINTIFF/APPLICANT

VERSUS

JAPHETH MAGUT.....DEFENDANT/RESPONDENT

RULING

The application for determination is Notice of Motion dated 30th April, 2012 brought under S. 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and other enabling provisions of the law.

The Plaintiff prays that the court sets aside its orders of 15th April, 2005 dismissing the Plaintiff's suit under Order XVI Rule 6 of the Civil Procedure Rules, that the suit be reinstated and for costs.

The application is based on the following grounds:-

(a) The Plaintiff filed the said suit against the defendants seeking inter-alia the principal sum of Kshs. 9,995,057.80/= and interest at 27% per annum from 9th August, 1995 till payment in full.

(b) This matter was last listed for hearing on 14th October, 2003.

(c) The court on its own motion on 15th April, 2005 dismissed this matter under Order XVI Rule 6 of the old Civil Procedure Rules.

(d) The Defendant filed bankruptcy proceedings in the year 2000 and obtained receiving order.

(e) The receiving order was rescinded on 24th November, 2009.

(f) The reasons leading to non prosecution of the Plaintiff's case were beyond the control of the Plaintiff.

(g) The Plaintiff is keen to have the matter prosecuted and issues therein determined on merit.

(h) It is fair and just that this application be allowed.

(i) This court is vested with unfettered discretion to grant the orders sought.

(j) The application is brought in good faith.

(k) The Defendant/Respondent will not be prejudiced in any way in the event that this application is allowed.

It is also supported by the affidavit of Damaris Gitonga, the Manager, legal services of the Plaintiff bank sworn on 30th April, 2012. She depones that the suit was last fixed for hearing on 14th October, 2003 after which the court on its own motion dismissed the suit for want of prosecution. That the delay in prosecuting the suit was that, in the year 2000 the Defendant obtained receiving orders which orders were rescinded in the year 2009. That on 11th April, 2011, the Plaintiff instructed the law firm of M/s. Omwenga & Co. Advocates to take over the conduct of the suit in place of M/s. Nyairo & Co. Advocates but nothing could be done as the court file went missing. She states that the file was traced in October, 2011 when it was established that the suit had been dismissed for want of prosecution on 15th April, 2005. She adds that all along the Plaintiff was willing to prosecute the suit and therefore the court should exercise its discretion and grant the orders sought.

The Defendant/Respondent opposed the application by way of Grounds of Opposition dated 23rd July, 2012. They outline the following:-

1. The application is misconceived, bad in law, frivolous, vexatious and an abuse of the due process.

2. The Applicant is guilty of latches.

3. The order complained about is not exhibited as is required by law.

4. The Applicant admits in the supporting affidavit, that the court was right in dismissing the suit for want of prosecution.

In rejoinder, the Applicant filed a Supplementary Affidavit, also sworn by Damaris Gitonga, on 10th September, 2012. She reiterates that the delay in prosecuting the suit was occasioned by the Defendant's move to file bankruptcy proceedings. She annexed a copy of Gazette Notice No. 8090 as Annexture 'A' being the receiving order obtained by the Respondent. She states that the receiving order was received by the High Court sitting at Milimani in Nairobi on 26th July, 2010 as attested by Order of that court issued on 12th August, 2010, marked annexture B. That the Plaintiff is desirous of prosecuting the suit and in the interest of justice and fairness, the application should be allowed.

The application was canvassed before me on 25th September, 2013 by way of oral submissions. Mr. Omwenga advocate submitted on behalf of the Applicant while Mr. Ngigi advocate submitted on behalf of the Respondent. Each advocate reiterated the content of the depositions contained in the affidavits sworn in support of, and opposition to, the application. I need not duplicate the submissions save to highlight additional submissions. Mr. Omwenga added that under S. 9 of the Bankruptcy Act, once a receiving order has been issued, no suit can proceed as against the debtor unless with an order of the court. He stated that in the interest of justice, the Plaintiff should be allowed to pursue a debt that currently stands at over Kshs. 22 million.

