



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 1839 OF 1996

DR. NDWIGA NJUE MWACHANDI.....1ST PLAINTIFF

DR. VICTOR MUURU KABURU2ND PLAINTIFF

Versus

CHARLES MUNGAI NGANGA 1ST DEFENDANT

ADOLF ISSAC MUCHIRI T/A DOLINE AUCTIONEERS2ND DEFENDANT

RULING

[1] The Defendant has applied for dismissal of the plaintiff's application dated 30th December, 2004 for want of prosecution. The application is dated 13th February, 2014 and is supported by affidavit sworn by Julius Nyakiangana on 13th February, 2014. The suit herein was filed on 26th July, 1996. Then, there were numerous interlocutory applications filed by the Plaintiff but which were dismissed with costs. The Plaintiff has admitted being in rent arrears and settled part of it. Sometime on 11th July, 1997 with leave of the court the defendants filed a joint defence and counterclaim which was duly served upon the plaintiff. By a preliminary decree issued on 29th September, 1997 the defendant's claim was partly granted for vacant possession and eviction orders were sanctioned. No appeal was lodged against the preliminary Decree. The plaintiff withdrew this suit through a Notice of withdrawal dated 9th July, 1997 and the entire suit against all the defendants was marked by the Court as withdrawn. The matter was subsequently fixed for formal proof of the defendant's counterclaim and final decree was given on 3rd September, 2003. Certificate of taxation was issued on 27th April, 2004. After notice of execution, the property of the judgment-Debtor was attached and a Notice of Objection was filed by the objectors herein. The objection proceeding was dismissed by the Court.

[2] Upon dismissal of the objection proceedings, the defendants executed the decree by way of Notice to Show cause dated 26th October, 2004. This is what prompted the plaintiff to file Chamber Summons dated 30th December, 2004 under certificate of urgency seeking to stay execution of warrant of arrest and committal to civil jail following orders made on 2nd December, 2004. The plaintiff was granted interim orders on 6th January, 2005 pending the hearing and determination of the said application. The court fixed the application for hearing *inter partes* on 20th January, 2005. The Applicant raised a preliminary objection to the application but Njagi J ruled on 28th April, 2005 that the plaintiff's application be heard on merit. Since the said ruling,

the Plaintiff has not taken any step for over ten years to prosecute the application dated 30th December, 2004 and this is reason the Applicant applied for its dismissal for want of prosecution.

[3] All the foregoing events were detailed in the supporting affidavit by the Applicant. This matter has been pending since 1996 and cannot be concluded because of the stay of execution order. The Applicant deplored the conduct of the plaintiff in this case to be generally depiction of a vexatious litigant. Withdrawal was done without assigning any reason. It is in the replying affidavit that the Respondents have given two reasons why the application was not prosecuted. There is serious allegation that the 2nd defendant and 2nd plaintiff are deceased but the Respondent has not annexed death certificates or any other document in proof of death. He has also raised another serious allegation; that the court file went missing hence the reason for not prosecuting the said application. He is the party alleging a fact which he must prove.

[4] The Applicant submitted that no proof or evidence on the particular file missing that was adduced. No letters addressed to Court that were annexed on the subject of missed file. If at all the court file went missing, the Respondent should have sought for a reconstruction the file. According to the Applicant, the court file has all along been available at the registry. On 31st July 2003 judgment was given upon formal proof hearing. Thereafter taxation was done and certificate of taxation was issued on 26th April, 2004. On 14th July, 2004 Notice of intention to proceed with objection was filed. On 1st October, 2004 objection proceedings was dismissed. On 2nd December, 2004 warrant of arrest was issued. On 6th January, 2005 the court ordered that the plaintiff to serve his application for hearing on 20th January, 2005. On 16th March, 2005 the preliminary objection by the Applicant was heard and the court gave a ruling on 28th April, 2005. On 7th June, 2007 the applicant fixed the application dated 4th June, 2007 for hearing when it was taken out. On 19th February, 2014 application dated 13th February, 2014 was fixed for hearing. Again, to prove the court file has never gone missing, on 7th June, W. Ithondeka & Co. Advocates filed Notice of Motion dated 4th June, 2007 seeking leave to come on record instead of Kasyoka & Associates. The application is on record. In view of these events and court record, it is clear that the court file has never gone missing. The Applicant also stated that they have noted that the respondent has been playing games with the court by filing applications which they do not prosecute. One such application still pending is the one dated 4th June, 2007. These things portend abuse of the process of the court.

