REBULIC OF KENYA

IIN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL SUIT NO. 47 OF 2013

SBI INTERNATIONAL …….....PLAINTIFF /RESPONDENT

VERSUS

REUBEN KIPKORIR J.T BORE…….....DEFENDANT /APPLICANT

RULING

By a Notice of Motion brought under Sections 1A, 1B, 3A and 63(e), Order 2 Rule 15 1 (a) and (2). Order 17 Rule 2 (3) and Section 19 (1) and (2) of the Environment and Land Court Act, 2011 of the Laws of Kenya and dated the 24th August 2016, the Defendant/ Applicant seeks to have the Plaintiff's suit struck out on the following grounds:

1. That it discloses no reasonable cause of action.

2. That the lease agreement dated 18.8.2012 was never renewed after it lapsed on or about 18.8.2016.

3. The application dated 19.7.2013 was dismissed on 28.5.2014 since it lacked merit.

4. In its plaint the Plaintiff does not pray for a permanent injunction.

5. There is no life that can be breathed or injected to salvage the suit.

6. It is a clear case for dismissal and there is no need to give evidence in the form of an affidavit to the application.

7. The Plaintiff has never taken any step to prosecute its suit for over two and a half years.

The Plaintiff/Respondent did not file any replying affidavit or grounds of opposition.

The application was disposed of by way of written submissions with some highlights by counsel. In his submissions Mr. Siele Sigira counsel for the Defendant/ Applicant stated that he was relying on Order 2 Rule 15 of the Civil Procedure Rules which does not require the applicant to file an affidavit or tender any evidence in support of the assertion that the Plaintiff's suit discloses no reasonable cause of action. He emphasized Order 17 Rule 2(3) and stated that for close to 3 years, the plaintiff had not bothered to move the court. All that the plaintiff did after filing the suit was to file an application for injunction under certificate of urgency which was heard and dismissed with costs to the defendant. The main reason for dismissal of the said application was that the lease upon which the suit was anchored was never registered and was therefore not valid. The said lease lapsed on 18.8.2016 thus destroying the substratum of the suit. It is therefore no wonder that the plaintiff went to sleep as it had no basis upon which to pursue its claim.

Mr Sigira further submitted that the plaintiff's suit cannot be salvaged as the lease upon which it was based lapsed in 2016, not to mention that it was declared invalid by the court's Ruling of 28th May 2014. Additionally, the only prayer in the Plaint was for an injunction without stating whether it was permanent or mandatory. It therefor follows that once the application for injunction was dismissed, the suit could not stand and ought to have been dismissed as well. Mr. Sigira stated that even after the Defendant applied for dismissal of the Plaintiff's suit, the plaintiff did not deem it fit to file a replying affidavit or grounds of opposition, further demonstrating the extent of their laxity.

Mr. Kamande counsel for the Plaintiff submitted that the Plaint contains triable issues. He further submitted that the Defendant had been paid under the purported lease and thereafter acted in violation of the said lease thus necessitating the filing of the suit.

In his written submissions counsel for the Plaintiff states that the Defendant's application is incompetent as it is brought under Order 2 Rule 15 (1) which requires no evidence yet it is combined with an application for dismissal of the suit for want of prosecution under Order 17 Rule 2 (3) which must be supported by evidence.

The issues for determination are basically twofold:

1. Whether the plaintiff's suit discloses any cause of action.

2. Whether the Plaintiff's suit should be dismissed for want of prosecution.

On the first limb, the Plaintiff's suit is based on a lease agreement dated 18th August 2010 whereby the Defendant leased his land to the plaintiff for a period of two years for the Plaintiff's use as a quarrying site. Upon expiry of the 2 year lease the same was renewed on 18th August 2012 for a further term of 4 years at a consideration of Kshs. 200,000 per acre per annum which translated to Kshs. 500,000 per annum for the 2.5 acres. Before the expiry of the said term of 4 years, the defendant terminated the lease on 21st May 2013 prompting the plaintiff to file this suit. The only prayer in the Plaint was for an injunction to restrain the defendant from evicting the Plaintiff. At the time of filing the plaint the plaintiff filed an application for injunction under certificate of urgency seeking the prayers set out in the Plaint. The said application was dismissed with costs on 28th May 2014.

It is the Defendant counsel's submission that since the only prayer in the plaint was for an injunction and the same was dismissed, the plaintiffs claim cannot be sustained. He further submits that in any event the lease expired on 18. 8 2016, consequently the suit herein cannot be salvaged as the substratum on which it was based has been destroyed.

