



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 433 OF 2012

BEATRICE OLOO ODHIAMBOPLAINTIFF

VERSUS

REGINA NGUNDO1ST DEFENDANT

CRYSTAL VALUERS LIMITED2ND DEFENDANT

STEPHEN MMBAJIWE NYAMU T/A LIFILINE TRADERS3RD DEFENDANT

ELIZABETH W. MUIGAI T/A WAGLY AUCTIONEERS4TH DEFENDANT

R U L I N G

1. The Plaintiff has filed yet another application before this Court. This time it is her Notice of Motion dated 3rd February 2014 which seeks reinstatement of this suit and that this Court be pleased to enlarge time and/or grant a period of 60 days for the Plaintiff to deposit security for costs. However, the second prayer of the Application was to allow the firm of Mwakio, Kirwa & Company, Advocates to come on record for the Plaintiff which was granted by this Court on 10th March 2014. The Application was grounded under *Articles 48 and 50* of the Kenya Constitution, **Order 50 rule 5** and **Order 51 rules 1 and 3** of the *Civil Procedure Rules* as well as **sections 3A, 63 (e) and 95** of the *Civil Procedure Act*. The Application was based on the following grounds:

“a) THAT the plaintiff has interest in prosecuting this matter and have it determined on merits.

b) THAT the plaintiff has appointed the firm of Mwakio, Kirwa & Company Advocates to conduct this matter on her behalf.

c) THAT the plaintiff is willing and able to deposit the security for costs within a period of 60 days from the date of reinstatement of this suit.

d) THAT the plaintiff is willing to pay costs of any suit relating to this matter.

e) **THAT the defendants cannot suffer any prejudice that cannot be compensated by way of costs.**

f) **THAT the application has been brought without undue delay.**

g) **THAT the Plaintiff will suffer great injustice if the application is not allowed.**

h) **THAT it is in the interest of justice that the application be allowed.**

i) **THAT this Honourable Court has the necessary power to grant the orders sought by the Plaintiff”.**

2. The Application was supported by the Affidavit of the Plaintiff sworn on 3rd February 2014. As far as this Court is concerned, the contents of the Plaintiff's Affidavit reiterated what she had previously detailed to the Court in the Supporting Affidavit to her Application before Court by way of Notice of Motion dated 17th July 2013. That Application had been dismissed by this Court with costs on 28th January 2014. The deponent added that she had been advised by her (new) advocate on record that she had a right to access to justice and that such rights could not be defeated by not depositing security for costs. Further, the Plaintiff indicated that she was able to pay the amount of Shs. 350,000/-by way of security as directed in my Ruling of 20th June 2013. She was also willing to pay the costs as awarded against her in CMCC No. 7343 of 2009 in the amount of Shs. 31,860/-.
3. The Defendants' filed a Replying Affidavit through **Edwin Mukira** sworn on 4th March 2014. The deponent stated that he was a director of the second Defendant and authorised to swear the said Affidavit. At paragraphs 3 and 4 thereof the deponent maintained that the Application before Court was a clear confirmation that the Plaintiff was a vexatious litigant and that she would never comply with a Court Order unless faced with a serious consequence. Mr. Mukira noted that the Plaintiff had been ordered to pay costs and provide security as per the Court's Order dated 20th June 2013. She had made no attempt to comply with the said Order. She had not admitted her inability to pay and was enjoying all means to keep the Defendants in Court causing them to incur costs, without her having any intention of settling the same. The deponent maintained that the Defendants were suffering prejudice over the litigation costs incurred over the years for which the Plaintiff had declined or been unable to pay including the costs in **CMCC No. 7343 of 2009**. The deponent concluded that the Plaintiff's right to justice had not been hampered by the dismissal of this suit. She could pay the costs of all the previous suits and file a fresh suit if she was still interested in pursuing any claim as against the Defendants. The Plaintiff had blocked herself from accessing justice.
4. The Plaintiff swore a Supplementary Affidavit, with the leave of the Court, dated 24th March 2014. She denied being a vexatious litigant and also denied that she did not comply with Court Orders unless she was faced with serious consequences. Although ordered to pay security for costs within 45 days from 20th June 2013, the Plaintiff had filed an application for review of the Court's said Orders of that date. The Application for review was determined on 28th January 2014. During the period 5th August 2013 (when the 45 days allowed by Court expired) to 28th January 2014, the Plaintiff maintained that she could not file an application to reinstate as the Application for review was still pending before Court. She had been advised by her advocates on record that if a suit is dismissed for failure to deposit security for costs, the Court could set aside the Order dismissing the suit and extend the time for the giving of the required security if she could prove that she was prevented, by sufficient cause, from giving the same security. She maintained that the facts that she had detailed in this Application proved that there was sufficient cause to reinstate the suit.
5. Mr. Mwangombe, learned counsel for the Plaintiff, submitted before Court, that the suit had been filed on 6th July 2012 but the same had been dismissed when the Plaintiff failed to deposit Shs. 350,000/-as security for costs as directed by the Court 20th June 2013. The Application was seeking the reinstatement of the suit and the enlargement of time by 60 days in which the Plaintiff would deposit the amount of security ordered by the Court. Counsel maintained that **Order 26 rule 5** of the *Civil Procedure Rules* gave the Court power to reinstate a suit which had been

