



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 831 OF 2010**

**BETWEEN**

**TATU CITY LIMITED.....PLAINTIFF**

**AND**

**STEPHEN MBUGUA MWAGIRU.....1<sup>ST</sup> DEFENDANT**

**ROSEMARY WANJA MWAGIRU.....2<sup>ND</sup> DEFENDANT**

**KOFINAF COMPANY LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. On 8<sup>th</sup> March 2017 the court dismissed this suit for want of prosecution. The plaintiff has now moved the court by a Notice of Motion dated 18<sup>th</sup> January 2019 to, “reinstatement of the Plaintiff’s suit.” It is made under **Articles 48, 50 and 159** of the Constitution, **sections 1A and 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)**, **Orders 12 rule 7** of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law.
2. The facts upon which the application is grounded is found in two affidavits sworn by Christopher John Barron, the plaintiff’s Chief Operating Officer, on 18<sup>th</sup> January 2019 and 1<sup>st</sup> April 2019. He deposes that the firm of *Ochieng, Onyango, Kibet and Ohaga Advocates* acted for it but it later instructed the firm of *Ahmednasir Abdikadir and Company Advocates* which filed a Notice of Change on 26<sup>th</sup> April 2018 together with a consent order between the advocates permitting the latter firm to come on record to represent the plaintiff. Mr Barron deposes that the previous firm had not informed him of the fact that the court had issued a notice to dismiss the suit.
3. According to the affidavit of Mr John Ohaga, a partner in the of *Ochieng, Onyango, Kibet and Ohaga Advocates*, sworn on 11<sup>th</sup> December 2018, after the plaintiff had withdrawn instructions, he believed that the subsequent advocates had taken over the matter. He was not aware that the court had issued a notice to dismiss the suit and the matter fixed for dismissal on 8<sup>th</sup> March 2017.
4. Mr Barron further deposes that his advocates now on record made several attempts to get the court file in order to take steps to prosecute the matter and to that extent addressed the Deputy Registrar in a letter dated 11<sup>th</sup> May 2018 seeking assistance to locate the court file. When the file was eventually traced, he learnt that the suit had been dismissed and the party and party bill of costs lodged.
5. The plaintiff contends that dismissal of the suit was due to the negligence of its advocates. It is now ready to prosecute the suit and will suffer serious prejudice if the suit is not reinstated as it has an arguable case with a high chance of success. It avers that it is in the interests of justice that the suit be reinstated.
6. The defendants opposed the application through the replying affidavit of Stephen Mbugua Mwangiri sworn on 18<sup>th</sup> January 2019. He deposed that the plaintiff was initially represented by the firm of *Oraro and Company Advocates* and later the firm of *Ochieng, Onyango, Kibet and Ohaga Advocates* who came on record on 24<sup>th</sup> January 2013 and who were on record when the court dismissed the suit.
7. Mr Mwangiri deposed that on the day the matter was scheduled for dismissal, the plaintiff was represented in court by its advocates on

record. He stated that Ms. Rachier, who appeared on behalf of the plaintiff, on 8<sup>th</sup> March 2017 was unable to explain to the court why the matter had not been prosecuted since 14<sup>th</sup> May 2011.

8. The defendants contended that it is the plaintiff's indolence that led to the suit being dismissed by the court on its own motion under **Order 17 rule 2** of the **Civil Procedure Rules, 2010** ("the **Rules**"). The defendant further states that the plaintiff has not provided a sufficient reason why the suit was not prosecuted to warrant the court to set aside its order.

9. In addition to oral arguments, both parties filed extensive written submissions to support their respective cases. The common thread is that both parties agree that the court is called upon to exercise its discretion to set aside the dismissal order and reinstate the suit. Before I consider the issues raised by the parties, it is important to set out the chronology of events leading to dismissal of the suit.