Upon being served with the Notice of Motion, the Plaintiff did not deem it fit to file any preliminary objection, grounds of opposition or replying affidavit as contemplated by Order 51 Rule 14 (1) of the Civil Procedure Rules. The grounds stated by the applicant are therefore uncontroverted.

In their submissions, counsel for the respondent contend that the application is incompetent as it makes reference to the expired lease yet Order 2 Rule 15 states that no evidence is admissible in support of an application made under this provision. With utmost respect, this argument does not lie as the applicant has not sworn any supporting affidavit and the facts alluded to in the grounds on which the application is based are borne out by the pleadings.

Moving on the question as to whether the suit discloses any cause of action, it is apparent from the pleadings that this suit was based on a lease and the only prayer sought by the plaintiff was for an injunction. Following the expiry of the lease and the dismissal of the application for injunction, it remains to be seen what shall be canvassed at the main hearing. Indeed by its own actions, the Plaintiff has previously given the Defendant and this court the impression that it was willing to withdraw this matter subject to agreement with the defendant on the issue of costs. The filing of an application to amend the Plaint under certificate of urgency on the day that this application was fixed for hearing however gave the

clearest indication that the plaintiff was making a frantic attempt to salvage its suit.

The case of D.T Dobie and Company (Kenya Limited) Vs Muchina 1982 KLR sets out the principles that ought to guide the court when faced with an application for dismissal of a suit.

In this suit Madan J (as he then was) stated as follows:

> ***"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way," Sellers LJ. (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.***
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> ***If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind to summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing.***
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> ***No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it."***

That decision of Madan J.A (as he then was) in the case above has been consistently followed and is sound law. In the case of **Crescent Construction Co. Ltd vs Delphis Bank Ltd Civil Appeal No.146 of 2001** decided on 9th February, 2007, this Court after quoting it with approval further stated thus:

> ***"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the court must not drive away a litigant from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter."***

In view of the foregoing authorities, I am constrained to disallow the prayer for dismissal of the suit disclosing no cause of action.

On the second issue as to whether the Plaintiff's suit should be dismissed for want of prosecution, it is clear from the proceedings herein that the plaintiff's conduct in this matter has been less than satisfactory. After the dismissal of the Plaintiff's application for injunction in May 2014, no action was taken until the Defendant filed an application to dismiss the suit in August 2016. Curiously, the plaintiff did not deem it fit to file a replying affidavit to explain the delay and instead purported to do so by way of written submissions. With respect to learned counsel for the plaintiff, this is irregular. I am conscious of the fact that courts are enjoined to do substantive justice and ought not to decide cases based on technicalities but this does divest the parties and their advocates of the responsibility to exercise diligence in the conduct of their matters. The plaintiff's counsel has submitted that the delay of two and a half years is not inordinate and ought to be excused as the Defendant has suffered no prejudice. In the case **of Ivita Vs Kyumbu 1984 KLR cited in Pravichandra JamnadasKakad Vs Kenya Bus Services Ltd & Another 2014 KLR**, Justice Chesoni stated as follows:

> "**The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay? Justice is justice to both the plaintiff and the defendant, so both parties to**

the suit must be considered and the position of the judge too, because it is no easy task, for the documents and or witnesses may be missing, and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the plaintiff's delay. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court can exercise its discretion in his favour and dismiss the action for want of prosecution. Thus even if delay is prolonged and the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing".

In the instant case, the defendant has expressed his displeasure at the plaintiff's delay in prosecuting the its case, however, he has not shown what prejudice this has occasioned him. This would have been possible if the defendant had filed a supporting affidavit. In the absence of such affidavit, the court cannot speculate. I appreciate the dilemma that the applicant's counsel was faced with as he chose to file his application under Order 2 rule 15 1 (a) which prohibits the production of evidence to explain why a suit discloses no cause of action. At the same time, he cited Order 17 rule 2 as one of the provisions upon which the Notice of Motion is based. This provision requires one to support the prayer for dismissal, ideally by way of an affidavit.

I have carefully considered the Notice of Motion and grounds upon which it is based, the pleadings herein, learned Counsels oral and written submissions and the sections of the law, authorities cited to me. The upshot of the above is that the court is disinclined to grant the orders sought and the application is disallowed. Since the Plaintiff has been jolted into action and filed an application to amend its Plaint, I direct that the said application be fixed for hearing within the next 21 days in order to expedite this matter. The costs of this application will be in cause.

Dated, signed and delivered at Kericho this 12th day of April, 2017.

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JANE M. ONYANGO

JUDGE

In the presence of:

1. Mr. Siele Sigira for the Defendant/Applicant.

2. Mr. Oboso holding brief for Mr. Kamande for the Plaintiff/Respondent.