



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 319 OF 2010

PETROMIN LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA REVENUE AUTHORITY.....DEFENDANT/RESPONDENT

RULING

1. On **15th July, 2015**, this matter came up before court upon a **Notice to Show Cause** that had been issued to the parties but none of them attended court. Consequently, the matter was dismissed for want of prosecution.

2. Subsequently, the Plaintiff lodged the application dated **6th April, 2018** which is the subject of this **Ruling** seeking the following orders:-

a) That this Honourable Court be pleased to set aside and/or vary the orders of Honourable Justice Muya issued on the 15th July, 2015 dismissing the instant under Order 17, Rule 2 of the Civil Procedure Rules, 2010.

b) That upon the grant of prayer No.(1) above, this Honourable court be pleased to reinstate this suit for full hearing and determination on merit.

3. In the **Supporting Affidavit** sworn by the Plaintiff's Director and the grounds at the face of the application, the Plaintiff avers that *the Notices to Show Cause were not served to it or its advocates as intimated on 15th July, 2015, when the matter was dismissed; that the Plaintiff was therefore condemned unheard contrary to the rights of fair hearing enshrined under Article 48 of the Constitution of Kenya, 2010. According to the Plaintiff, it should be granted an opportunity to ventilate its case since no prejudice will be occasioned to the Defendant.*

4. In its response to the application, the Defendant filed a **Replying Affidavit** dated **24th May, 2018**. The affidavit is sworn by its Counsel **Janet K. Lavuna** who depones that *the application is devoid of merit having been brought almost three (3) years after the suit was dismissed. She submitted that it was well within the Applicant's knowledge and their Counsel that the case would be heard during the Service Week and failure to attend would lead to dismissal of the case. The Respondent further intimated it would be prejudiced if the suit was to be reinstated because most of its employees who were potential witnesses might have left employment or retired.*

5. The Respondent further contends that the Plaintiff has been complacent and casual in the matter he handled the suit and a court of equity should only aid the vigilant but not the indolent. The Respondent also feels that there is no good reason upon which the request for reinstatement may be granted.

6. The application was canvassed by way of written submissions with the Applicant filing its submissions on **18th December, 2020** whilst the Respondent filed on **4th February, 2021**.

Analysis and Determination

7. I have had the benefit of reading the written submissions and the decided cases cited by the parties. They replicate much on the grounds in support and opposition of the application as captured above. I therefore need not to duplicate the same herein.

8. The main issue for determination in this application is whether the court should set aside the dismissal order and reinstate the Plaintiff's suit for hearing on its merits.

9. Under **Order 17 rule 2(1)-(4)** of the **Civil Procedure Rules**, a Plaintiff's suit slides into grave danger of being dismissed for want of prosecution when no party takes any step in furtherance of the prosecution of the suit for a period of 12 months.

10. **Order 17 rule 2(1)** of the **Civil Procedure Rules**, specifically grants the court power to dismiss a suit in which no step has been taken for one year. The provision states as follows:-

“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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit”.

11. The order also requires the court to give notice to the party concerned to show cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit.

12. The question that arises therefore is whether in this case there was a **Notice to Show Cause** that was issued in writing to the Plaintiff before the suit was dismissed. It is the submission of the Plaintiff that none was given. I have scrutinized the documents on record and I agree with the Plaintiff's assertions. There is nothing on record to show that a **Notice to Show Cause** was ever issued by the court. Ordinarily, once a **Notice to Show Cause** is issued by the court, the same should be served upon the parties. In the present case however, none seems to have been issued in writing or at all. At the time this court gave order dismissing the Plaintiff's suit for want of prosecution, the issue of whether a **Notice to Show Cause** was issued or served to both parties was not delved into.

13. In the case of **Nairobi HCCC No.1266 of 1999, Associated Warehouse Company Ltd & Others –vs- Trust Bank Limited**, Azangalala J, as he then was, held that:-

“The Plaintiff's state that they did not receive the notice to show cause why their suit should not be dismissed. Their advocates were also not served with the Notice..... the dismissal order was therefore made without the knowledge of the Plaintiffs or their agents. There is no affidavit of service. The ex-parte dismissal of the suit is irregular. Rule 2(1) of Order 16 presupposes service before dismissal.”

14. It should be noted that **Order 16 rule 2(1)** of the **Civil Procedure Rules** referred to above is now **Order 17 rule 2(1)** of the **current Civil Procedure Rules** and it is clear that the process of our judicial system requires that all parties before the court should be given an opportunity to remedy their defaults before any adverse orders are made against them hence the proviso in **Order 17 rule 2(1)**. In this case, the Plaintiff was not given the opportunity to show cause why its case should not be dismissed. The issuance and service of a **Notice to Show Cause** to the Plaintiff is of paramount importance for justice to be seen to have been done. This is so because once a suit is dismissed, the Plaintiff is forever barred from agitating its case.

15. However, the Defendant has submitted that the delay exhibited by the Plaintiff and displays the conduct of lethargic litigant who have lost interest in his case. The Defendant submitted that due to that delay, some of its employees who would have been potential witnesses have either left employment or retired and if the case is reinstated, it will be

prejudiced.

16. In my humble view, an award of costs will adequately compensate the Defendant for any inconvenience that it may have suffered. It will certainly suffer no prejudice by allowing the suit to proceed to hearing because it can make an application to substitute its witnesses given that the witnesses testify by virtue of actively holding their respective office.

17. In the circumstances, the Plaintiffs application is allowed. The **Order of 15th July, 2015** by which the Plaintiff's suit was dismissed for want of prosecution is hereby set aside, and the suit reinstated for hearing. The Defendant shall have the costs of this application and throw away costs of the suit. This suit should now be fixed for hearing on priority basis.

It is so ordered.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 22ND DAY OF APRIL, 2021

D.O. CHEPKWONY

JUDGE