REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 102 OF 2002

GIDEON SITELU KONCHELLA …… PLAINTIFF

VERSUS

DAIMA BANK LTD. …….. DEFENDANT

R U L I N G

1. There are two Applications before this Court, the substantive Application being that of the Plaintiff by way of Chamber Summons dated 12th May 2005. The second Application is dated 8th April 2013 but amended on 22nd April, 2013 brought under **Order 1 Rule 15** of the *Civil Procedure Rules, 2010*. It seeks the prayer that Third Party Notices be allowed and authorised to issue as against 14 parties. In my view, whether that Application be allowed or otherwise is dependent upon the Court's determination of the first of the Plaintiff's Application dated 12th May 2005 as above. That Application was filed under the provisions of the old **Order IX Rule 8** of the *Civil Procedure Rules* as well as **sections 3A and 63 (e)** of the *Civil Procedure Act*. The prayers sought were that the Court be pleased to set-aside, discharge or vacate its Order made on the 14th March 2005 in which it dismissed the suit for the Plaintiff's non-attendance. The Application was grounded on the supporting Affidavit of the Plaintiff dated 12th Made 2005 as well as upon the following grounds:

> **"(a) The suit was dismissed due to non-attendance of the Plaintiff.**
>
> **(b) The Plaintiff was not aware that this suit had been set down for hearing on 14th March, 2005.**
>
> **(c) The hearing date was not communicated to the Plaintiff by his previous advocate and therefore the Plaintiff did not deliberately fail to attend court.**
>
> **(d) The Plaintiff has a good case on the merits and the suit should be determined on its merit so as to ensure that justice is done.**
>
> **(e) The Plaintiff stands to suffer irreparably unless the dismissal order is discharged and the suit reinstated.**
>
> **(f) Further and other grounds to be canvassed at the hearing".**

2. The Plaintiff's Affidavit in support of the Application noted that he had withdrawn instructions

from his previous advocates Messrs. S. Musalia Mwenesi but that the firm had failed to notify him that the matter was fixed for hearing before this Court on 14th March 2005. He had approached his new advocate Mr. Kioko Kilukumi who having cleared with his previous advocates that he could take over the matter, had perused the Court file to discover that the said date of 14th March 2005 had been fixed by the Plaintiff's previous advocate. As he had not been informed of the hearing date, his failure to attend Court was not deliberate. He had been advised by his new advocate that this Court follows the principle that the mistakes of a litigant's advocate should not be visited upon the litigant.

3. The statutory manager of the Defendant bank one **Simeon Ng'eny** swore a Replying Affidavit dated 9th June 2005. The deponent outlined what he termed the "Genesis of the Dispute between the Plaintiff and the Defendant". He related that there had been previous proceedings between the parties being *HCCC No. 627 of 1998* which had ended in a consent judgement of Shs. 5 million in the Defendant Bank's favour but the question of the interest still remained outstanding, despite the charged property being sold and the proceeds thereof going in part satisfaction of the Decree therein. As regards the balance owed under that suit, the deponent recorded that a warrant of arrest had been issued as against the Plaintiff and such was still outstanding and had yet to be stayed or set aside. He noted that <u>this</u> suit was dismissed on 14th March 2005 as it had been filed in order to circumvent the clear Orders of the Court issued in *HCCC No. 627 of 1998*. In the deponent's opinion, both the Application before this Court and the dismissed suit were an abuse of process and *res judicata* and no useful purpose could be achieved by reinstating the same.
4. As regards the date for the hearing of this suit – 14th March 2005, the deponent recorded that the same had been fixed by consent of both parties and only evidence from counsel on record for the Plaintiff at the time would shed any light as to why he was not in Court on that day or indeed the Plaintiff himself. Finally and more or less by submission, Mr. Ng'eny detailed as follows:

> **"i) THAT the application is misconceived frivolous and abuse of the court process.**
>
> **ii) THAT no useful purpose would be served by reinstating the dismissed suit which in any event is fatally defective and untenable in law.**
>
> **iii) THAT the applicant is pursuing the dismissed suit to avoid court orders issued against him in HCCC 627 of 1998, he has no right of audience before this court until he presents himself before the deputy registrar.**
>
> **iv) THAT there has been inordinate delay in bringing up this application which delay has not been explained.**
>
> **v) THAT the applicant is in contempt of court in HCCC No. 627 of 1998 and unless and until he purges that contempt he has no right of audience before this honourable court".**

5. It should also be noted that in response to the Plaintiff's Amended Notice of Motion dated 22nd April 2013, the Defendant filed Grounds of Opposition which detailed as follows:

> **"1. THAT the plaintiff/applicant's motion herein is fatally defective and untenable in law as the suit herein was dismissed by an order of this honourable court (Azangalala, J) on 14th March 2005.**
>
> **2. THAT the plaintiff/applicant's motion is scandalous, frivolous, vexatious and an outright abuse of the court process as he seeks to enjoin and/or effect third party notices on parties in a suit that has been dismissed and is yet to be reinstated by an order of the court.**
>
> **3. THAT the plaintiff/applicant's motion herein is misconceived and bad in law as third party notices is a preserve of the defendant/ respondent herein as**

envisaged under Order 1 Rule 15 of the Civil Procedure Rules, 2010.

4. THAT the plaintiff's motion is scandalous and an outright abuse of the court process as is pending before this court an application to set aside the order of dismissal dated 15.05.2005 which the applicant is yet to prosecute seven years later.

5. THAT the application is made seven years after the dismissal of the suit without any explanation for the delay.

6. THAT the purported amended notice of motion and the amended affidavit in support are a nullity in law".

6. The Court has noted that the Plaintiff filed a Notice of Motion dated 30th January 2012 in which, apart from leave being granted to the firm presently on record for the Plaintiff to come on record, sought orders for stay of execution pending an Intended Appeal and a temporary injunction with regard to the enforced disposal of the suit property. That Application was withdrawn before Court on 3rd May 2012 with costs to the Defendant. The Plaintiff then filed a further Application dated 8th May 2012 which sought the same prayers as regards leave being granted to Wachakana & Co to prosecute the suit on behalf of the Plaintiff but also that Third Party Notices be allowed to issue as above. My brother **Mutava J.** recorded, by consent, on 10th October 2012 that the first prayer should be allowed in terms of representation but that the request concerning the issue of Third Party Notices be stood over as a matter for the full hearing of the suit.
7. Those Applications having been more or less dealt with, this Court is left to determine the said Application before it dated 12th May 2005. However, the Court notes that the leave sought to issue Third Party Notices sought in the Amended Notice of Motion dated 22nd April 2013 are against the same 14 parties are as had been detailed in the Plaintiff's Application dated 8th May 2012. Could that part of the said Notice of Motion relating to leave to issue the Third Party Notices be said to be *res judicata*? Moreover, I have reviewed the Further Affidavit of the Plaintiff sworn on (without leave) 25th February 2013. It seems that he is basing his Application before Court on the fact that the Defendant was placed in liquidation on 13th June 2005. He maintains that the delay in prosecuting the Application before Court dated 12th May 2005 was as a result of such liquidation but he gives no detail in that regard other than to say that he has only recently been given leave by this Court to proceed with the Application and prosecute the Defendant. Nowhere does the Plaintiff say why it took him 7 years to obtain the leave of this Court by virtue of his said application dated 8th May 2012.
8. However, in a somewhat convoluted submission, the Plaintiff's advocate noted that **Mutava J.** having allowed prayer no. 1 of the said Notice of Motion dated 8th May 2012, the said firm of Wachakana & Co. were now free to prosecute both the suit and the Application dated 12th May 2005. Counsel explain the delay in prosecuting that Application because of the liquidation process of the Defendant which commenced on the 13th June 2005. The Application before Court had not been heard by that date and the delay was not malicious because of the liquidation. Counsel went on to say that the Application raised serious issues including whether the dealings with the Plaintiff's land were void for lack of consent of the local Land Control Board. Another issue was whether the Charge was void for lack of valuable consideration and was therefore liable to be set aside. The Applicant had attached to the Supporting Affidavit, Official Searches to show that the suit land had been subdivided and transferred to the various Third Parties, against whom the Applicant sought the consent of the Court, to issue Third Party Notices. The transfers had been done in the year 2011. In counsel's view the Defendant was not coming to Court with clean hands as there were serious issues of fraud and misrepresentation as detailed in the Plaint. There would be no harm or disadvantage to the Third Parties who are the purchasers of the Plaintiff's property. Counsel further commented that the Court had a duty to order that the property do revert back to the Applicant under the provisions of *Articles 23 (1)* and *165* of the *Constitution*. The Applicant's proprietary rights had been violated
9. Mr. Njuguna, learned counsel for the Defendant, responded by submitting that both Applications before Court were opposed. He maintained that the Plaintiff's Chamber Summons dated 9th June