[6] The Applicant stated the applicable law; that the principles for dismissal for want of prosecution are now settled and are as follows:-

- i. The default to prosecute is intentional as no valid reason has been advanced by the respondent to explain why the said application was not prosecuted for the last ten years or so.
- ii. There has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his lawyer

The Civil Procedure Act Cap 21 provides that an application for dismissal can be lodged if there is a delay for 3 months. In this particular matter the delay is over ten years which is prolonged, inordinate and inexcusable. There is no valid explanation given for the delay. The delay has been prejudicial to the applicant who cannot execute the warrants due to interim orders which were granted *ex parte*. The merit of the application dated 30th December, 2004 is determined on prosecution of the application but it cannot be a ground and/or one of the principles to be considered by the court in an application for dismissal for want of prosecution.

[7] The other principle to be taken into consideration in granting or not to grant the orders sought is whether the delay shall give rise to substantial risk that it is not possible to conduct trial of the issues in question or is such likely to cause or to have caused serious prejudice to the defendant. There has been serious prejudice as execution has been stayed *ex parte* for the last over ten years hence making it impossible to proceed due to change of circumstances. The judgment

obtained may end up being academic exercise. The Respondent's application dated 30th December, 2004 should be dismissed for want of prosecution.

Plaintiff justified sustenance of their application

[8] The Plaintiff/Respondent opposed dismissal of their application dated 30th December, 2004 as sought in the Defendant's application dated 13th February, 2014. They relied on grounds of objection and the Respondent's replying affidavit sworn by Dr. Ndwiga Njue Mwachandi on the 11th day of April, 2014. They submitted that the history of the matter to be important consideration. To them the Applicant distorted the history of this case. He has failed to disclose that when the Plaintiff's/applicant's made an application for interlocutory orders to restrain the defendant from evicting the plaintiff the court granted that order. The defendants were ordered not to auction the defendant's distressed goods and they were ordered to agree on what amount of rent was due and owing (if any) to the defendants by the Hon. Justice Mbiti. The parties to this suit happen to have schooled together up to form six when they were young and were friends. After schooling each went unto his own way but they remained as family friends. Indeed it is the 1st Defendant who invited the 1st Plaintiff to come and take lease of the suit premises which belonged to him for the purpose of setting up a nursing hospital. But somewhere a rift arose as the lease agreement was being drawn. The 1st defendant became misadvised and thus out of apprehension the Plaintiff's commenced the suit to the total disadvantage of all the parties. Parties sat and agreed the suit to be withdrawn and the whole matter to be settled out of court. on that basis, a notice of withdrawal dated 9th July, 1997 was filed and suit was withdrawn.

[9] But on 11th July, 1997 the defendant's through an incompetent person did file a counterclaim in a non-existent suit. The defendant's counterclaim nonetheless proceeded to formal proof in the absence of the Plaintiff's and/or their counsel. A decree and a certificate of taxation were issued on 27th April, 2004. Objection proceedings to attachment were sustained vide an order dated 14th day of July, 2004 and the defendants sought execution by way of notice to show cause dated 26th October, 2004 why the plaintiffs should not be arrested and be committed to civil jail. The plaintiffs' lawyers advised them; 1) That the entire counterclaim was a nullity as it had been filed against a non-existent suit on 11th July, 1997, the principal suit having been withdrawn on 9th July, 1997; 2) Moreover Law Society of Kenya confirmed in writing that Mr. Julius Nyakiangana did not have a valid practicing certificate as at the time he filed the defendants' counterclaim on 11th July, 1997. Those pleadings were bad in law and should not have been entertained by the court; 3) That, because the defendant's counterclaim is bad in law all the other consequential orders are also illegal and inconsequential in law. The advice led the plaintiffs to instruct their lawyers to seek for stay of execution through the chamber summons dated 30th December, 2004 and on 6th January, 2005 the court granted the stay of execution orders as sought. The other prayers outstanding on the said application relate to; 1) lifting of the warrant of arrest and orders for committal to civil jail issued against the plaintiffs/applicants; 2) setting aside of the judgment and decree issued on the counter-claim as the said proceedings were led by an unqualified person and all other subsequent orders arising therefrom. Costs of the suit are also prayed for.

[10] The Plaintiffs were granted interim orders on 6th January, 2005 pending the hearing and determination of the said application and set the hearing date for 20th January, 2005. On 20th January, 2005 the defendants brought a vexatious and frivolous preliminary objection application which was dismissed by Hon. Justice L. Njagi and ordered that the plaintiff's application be heard and determined on merit on 28th April, 2005. After that order, the court file disappeared under very suspicious and mysterious circumstances. It would be for the best interest to the Plaintiffs/respondents for the application to be heard once and for all in order to remove the apprehension of the unknown which is hanging upon them like the sword of Damocles.