On the part of Mr. Ngigi, he submitted that the matter ought to have been placed before the court for necessary orders once the bankruptcy order was issued. He said that before the suit is reinstated, the Plaintiff ought to explain why the same was dismissed. He also said that the Applicant did not exhibit the order dismissing the suit in compliance with Section 80 of the Civil Procedure Act and Order 45 Rule 1 (a) and (b) of the Civil Procedure Rules. He said that the Applicant is guilty of delay as suit was dismissed in the year 2005 and it was not until the year 2012 that this application was filed. That in any event, the Plaintiff ought to have enjoined the receiver if he intended to pursue the suit.

I have accordingly considered the application and respective submissions made before me and I

take the following view. It is not in dispute that a receiving order was issued against the Respondent in the year 2000. This is borne out in the Gazette Notice No. 8090 of 17th November, 2000 annexed to the Supplementary Affidavit as annexture A. It is also not disputed that the receiving order was lifted on 26th July, 2010 vide the Bankruptcy Cause No. 28 of 2000, as per annexture B annexed to the Supplementary Affidavit. What this means is that the suit was dismissed for want of prosecution when the receiving order was subsisting. As rightly pointed out by learned counsel, Mr. Ngigi, for the Respondent, it was the Plaintiff's obligation to bring to the attention of the court of the existence of the bankruptcy proceedings. Otherwise, how else would the court, in this matter, have known of the existence of the said order?

Be that as it may, Section 9 of the Bankruptcy Act, Cap 53, Laws of Kenya, provides that:-

"On making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property by person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, except with the leave of the court and on such terms as the court may impose."

This essentially means that no proceedings against the Defendant could continue when the receiving order was in force. In lieu thereof, the Plaintiff ought to have obtained the leave of the court to continue with the suit which it did not do. As such, it it only fair to conclude that the failure to prosecute the suit was beyond the control of the Plaintiff.

In all, the court, upon evaluating all the circumstances of the case, exercises its discretion in granting the orders sought. Such a discretion should be exercised judiciously with the objective of meeting ends of justice. In this regard and as was held by the Court of Appeal in the case of **MAINA -VS- MUGIRIA (1983) e KLR, 78** that "***the discretion was never intended to be exercised to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice,"*** no evidence that the Plaintiff obstructed the cause of justice in not prosecuting the suit has been demonstrated by the Defendant. And as it is conceded by parties, the dismissal of the suit was done by the court suo moto at a time when the receiving order was in place.

Moreover, it is my view that the Defendant has not demonstrated what prejudice he will suffer if the orders sought are granted. Court must, in exercising its discretion focus on doing substantive justice (**MAINA -VS- MUGIRIA - Supra)**. Bearing in mind the court record and that the amount of money that is subject of the suit is quite large, it is important the suit be heard to its logical conclusion. In any case, as at now, the Defendant is no longer a bankrupt and nothing prevents him from defending the suit.

I agree with Mr. Ngigi, counsel for the Respondent that Section 80 of the Civil Procedure Act and Order 45 (1) of the Civil Procedure Rules presupposes that an order or decree sought to be reviewed or set aside should be annexed to the application. However, the failure to extract the order or decree cannot bar the court from considering the application on its merit as such an omission is a technicality the court ought to ignore.

In the end, as an independent arbiter, the court must demonstrate its partiality by not appearing to lean to any party to distract the course of justice. Therefore, giving regard to the fact that the Defendant would not suffer any prejudice and in exercising my discretion thereof, I think this application ought to succeed. Prayers (1) and (2) of the application are allowed. Costs shall be in the cause.

DATED and **DELIVERED** at **ELDORET** this 11th day of March, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Omwansa for the Plaintiff/Applicant

Mr. Mwaniki holding brief for Ngigi for the Defendant/Respondent