



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KITALE
LAND CASE NO. 12 OF 2016
(FORMERLY ELDORET ELC NO. 403 OF 2015)

TURBO HIGHWAY LIMITED.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT

RULING

1. The application dated **18/4/2019** has been brought by the defendant/applicant seeking the following orders:-

(a) That this court be pleased to dismiss the plaintiff's suit against the defendant for want of prosecution.

(b) That this court be pleased to dismiss the plaintiff's suit against the defendant for lack of reasonable cause of action.

(c) That the costs of this application and the suit be awarded to the defendant.

2. The application is brought under **Order 17 Rule 2 sub-rules (1) (2) & (3), Order 50; Order 51 Rule 1 of the Civil Procedure Rules 2010; Section 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya.**

3. The grounds on which the said application is made are that the plaintiff filed this suit and an application therein under certificate dated 4/11/2015 on the 5/11/2015; that vide the application he sought a temporary injunction restraining the defendant from offering for sale by way of auction land parcels **Eldoret Municipality Block 2/8, 2/9 and 2/10** situated in Eldoret within Uasin Gishu County; that the plaintiff's application was heard on 1/2/2016 and a ruling thereon delivered on the 7/4/2016 vide which the court dismissed the plaintiff's application and consequently vacated the interim orders granted on the 6/11/2015; that ever since 7/4/2016 when the court delivered the ruling, the plaintiff together with his counsel on record have never made any attempts and/or taken any steps to fix a date for the hearing of the substantive suit; that it is now more than 12 months since the matter was last in court; that the plaintiff lacks a reasonable cause of action for the reason that since the dismissal of his application for injunction the defendant/applicant sold the suit property and regularized the non-performing account thus concluding all activities herein; that it would be just and equitable to have the suit herein dismissed for want of prosecution as litigation has to come to an end; that the pendency of this matter in court causes the defendant/applicant a lot of anxiety and it is only just and in the best interest of justice that the suit be

dismissed as prayed herein and that this matter is ripe for dismissal.

4. The application is supported by the affidavit **Tom Ogola** the Manager in the Legal Department of the defendant, sworn on **18/4/2019**. That affidavit reiterates the same matters set out in the grounds above.

5. In his response to the application, the plaintiff through its Director **Amit Aggarwal** filed replying affidavit dated **18/6/2019**. He denies that no action has been taken in the matter by the plaintiff since **2015**; that an application was heard and determined in **2016**; that the defendant exercised its power of sale and sold the suit properties; that the plaintiff's advocate wrote on **25/8/2016** to the defendant seeking details of the auction and the price at which the properties were sold and to date no such information has been availed hence the difficulty in progressing with the case; that the defendant filed its documents on 14/9/2017 and even then it failed to attach the documents relating to the sale including the statements of account; that the defendant's conduct as described herein above was meant to frustrate the plaintiff; that the plaintiff's counsel tried on several occasions to have a hearing date fixed but in vain since the court diary was said to be full; that the plaintiff is keen on pursuing the suit except for the fact that it had been hampered by factors beyond its control and that it is in the interests of justice that the application be declined.

6. The applicant/defendant never filed any submissions as ordered by this court. The plaintiff filed his submissions on **22/8/2019**.

Determination

Issues for determination

7. The following are the issues that arise for determination with regard to the instant application:

(1) Should the plaintiff's suit be dismissed for want of prosecution?

(2) If not should the plaintiff's suit be dismissed for lack of a reasonable cause of action.

(3) Who should bear the costs of application?

(1) Should the plaintiff's suit be dismissed for want of prosecution?

8. Order 17 rule (2) (1) of the Civil Procedure Rules provides for dismissal of suits for want of prosecution. It provides as follows:

"2 (1) 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.

2. If cause is shown to the satisfaction of the court it may make such orders as it think fit to obtain expeditious hearing of the suit.

3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.

4. The court may dismiss the suit for non-compliance with any directions given under this order."

9. For a suit to be dismissed for want of prosecution therefore it must be shown that no party has taken any step in relation thereto for one year preceding the lodging of the application for such dismissal.

10. In the instant case, a ruling was read on **7/4/2016**. The applicant maintains, and correctly so, that since that date the respondent has never made any attempts to fix the suit for hearing and that that is a period in excess of the **12 months** provided for under **Order 17 rule 2**.

11. I have examined the record and found that there is no evidence that the plaintiff filed any documents or took action before the instant application was filed. In fact the proceedings show that from **7/4/2016** the next action that took place was filing of the instant application on the **9/5/2019**.

12. The plaintiff however disputes that and avers that some action took place. In his affidavit he avers that one of the prayers the plaintiff sought was for an order of an account, given that the amount claimed by the defendant in exercise of its statutory power of sale was disputed and that the plaintiff could not therefore proceed with the case without the statements of account.

