

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPLICATION NO. 115 OF 2017 (OS)

PROF. TOM OJIENDA & ASSOCIATES.....ADVOCATE

VERSUS

MUMIAS SUGAR COMPANY LIMITED.....CLIENT

RULING

1. The application for determination is the Motion dated 21st September 2020, seeking dismissal of the Summons dated 7th December 2017 for want of prosecution. It is argued that after the court herein delivered a ruling on 31st January 2019, deeming the reference dated 7th December 2017 to have been filed in time, the client did not take any further step, and two years have since lapsed.

2. The response to the Motion is through an affidavit, sworn on an unknown date in 2020, but filed herein on 17th November 2020, by Kizito Wangila Masinde, advocate. The case stated is that by the ruling of 31st January 2019, the court had directed the Deputy Registrar to avail the file she had used to tax the contested bill in Kakamega HC Misc. Applica. No. 16 of 2017, to facilitate consideration of the other prayers in the application dated 7th December 2017. It is averred that delay was on the part of the court, caused by non-compliance by the Deputy Registrar with the directive above. It is argued that the client could do nothing to compel the court to deliver its ruling.

3. I have closely perused the record before me. I have confirmed that the court did indeed, on 31st January 2019, deliver a ruling wherein the application dated 7th December 2017 was deemed to have been filed in time, and holding determination of the other prayers in abeyance to await compliance by the Deputy Registrar that she puts the file she used to tax the disputed bill, being Kakamega HC Misc. Applica. No. 16 of 2017, together with the instant file. The directive to the Deputy Registrar has never been complied with, for the file in Kakamega HC Misc. Applica. No. 16 of 2017 has never been put together with the instant file to facilitate determination of the rest of the prayers in the application dated 7th December 2017, and the instant file, after delivery of the ruling on 31st January 2019, was returned to the registry and filed away.

4. The order herein of 31st January 2019 was to apply to the other two files in the series, being Kakamega HC Civil Applica. Nos. 116 and 117 of 2017, with respect to Kakamega HC Misc. Applica. Nos. 14 of 2017 and 18 of 2016, respectively. I have perused the two files in Kakamega HC Civil Applica. Nos. 116 and 117 of 2017, and noted that the Deputy Registrar is yet to comply with the directive of 31st January 2019, by availing the files in Kakamega HC Misc. Applica. Nos. 14 of 2017 and 18 of 2016. Like the instant file, after delivery of the ruling on 31st January 2019, the files were returned to the registry and no action was taken on them until the advocate filed the subject Motion.

5. For all intents and purposes, the office of the Deputy Registrar is to blame for the impasse, and I would, to an extent, exonerate the client. To an extent because it took steps to follow up with the Deputy Registrar to ensure compliance with the directions given on 31st January 2019, or to establish the status of the matter, instead of waiting for the advocate to move the court by the instant Motion. Indeed, it should have taken some step, in much the same way as taken by the advocate in filing the instant Motion. Much as there was a lapse on the part of the Deputy Registrar, the client was equally indolent.

6. I will not grant the prayer to dismiss the matter, instead I shall direct the Deputy Registrar to comply with the directions of 31st January 2019. I shall allocate the matter a date for mention for compliance, at the delivery of this ruling. I believe no such date was allocated on 31st January 2019 because the said ruling was delivered on my behalf by my colleague Judge, and it would appear that there was a gap in case management of the matter on that account. The Deputy Registrar should, however, not escape censure for failing to do what had been directed to be done by that ruling, for if the Deputy Registrar had acted as directed there would have been no delay.

7. The order above shall apply with equal measure to Kakamega HC Civil Applica. Nos. 116 and 117 of 2017. The Deputy Registrar shall cause the files in Kakamega HC Misc. Applica. Nos. 14 of 2017 and 18 of 2016 to be made available for the purposes of Kakamega HC Misc. Applica. Nos. 14 of 2017 and 18 of 2016.

8. The advocate is largely successful in his Motion, were it not the fact that the blame for the delay was shared by the Deputy Registrar and the client. I have seriously considered awarding costs of the Motion on the advocate, for getting the matter back on the track, and in view of the indolence by the client, but I believe that the Deputy Registrar takes the greater responsibility for the delay. Let each party shall bear their own costs. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF MARCH 2021

W MUSYOKA

JUDGE