[12] The Plaintiffs are dismayed by the submission by the defendants' counsel which doubts the deaths of the 2nd Plaintiff and also that of the second defendant one Adolf Isaack Muchiri who was the former MP for Kasarani. The said counsel is well aware of these deaths. On the file having gone missing, the plaintiff referred to the Defendant/applicant's own letters dated 29th November, 2007 and 23rd January, 2014 addressed to the deputy registrar of this court seeking for assistance to trace the file. Counsel then expressed displeasure with the submissions of the defendant "...that the court file has all along been available at the registry." Suffice to say the Plaintiff's averment that the court file has been missing is true. But now that the same is available the court should observe the delay in prosecuting the plaintiff's application had not been occasioned by their own cause. Therefore, the default to prosecute was not intentional and it has been explained. The prolonged delay was occasioned by the missing court file. Order 17 of the Civil Procedure Rules, 2010 only addressed the issue of the application for dismissal of suits and does not address the issue of the dismissal of applications. With applications no time limit which has been set. Serious issues have been raised in the application especially that the counter claim was filed upon a non-existent suit. Everything upon the said counter-claim is a nullity in law. No substitution of the deceased parties has been done as required for this case to move forward. The plaintiff's advocate's file also was misplaced when they moved offices. They are yet to obtain copies of the original pleadings from the court registry. They have approached counsel for the defendant on several occasions requesting him to provide them with the documents, but in vain. Due to the above reasons, they could not reconstruct a skeleton court file. In sum, justice is to both the applicant and the respondents. The court should excuse the delay as no prejudice will be suffered by the defendant if the application dated 30th December, 2004 is heard on merit. Therefore, urged the Court to dismiss the applicant's application dated 13th February, 2014 with costs.

THE DETERMINATION

Unpleasant exchanges

[13] It is not out of order for the Court to make an observation that parties herein exhibited heightened undignified mood in their submissions. But what makes me shudder is to see counsels wearing the same cloth of their clients and equally showing similar propensities. These things are visible in the tone and tempo in the submissions. But I find solace; that the language used by counsels to describe their colleague and their respective clients in this case is not the official language in the legal profession. They should read and read well the purport of the overriding objective and the statutory obligation they owe to the Court in resolution of disputes. I end that issue there.

Need to serve substantive justice

[14] I will be guided by the dictates of substantive justice enshrined in Article 159 of the Constitution in determining the issues at hand. Should I dismiss the application dated 30th December, 2004? Administration of justice loathes delay for delay in prosecution of cases is a source of injustice. There is prolonged delay in the prosecution of the said application. The explanation given is that this file went missing after Hon. Justice L. Njagi dismissed a preliminary objection to and ordered that the plaintiff's application be heard and determined on merit on 28th April, 2005. The Plaintiff stated that the Applicant even wrote to court through letters dated 29th November, 2007 and 23rd January, 2014 seeking the assistance of the Court in tracing the file. However, the Plaintiffs are not saying what efforts they made to progress their application. There is also no real evidence to show the file was missing at the time as alleged. The circumstances of this case remind me of not uncommon temporizing especially by a party who is enjoying a favourable order, of stay or an injunction. The Plaintiffs are enjoying an order for stay of execution herein. But as a court of law, I will resist to act impulsively and instead examine the entire circumstances of the case in order to find out whether it is still possible to do justice despite the prolonged delay. I am convinced it is possible to have the application dated 30th December,

2004 heard on merit without causing prejudice to the Defendant for the sake of substantive justice. Although the merits of the application are not the reason I have spared the application in question, I think I should give the issues in controversy an opportunity to be evaluated and determined on merit completely and effectually. And that course of action will confer real benefits on the parties as each party will know its standing in the case after a decision is made on the said application. But I am mindful that the defendant has a judgment which has not been set aside and it is only fair the application dated 30th December, 2004 is heard expeditiously. Accordingly, the application dated 30th December, 2004 shall be heard within 45 days of today on a date agreed between the parties. Should the Plaintiff find it necessary, it must obtain copies of the documents in the court file within 14 days of today. No further delay will be tolerated in this matter and should the plaintiff fail to prosecute its application dated 30th December, 2014 on the appointed date, the court will take such action including striking it out altogether and vacating the order of stay of execution of the decree herein or as it will deem fit. It is so ordered.

Dated, signed and delivered in court at Nairobi this 9th day of October 2014

F. GIKONYO

JUDGE