

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
HCCC CASE NO. 265 OF 2002

THOMAS ONYANCHAPLAINTIFF

Versus

HOUSING FINANCE COMPANY OF

KENYA LIMITED 1ST DEFENDANT

JOSEPHAT MUTUNGA MUIAH2ND DEFENDANT

RULING

Striking out suit

[1] The Court is being asked through a Motion dated 18th October, 2012 to strike out this suit with costs to the 1st Defendant, the Applicant herein. The Motion is expressed to be made under Order 2 Rule 15 Order 11, Rule 7 (3), Order 50 rule 1 of the Civil Procedure Rules, 2010 Section 1A, 1B and 3A of the Civil Procedure Act, Chapter 21, Laws of Kenya and all other enabling provisions of the law. The application is supported by the affidavit of ZEHRABANU JAN MOHAMED and other grounds, the major one being: That the plaintiff's advocate has taken no steps to comply with the directions issued by the Court on the 6th day of December, 2011.

[2] M/S Jan Mohammed, counsel for the Applicant emphasized the application is seeking to strike out the suit against 1st defendant. The directions issued on the 6th day of December, 2011 were specific that all pre-trial formalities were to be completed within a given period, but two years later the plaintiff has not complied. The said Directions were obtained ex parte. The Replying affidavit, witness statements and documents herein were filed late. She was aware that striking out of suit is draconian but the Court should consider that this suit that was filed in 2002 and an injunction obtained in 2004. In such circumstances, the Court should exercise discretion equitably and strike out the case. Several applications to strike out the suit had been made earlier. And it is about time the Court brought this litigation to an end. The Replying affidavit does not explain the delay at all. It has also not made full and frank disclosures. The suit is a perfect candidate for striking out with costs.

[3] Mr. Nyangau for the plaintiff opposed the request to dismiss the suit. He invited the Court to consider the explanation given for the delay at paragraphs 3 & 4 of the Replying Affidavit. The Plaintiff was not aware documents had not been filed in court. And now, they have filed witness statements and documents as required. A list of documents had been filed earlier. The mistake in not complying with the directions of the Court is on the part of previous advocates on record. Such mistake of counsel should not be visited on the plaintiff. The explanation given is sufficient to enable the Court to exercise discretion favourably in the interest of substantive justice. The request made is based on a technicality which should be discarded. He also threw some blame on the 1st Defendant whom he accused of being guilty of delay which arose out of the numerous applications it made herein. He submitted that Order 2 Rule 15 and Order 11 Rule 2 are relevant here. The former grants court jurisdiction to strike out pleading but a party

applying should distinguish the two limbs in the Rule. Sub Rule 2 of Rule 15 prohibits evidence being adduced. The application has been brought under Rule 15 without specifying the particular limb it is made under. It is, therefore, incompetent application. Order 11 Rule 7 limits punishment for delay to costs, and under that rule the court has no jurisdiction to strike out the plaint. The jurisdiction of court has not been properly invoked.

[4] Jan Mohammed made a brief reply that the Plaintiff is merely blaming the advocate for the delay which really is not an explanation for the delay. She quipped: Where has the Plaintiff been for two years? Counsel submitted further that the Practice notes of court provides for striking of pleadings for breach of court directions. Order 11 Rule 7 talks of “*may*” which means it is discretionary. Substantive justice applied both ways and the advanced age of case is a necessary factor. She beseeched court to dismiss suit.

THE DETERMINATION

[5] An issue of a technical nature has arisen herein. Whereas an order to strike out a plaint will yield result of decimation of the suit, it should not be confused with an order for dismissal of suit. The procedural law applicable as well as the principles which guide the Court in the exercise of discretion in striking out the plaint or dismissing the suit are different. The threshold for each is also different and both are not the same or necessarily mutually interchangeable. It is, therefore, desirable that parties, especially where advocates are involved, use the correct terms in applying. Nonetheless, I should presume the 1st plaintiff is asking the Court to dismiss the suit for failure by the plaintiff to adhere to directions on pre-trial processes to progress the case to hearing. The Applicant says the Plaintiff did not act for two years and has not given any reasonable explanation for the delay. All that he has done is to blame the delay on the illness of his previous advocate. What is startling is where the plaintiff has been for two years because there are other measures he may have taken to progress the case. the mistake of counsel may not visited on the client but in this case the plaintiff was aware of the illness of counsel or if he was not, he should have known had he been vigilant to inquire about his case. The plaintiff has an injunction which was obtained in 2004 and such party is expected to act in the best interest of the overriding objective as stipulated in section 1A and 1B of the Civil Procedure Act to assist the Court attain an expeditious disposal of his case. Looking at the circumstances of this case, the provisions of Order 40 rule 6 of the Civil Procedure Rules should be the proper guide. I will only spare this case in the interest of justice, but on stringent conditions. My said decision answers to a higher constitutional principle of justice to serve substantive justice to all the parties and Articles 48, 50 and 159 of the Constitution are relevant guide. The test I have applied is the one set out by Chesoni J (as he then was) in the case of **Ivita Vs Kyumbu**: whether, despite the delay, it is still possible to do justice for all the parties. But, the Plaintiff should set down the suit for hearing within 45 days from today. And in the event of default, the suit will stand dismissed and there will be no need of a formal application for dismissal of the suit. I note also that in accordance with Order 40 rule 6 of the CPR, the injunction herein has lapsed. But in line with the foregoing decision, I hereby extend the injunction for 45 days only, which means it will lapse after 45 days unless for any sufficient reason the court orders otherwise.

Dated, signed and delivered in court at Nairobi this 12th day of November, 2014

F. GIKONYO

JUDGE