



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 172 OF 2012

DUBAI BANK KENYA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

UKAMBA AGRICULTURAL INSTITUTE.....DEFENDANT/APPLICANT

SOUTH EASTERN KENYA UNIVERSITY.....INTERESTED PARTY

RULING

1. The subject application herein is dated 2nd December 2019, brought under the provisions of section 1A, 1B, 3A, 99 and 100 of the Civil Procedure Act and order 45 rules 1 & 2 of the Civil Procedure Rules.
2. The applicant therein seeks for an order that, the order made on 5th September 2019, by the Hon. Lady Justice R. Ngetich be reviewed to correct the error or omission appearing on the face of the record and any other appropriate orders be made. The application is supported by the grounds on the face of it and the affidavit sworn by Nzamba Kitonga Advocate.
3. He avers that, on 12th May 2019, he filed an application dated 9th May 2019 seeking for the dismissal of the suit, with costs. The same was considered by the court whereupon the court ordered the suit dismissed for want of prosecution. That, the learned judge was not very audible and he inquired as to whether the suit had been dismissed with costs, and the learned judge answered "yes, the suit is dismissed with costs".
4. However, when his clerk presented the draft formal order before the court registry, it was reflected on the ground that, no order of costs in the hand written orders was made by the learned judge. He confirmed the same upon perusal of the file. Therefore, it is only fair and just that the order be reviewed.
5. The application was served but no response was filed thereto. The respondent opted instead to file another notice of motion application dated 24th February 2020, seeking for inter alia; that, the subject order be reviewed and the same be substituted with an order to reinstate the suit and transfer it to the Environment and Land Court. Unfortunately, the subject application was filed late in the day, on 26th February 2020, when the matter was already set for hearing of the application subject to this hearing.
6. At the hearing of the application, the learned senior counsel Mr. Nzamba Kitonga, relied entirely on the application, the grounds and affidavit in support. The respondent's counsel invited the court to consider the affidavit in support of their application yet to be prosecuted. Having heard both parties and considering the merits of the application, I find that, it is evident from the body of the application dated 9th May 2019, that, the applicant sought for dismissal of the suit with costs under prayer (1) and (2) thereof. The order given on the 25th September 2019, the learned judge ordered the suit dismissed for want of prosecution.
7. The record indicates that, on the material date when the suit was dismissed, the respondent was represented by the learned counsel Ms. Muthoni holding brief for Ms. Kethi Kilonzo. The respondent's learned counsel is entered on record as having stated ; that, the application may be allowed as prayed, which meant the suit be dismissed with costs.
8. It is trite law, that, costs follow the event unless there are exceptional circumstances (which is not the case herein) to depart from that general rule. In conclusion, I find that, even, hold generally, this application is not opposed, but more fundamentally, costs should follow the event, and therefore, it is only just and fair that, the application be allowed as prayed.

9. It is so ordered.

Dated, signed and delivered on this 27th day of February 2020.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Mubangi for the plaintiff

Ms. Muthama for Ms. Kilonzo for the interested party

No appearance for the defendant