dismissed for failure to provide security, where the Plaintiff has detailed sufficient cause. Counsel maintained that the reason for the Plaintiff's failure to provide the security ordered was that she had filed an application dated 17th July 2013, for review of the Court's Ruling of 20th June 2013. One of the prayers in that application was to seek an order for stay of the Court's Orders of 20th June 2013. That prayer was not granted but on 29th July 2013, the Court had granted an order of *status quo*. That was the reason why the Plaintiff did not comply with the security for costs Order. Counsel then noted that the Application for review was filed within the 45 day period allowed for the security to be put in place. Counsel further noted that the suit was dismissed at the end of the 45 day period on 6th August 2013. The Plaintiff had an interest in prosecuting this matter and having the same heard. She had no other avenue to seek justice other than to come back before this Court. Counsel relied upon the case of **Banco Arabe Espanol v Bank of Uganda (1999) 2 EA (SCU)**.

6. Mr. Mbaabu for the Defendants opposed the Application. He maintained that it was one of those applications that demonstrated that the Plaintiff was a vexatious litigant. Upon the dismissal of her review application on 28th January 2014, the Plaintiff had an opportunity to appeal which she did not do. He understood that the *status quo* Order given on 28th July 2013 suspended the Court's Orders of the 20th June 2013 until the hearing and determination of the review application. As a result, that Order was suspended until 28th January 2014. Thereafter, the 20th June 2013 Orders were reinstated and the Plaintiff had the balance of the 45 days ordered for the provision of security to comply. She failed to provide any such security. The suit had not been dismissed as submitted by counsel for the Plaintiff on 6th August 2013 as the 45 day period had not expired. Now, the Plaintiff was seeking 60 more days to provide security for costs. In counsel's view that showed that the Plaintiff was not concerned in complying with Court Orders. He noted that costs of matters in the subordinate courts had not been paid and the Defendants continued to be prejudiced by the continual applications made by the Plaintiff before Court. Mr. Mbaabu referred to **Order 26 rule 5 (1)** as regards reinstating the suit. **Rule 5 (2)** detailed that it was only where a suit had been dismissed under **subrule 5 (1)** that a case can be reinstated. Further he noted that numerous applications had been made by the Plaintiff over the past one year with no effort having been made whatsoever to set the suit down for hearing. In his view, the Plaintiff was a vexatious litigant who had filed over 5 cases as against the first and second Defendants in the Business Premises Rent Tribunal, the Subordinate Court as well as this Court. The Plaintiff was wasting the Court's time and such was an abuse of the Court process.
7. In a short rejoinder, Mr. Mwangombe maintained that Mr. Mbaabu had put his own interpretation upon the *status quo* Order of the 28th July 2013. He also maintained that the Plaintiff was not a vexatious litigant as such was defined as a person who brings suits that have no chance of succeeding. He maintained that **Order 26 rule 5** was very clear and that the Plaintiff had asked for 60 days to deposit the security amount ordered. It was within the discretion of the Court to allow the extension of time.
8. **Order 26 rule 5** reads as follows:

“26. 5. (1) If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.

(2) If a suit is dismissed under subrule (1) and the Plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court may set aside the order dismissing the suit and extend the time for giving the required security”.

In my view, **rule 5 (1)** is very clear. Where security for costs is not given within the time ordered by the Court then it shall, upon application, dismiss the suit. No application has been made before this Court to dismiss the same and, as a result, **rule 5 (2)** does not come into play. As a result, I do not consider that the Court has any prerogative or discretion to extend the time ordered for the provision of the security for costs by the Plaintiff. As regards the reinstatement of the suit, I accept the submission of the learned counsel for the Defendants. The *status quo* Order made by this Court on 29th July 2013 froze its Orders of 20th June 2013 that the Plaintiff should provide security for costs

within 45 days, until her application for review was heard and determined. Ruling in that regard was delivered on 28th January 2014. The Plaintiff did not appeal that Ruling. As a result, time for the provision of security for costs commenced running afresh. Looking at the dates involved, security for costs should have been provided at the latest by 3rd February 2014. The Plaintiff failed to so provide. As a result, the Order of 20th June 2013 was very clear – the suit stood dismissed. I see no reason why that Order should not stand in view of the disobedience of the Plaintiff to the same.

9. As a result of what I have detailed above, I have no hesitation but to dismiss the Application dated 3rd February 2014 with costs to the first and second Defendant. This suit stands dismissed and this Court will not entertain any further application from the Plaintiff. This is the third time that this Court has found against the Plaintiff and, in my opinion, she quite justifies the definition of vexatious litigant as submitted by her own counsel – a person who brings suits and/or applications that have no chance of succeeding.

DATED and delivered at Nairobi this 12th day of May, 2014.

J. B. HAVELOCK

JUDGE