2005 was a simple one relating to the reinstatement of the dismissed suit. The principles regarding reinstatement are well settled but, in counsel's opinion, the Plaintiff had miserably failed to satisfy this Court that this suit, dismissed 8 years ago, should now be reinstated. Thereafter, he referred this Court to Exhibit "SN 1" attached to the said Replying Affidavit of Simeon Ng'eny. He maintained that the issues raised in this suit where exactly the same that were raised in *HCCC No. 627 of 1998*. Judgement in that suit was delivered on 22nd May 2001 as per **Hewett J.** In that suit, the Plaintiff had also made an application for stay which was again dismissed. There was never an appeal filed 13 years later. Notice of intention to appeal was filed. Counsel maintained that this suit, which the Court was being asked to reinstate, is a repeat of matters already raised and determined in another suit and as such, would serve no useful purpose if the Court made an order for the restitution of the suit. He maintained that the Plaintiff was attempting to resuscitate a suit through the back door and there could be no explanation for the delay of 8 years. He noted that the Defendant bank had been placed in liquidation in June 2005 while the application for leave to sue was only made by the Plaintiff, last year. In counsel's view, the Plaintiff is a vexatious litigant and counsel on record for him was now the third advocate representing him.

10. Counsel also noted that the Plaintiff had filed a Petition in the High Court at Machakos being *Petition No. 19 of 2012*. All the issues raised in the matter before this Court were also raised in the Constitutional Petition. The prayers in the Petition were the same prayers as requested by the Plaintiff in this suit.
11. So far as the Amended Notice of Motion was concerned, counsel for the Defendant pointed out that the same was a nullity as one could not join parties to a suit that has already been dismissed. These were the same parties who had been cited in the Petition before the High Court at Machakos. Finally, Mr. Njuguna referred the Court to his List of Authorities dated 12th March 2013.
12. The first of the authorities cited by the Defendant is a case in which I gave a Ruling dismissing a Notice of Motion filed in July 2011 seeking to set-aside Orders of Court granted in March 2003. That case was **Michael Kamau Gakundi v Daima Bank Ltd & Anor. (2012) eKLR**. In that matter I quoted extensively from the case of **Maina v Mugiria Civil Appeal No. 27 of 1982 (unreported)** which outlined this Court's wide and unfettered discretion to set aside an *ex parte* Judgement or Order. The Court of Appeal's decision by which I am bound detailed:

> **"The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:**

a. **Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just …. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E.**

b. **Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.**

c. **Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93".**

Further, I would reiterate my finding in that case when I detailed at paragraph 11 of my said Ruling:

> **"I agree with the Defendants that the Plaintiff has been indolent and has not shown**

good faith in the conduct of his case. This Court cannot exercise its unfettered discretion in favour of a litigant who wants to steal a march on his opponent or wants to obstruct or delay the course of justice. Indeed as far as the Defendants are concerned, justice to be further delayed is justice denied."

