



REPUBLIC OF KENYA



KENYA LAW
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**Sebuliba v Shimmers Plaza Limited & 9 others (Civil Suit 753 of 2012)
[2022] KEHC 157 (KLR) (Commercial and Tax) (27 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 753 OF 2012
JN MULWA, J
JANUARY 27, 2022**

BETWEEN

CHRISTOPHER SEBULIBA PLAINTIFF

AND

**SHIMMERS PLAZA LIMITED 1ST DEFENDANT
RAJ DEVANI 2ND DEFENDANT
BINDYA DEVANI 3RD DEFENDANT
BAMBI DEVANI 4TH DEFENDANT
THE ATTORNEY GENERAL 5TH DEFENDANT
NATIONAL BANK OF KENYA 6TH DEFENDANT
CAPE SUPPLIES LIMITED 7TH DEFENDANT
DIAMOND TRUST BANK 8TH DEFENDANT
TRADE WINDS LIMITED 9TH DEFENDANT
CHIEF LAND REGISTRAR 10TH DEFENDANT**

RULING

1. This suit was dismissed by the court upon a Notice to Show Cause (NTSC) why it should not be dismissed for want of prosecution on the 14/10/2021. The court record shows that the NTSC had been served upon the Plaintiffs Advocates by email on the 1/10/2021 but failed to respond to the NTSC by any means. They also failed to attend court on the hearing date for the NTSC.



2. The advocates for the 6th and 5th Defendants were in attendance and urged the court to dismiss the suit stating that there was a delay of three (3) years since the last action taken in court was on the 30/10/2019. On the 20/9/2021 the matter came up for hearing of the NTSC but none of the parties attended court when the court gave the 14/10/2021 as the hearing date. All parties were served.
3. On the 21/10/2021, the Plaintiff filed an application by Notice of Motion under provisions of Article 159(2) (a) of the 2010 Kenya Constitution, Sections 1A, 1B and 3A of the *Civil Procedure Act*, and Order 51 Rule (1) of the *Civil Procedure Rules* seeking an order for setting aside or vacation of the dismissal orders issued on the 14/10/21 and re-instate the suit for hearing.
4. Reasons for the application are stated by the Plaintiff's Advocate Nzaku Nzaku Advocates that they were never served with the notices to show cause and that they were in the process of fixing a mention date as they came on record on the 15/10/2020 but the court file was never retrieved for that purpose. The Advocate Steven Nzaku swore the Plaintiff's Affidavit on the same date.
5. There are ten Defendants in the suit, who were all served with the application and hearing notice. Only the 8th Defendant's advocate Mr. Harshi Shah attended court and did not offer any submissions, leaving the matter to the court's discretion.
6. I have considered the application and the reasons for the failure to progress the hearing of the application stated in the Affidavit on the 30/10/2019. The current Advocates came on record for the Plaintiff on 15th October 2020, in the middle of the Covid – 19 pandemic.
7. It is common knowledge that court processes were slowed down during the period March, 2020 and only up-scaled to a certain extent early 2021. That does not however excuse the Plaintiff's Advocates from attending court virtually on the occasions to show cause why the case should not have been dismissed. The court record shows that at least for the hearing of the 14/10/2021 when the suit was dismissed, the hearing notice had been sent to the advocates by email.
8. The suit was filed way back in 2012, and was actively prosecuted albeit by applications, upon applications. I have considered that when the current advocates took over the case for the Plaintiff in October 2020, they indeed sought for Mention dates from the Court Registry without any success – exhibits marked SM – 1(a), 1(b) and lastly being by letters dated 21/10/2020, 15/9/2021, 24/9/2021, 16/2/2021, 15/4/2021 and lastly on the 15/9/2021.
9. The principles governing re-instatement of suits upon dismissal are stated in the case of *John Nahashon Mwangi vs Kenya Finance Bank Ltd (in liquidation) [2015] eKLR*, thus:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically Articles 159 of *the Constitution*. Article 50 coupled with Article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court. In making a decision on such matter of reinstatement of a suit which has been dismissed by the court... Courts should sparingly dismiss suits for want of prosecution for dismissal is draconian act which drives away the Plaintiff in an arbitrary manner from the seat of judgment...

... the same test will apply in an application to reinstate a suit and a court should consider whether there are reasonable grounds to reinstate such suit of course after considering the prejudice that the Defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”



10. The above was reiterated in the case of *Joseph Kinyua vs GO Ombachi* [2019] eKLR – (F. Gikonyo J), among others.

In the circumstances of this suit and there being no serious opposition to setting aside the dismissal orders, and for ends of justice to be met, I think justice would be served by the suit being reinstated and heard on merit, upon conditions that I shall state here below – Section 1A, 1B and 3A of the *Civil Procedure Act*.

11. The court in exercise of its discretion may set aside its orders if persuaded that it is for the interest of justice to do so, and that no prejudice will be caused to the opposite party, that may not be compensated in costs, – *Jira Rodgers Gitonga Njeru vs Al Husnain Motors Ltd & 2 others* [2018] e KLR wherein very similar circumstances, the dismissal orders were set aside. See also *Ivita v Kyumbu* [1984] KLR 441.
12. Consequently, I set aside the dismissal orders dated 14/10/2021. The Plaintiff shall take the necessary steps to set down the suit for hearing within 90 days of this ruling. In default, the suit shall stand dismissed. I make no orders as to costs.

DATED AND SIGNED THIS 27TH DAY OF JANUARY 2022

HON. J. N. MULWA

JUDGE

