



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL CASE NO. 61 OF 2012

BETWEEN

NATHAN ONDEGO MDEIZI & 2 OTHERS.....PLAINTIFF/APPLICANTS

AND

BARCLAYS BANK (K) LIMITED.....DEFENDANT/RESPONDENT

RULING

Background

1. Plaintiffs/Applicants suit was filed on 29.03.12 by way of a plaint dated 28.03.12
2. The Defendant/Respondent's defence dated 09.05.12 was filed on 11.11.12.
3. By an order dated 03.05.16, the suit was dismissed for want of prosecution under the provisions of Order 17 rule 2(1) of the Civil Procedure Rules.
4. By a notice of motion dated 19.11.19 filed on even date, the Plaintiffs/Applicants have moved the court seeking orders for setting aside of the dismissal order on the ground that the notice of dismissal was not served on them. The application is supported by an affidavit sworn by **NATHAN ONDEGO MDEIZI**, the 1st Applicant on 19.11.19 in which he avers that their advocate, Mr. Wasilwa has informed him that he was on suspension in 2016 and that he was not served with the notice of dismissal.
5. The application is opposed by way of grounds of opposition dated 21.01.2020 mainly on the ground that the Applicants are guilty of prolonged and inexcusable delay.
6. In his further affidavit sworn on 10.02.2020, the 1st Applicant avers that there exists HCCC NO. 262 OF 2012 filed by the Respondent against the Applicants and that an application dated 29.01.2020 to transfer that suit to this court. Annexed to the affidavit is a letter dated 23.01.2020 by the Law Society of Kenya marked NO-2 certifying that MAKHAKARA HENRY WASILWA Advocate was suspended for 6 months from 21.09.15 and did not take out a practicing certificate in the years 2016.
7. I have considered the notice of motion in the light of the affidavits, the grounds of opposition and submissions by counsel for both parties.

Analysis and Determination

8. Order 17 Rule 2(3) gives the court the discretion to dismiss a suit where no application has been made or step taken by either party for one year, upon issuance of notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction.
9. It is not disputed that whereas the pleadings closed sometimes in 2012, no action was taken by either of the parties for close to 4 years prior to the dismissal of the suit on 03.05.16.
10. The legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of Civil Suits and can be found in Article 159(2) (b) of the Constitution that justice shall not be delayed.

11. There is evidence that the Applicants' advocate MAKHAKARA HENRY WASILWA Advocate was suspended for 6 months from 21.09.15 and did not take out a practicing certificate in the years 2016. He was therefore not certified to practice law when the dismissal order was made on 03.05.16. There is therefore a high probability that he was not served with the notice of dismissal.

12. **Section 3A** of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met.

The court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties.

13. The guiding principle in the court's exercise of this judicial discretion was laid down in **Mbogo & another -v- Shah (1968) EA 93**. The court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended ***to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.*** (Emphasis added).

14. The approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake was laid down in the case of **Belinda Murai & Others Vs Amoi Wainaina (1978)**, where **Madan J** set out the following

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”

15. **Apaloo JA** outlined the following approach to a similar question in **Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103**; **“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.**

16. From the material presented before the court and particularly the letter dated 23.01.2020 by the Law Society of Kenya, the Applicants' Advocate was certified to practice law in 2017 and 2018. Neither the Applicants nor their advocate have offered any reasonable explanation for not taking any action or steps for a period of over two years until 19.11.19 when this application was filed.

17. I am aware that continued delay of the suit no doubt infringes on the defendant's rights and legitimate expectations that disputes against it should be resolved expeditiously.

18. Since no credible excuse for the delay has been made out, the natural inference is that the delay on the part of the Applicants is inexcusable.

19. I have considered whether failure to reinstate this suit would cause the Applicants any prejudice and the answer is in the negative for the reason that the dispute in this suit can rightly be resolved in **NAIROBI HCCC NO. 262 OF 2012** which both parties have conceded is pending between them over the same subject matter.

DISPOSITION

20. Consequently, the notice of motion dated 19.11.19 filed on even date is considered and found to be unmeritorious and is hereby dismissed with costs to the Defendant/Respondent.

DELIVERED THIS 23rd DAY OF April 2020

T. W. CHERERE

JUDGE

For the Applicants - BMS Advocates

For Respondent- Walker Kontos Advocates

Order

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID -19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March, 2019.