13. I would also endorse the finding of **Gacheru J.** in the case of **Thomas Mwaura Gitau & Anor. v Eric Muhati & 2 Ors (2012) eKLR** when the learned judge quoted from the finding of **Warsame J.** in the case of **Mobil Kitale Service Station v Mobil Oil Kenya Ltd HCCC No. 205 of 1990 (unreported)** as follows:

> **"It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously".**

Gacheru J. in her said Ruling, also pointed to the provisions and tone of **section 1A** of the *Civil Procedure Act* which details:

> **"The overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."**

14. Finally, as regards the Defendant's authorities, I drew considerable comfort from the words of **Lord Denning MR** in the case of **Allen v Sir Alfred McAlpine (1968) 1 All ER 543** as quoted in the Ruling of my learned brother **Ochieng J.** in the case of **Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd (2006) eKLR** as follows:

> **"Lord Denning MR captured, in the following words, the fundamental reason why courts do dismiss suits for want of prosecution:**
>
> **"The delay of justice is a denial of justice ……**
>
> **To no one will we deny or delay right or justice. All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3. Sc. 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, C.1). To put right this wrong, we will in this court do all in our power to enforce expeditions; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it. It is the only effective sanction that they contain".**

15. I have reviewed the exhibits to the Replying Affidavit sworn by Mr. Ng'eny more particularly the pleadings in *HCCC No. 627 of 1998*. In that suit the Defendant herein sued the Plaintiff for Shs. 15 million odd in relation to a loan advanced to him in 1996. In **Hewett J's** Judgement delivered on 22nd May 2001, the learned Judge dealt with the point raised by the Plaintiff herein as regards there being a lack of Land Control Board consent for the Charge executed by him in respect of his land Title No. Kajiado/Kaputei/3282 when he detailed:

> "**What, in my judgement, is not legitimate is for Mr. Mwenesi to attack that consent and indeed the original contract for the loan and the alleged lack of Land Control consent to the Charge in the matters before me. I let his arguments run. Anything I say about them is of course obiter to the main thrust of this ruling. From the documents exhibited and from the viva voce evidence, I had no difficulty in elucidating the terms of the original loan and overdraft as I have set out above. I also have no difficulty in believing (but not holding) that the appropriate Land Control consent was granted. Not only is it exhibited as SM II to Mr. Musimba's affidavit of**

28th June 2000 but section 20 (1) of the Land Control Act which was not brought to my attention by counsel states. 'The Registrar shall refuse to register the instrument effecting a control the transaction unless he is satisfied that any consent required by this Act to be obtained in respect of the transaction has been given or that no consent is required.'"

16. I have also reviewed pages 7 - 13 of the Exhibit annexed to the Supporting Affidavit of the Plaintiff sworn on 15th Made 2012 in support of his Notice of Motion dated 8th May 2012. That contains a copy of the Petition presented to this Court at Machakos being *Petition No. 19 of 2012*. The first ground of the Petition reads:

"The contract to lend was illegal and enforceable in law as it contravened the mandatory requirements under the Land Control Act Cap 302 Laws of Kenya."

To my mind that is exactly the same prayer as was expressed before **Hewett J.** in *HCCC No. 627 of 1998* and is the same prayer at paragraph (c) of the Plaint herein dated 13th November 2001. As a result I find myself agreeing with learned counsel for the Defendant that the Plaintiff has become a vexatious litigant having the same point tried again and again before this Court. Such matters are clearly *res judicata*.

17. With all that in mind as well as the fact that the Plaintiff is guilty of inordinate delay in pursuing his Application before Court, I have no hesitation but to dismiss the Plaintiff's Chamber Summons dated 12th May 2005. As a result, the Plaintiff's Amended Notice of Motion dated 22nd April 2013 also stands dismissed with costs to the Defendant in both cases. In conclusion, I repeat the finding of **Azangalala J.** dated 14th March 2005 that this case stands dismissed once and for all.

DATED and delivered at Nairobi this 30th day of October 2013.

J. B. HAVELOCK

JUDGE