10. The suit was filed on or about 5<sup>th</sup> December 2010. After the pleadings closed, the next step in the matter was on 7<sup>th</sup> May 2011 when the defendants filed a Notice of Motion dated 12<sup>th</sup> May 2011. It was fixed for hearing on 18<sup>th</sup> July 2011. They filed another Notice of Motion dated 28<sup>th</sup> April 2011 which was fixed for hearing on 21<sup>st</sup> July 2011. Both Notices of Motion did not come up for hearing on the scheduled dates. Thereafter no steps were taken by either party until 8<sup>th</sup> March 2017 when the matter was fixed for dismissal before Hon. Ngetich J. The record of proceedings on that date shows as follows:

8/3/17

*Before Hon. R. Ng'etich J.*

*Cc Wanjala*

*Ndolo h/b for Kilonzo Junior for the 1<sup>st</sup> and 2<sup>nd</sup> defendant*

*Ndolo: Mr Kilonzo is not objecting to dismissal of the suit.*

*JUDGE*

8/3/17

*Ms Rachier for the plaintiff.*

*We have not had time with the client. We seek time to obtain statements and file relevant documents.*

*JUDGE*

8/3/17

*Ndolo: No reasons have been given for delay. I pray that the suit be dismissed.*

*JUDGE*

8/3/17

***RULING***

***The plaintiff has not given any reason as to why the suit has not been prosecuted since 14/5/2011. I therefore dismiss the suit with costs to the defendant.***

*JUDGE*

8/3/2017

11. One thing is apparent from what I have set out, and which the plaintiff has carefully avoided in its depositions, is that the dismissal order was not made *ex-parte*. It was made in the presence of its advocate who had an opportunity to explain or show cause why the matter should not be dismissed for want of prosecution. Neither the plaintiff nor the previous advocates on record spoke to this fact which confirms that the plaintiff's advocates were served with the notice and were aware that the matter was fixed for dismissal by the court.

12. The question then is whether I have jurisdiction to set aside an order of a judge of concurrent jurisdiction who heard the matter of dismissal on its merits. This suit was dismissed under **Order 17 rule 2** of **Rules** which deals with, "*Notice to show cause why suit should not be dismissed*" and it provides as follows:

2. (1) *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.*

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.

13. **Order 17** of the **Rules** does not provide for the court to set aside the dismissal order which has been made inter-parties. Where the plaintiff fails to attend court on the day the matter is dismissed, it may invoke, as the plaintiff has done, **Order 12 rule 7** of the **Rules** which provides that:

*7. Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.*

This provision is to be read in the context of **Order 12** of the **Rules** which deals with hearings and consequences of non-attendance. Under **Order 12 rule 3**, where the defendant only attends court, the court may dismiss the suit. When the suit is dismissed in those circumstances, the defendant may apply to set aside the dismissal order. Clearly, this provision could not apply to the circumstances obtaining in this case as the plaintiff was represented at the hearing. A party affected by an *ex-parte* order may also apply to set it aside under the provisions of **Order 51 rule 15** of the **Rules**.

14. I find that the plaintiff was given an opportunity to show cause why the suit should not be dismissed. The plaintiff through it advocates proffered reasons which the court found wanting and proceeded to dismiss the suit. I cannot proceed to hear this application as it would amount to sitting on appeal or reviewing a decision made on merits. In other words, this court is now *functus officio*, is so far as the application for dismissal is concerned.

15. The plaintiff has placed much reliance on the provisions of the Constitution. **Articles 47, 50 and 159** of the Constitution emphasize the right of every person to heard without undue delay and technicalities. In **Richard Nchapai Leiyangu v IEBC and 2 Others NYR CA Civil Appeal No. 18 of 2013 [2013]eKLR** the Court of Appeal summarized the position thus:

*[22] The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.*

16. The constitutional duty of the court is to provide every party with the opportunity to present their case and be heard. The plaintiff was given that opportunity to explain why it had not prosecuted the suit. The court rendered its decisions after hearing the parties. The legal remedy available to the plaintiff was to challenge that decision on appeal.

17. The Notice of Motion dated 18<sup>th</sup> January 2019 is dismissed with costs to the defendants.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of JANUARY, 2020.**

**D. S. MAJANJA**

**JUDGE**

Ms Ngugi instructed by Ahmednasir, Abdikadir and Company Advocates for the Plaintiff.

Ms Muthama instructed Kilonzo and Company for the defendants.