13. He exhibits a letter from his advocate Nyairo & Co. Advocates addressed to the defendant which appears to have been received and stamped by the defendant on **31/8/2016** seeking details *inter alia* of the names of the purchasers, the price at which the properties were sold at the auction and the sum due to the defendant.

14. He also exhibits three copies of invitations to fix a hearing date dated **28/9/2017**, **16/10/2017** and **3/11/2017**. Two of those invitations were stamped as received by Gumbo & Associates Advocates who act for the defendant to date.

15. Do these documents evidence any step taken in the suit? In my view **Order 17 rule 2** does not restrict the steps taken in the dispute to those that only include the filing of documents in the court registry or appearances in court. The wording of **Order 17 rule 2(1)** is “...*in any suit in which no application has been made or step taken by either party for one year...*,” that may be considered to mean any step or even application made outside the court record which may help further the hearing of the suit.

16. In my view the application for an account dated 25/8/2016 made by the plaintiff’s advocate would help the plaintiff and the court in addressing prayer No. (d) (bullet 1) of the prayers in the plaint. It therefore would assist in the determination of the substantive dispute raised by the plaintiff.

17. No categorical response was made by the defendant to the allegation that such an application was lodged with its offices and that its officers had neglected or refused to respond to it. In my view that application is sufficient to stave off an order of dismissal for want of prosecution.

18. However, would that be the proper position in this case where that application for an account was made in the year 2016 and more than 12 months have elapsed since it was served on the defendant?

19. In my view the defendant is under a duty to co-operate with its former client in and out of court with regard to matters that would help in the settlement or conclusion of this dispute and the defendant’s ominous silence only undermines the process. There is no doubt that had the application been lodged in court, a certain decision may have been made on it within no time and parties would have thereafter been expected to prosecute the suit.

20. I find that for the purposes of the defendant’s application for dismissal dated 18/4/2019 the period that lapsed after that letter was served on the defendant would not matter till the defendant responded to it sufficiently or with reasonable substance so as to enable the plaintiff to proceed. A 12 month period from such a response by the defendant is what this court would consider in order to exercise its discretion in favour of the defendant. The defendant has not shown that it responded to the application and therefore this court is unable to exercise its discretion in its favour to dismiss the suit as sought.

21. The other point raised by the plaintiff in opposition to the motion to dismiss is that in the year 2017 various invitations were made to Gumbo & Co. Advocates each seeking an *inter-partes* fixing of a hearing date for the main suit. It has not been denied by the defendant that those invitations were received. However those invitations were received before the 12 month period lapsing immediately before the filing of the instant application. Had this court not already found that the defendant’s conduct disentitled him from the favourable discretion of this court, this court would not have favourably considered them as affecting the 12 month period provided for in **Order 17 rule 2** so as to save the suit from dismissal for want of prosecution.

22. In the final analysis, I find that the suit should not in the circumstances be dismissed for want of prosecution.

(2) Should the plaintiff's suit be dismissed for lack of a reasonable cause of action?

23. I have found there are good grounds on which to exercise discretion in favour of the plaintiff and retain this case in the record for the purpose of its hearing on the merits in so far as the prayer for dismissal for want of prosecution is concerned.

24. However in regard to whether suit should be dismissed for want of a reasonable cause of action as alternatively urged by the applicant, I must examine the pleadings and in particular the plaint.

25. In this matter I must consider the overriding objective provided for under **Section 1A and 1B** of the **Civil Procedure Act**. The concept of the overriding objective is said to have stepped in to relieve litigants from the rigours of having regard to procedural rules to the extent that legitimate claims could not be pursued, with the effect that substantive justice was denied. In the **Stephen Gathua Kimani -vs- Nancy Wanjira Waruingi T/A Providence Auctioneers**, eKLR Mativo J. observed as follows:-

“In my view the overriding objective was brought to ensure that justice is served to both parties and further where there is conflict of the oxygen Rules principles with the substantive law the law ought to be interpreted in such a manner that will ensure the administration of justice.”

26. It has been the normal approach by the courts that where a statutory power of sale is sought to be exercised a mere dispute regarding the accounts between the parties ought not be a basis for an injunction against the chargee and that the remedy available to the chargor is damages against the chargee for any wrongful exercise of its statutory power of sale. In this regard I have considered the fact that the interlocutory application for injunction ended in favour of the chargee and if the chargor felt aggrieved the only remedy would lie in prosecuting its claim for wrongful exercise of statutory power of sale. In my view the plaintiff, having included a prayer for an order that the defendant do provide it with a proper statements of account in respect of the account secured by the charge registered against the titles now already disposed of by virtue of the exercise of the defendant's statutory power of sale, is at liberty to address that issue through the current proceedings without having to file a multiplicity of suits. I therefore find that prayer No. (b) in the application has no merit.

(3) What orders should issue?

27. The upshot of foregoing the application filed by the applicant has no merit and the same is dismissed with costs.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGE

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kuria holding brief for Nasiroli for Defendant

Mr. Bororio holding brief for Odwa for Plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/9/2019