REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 309 OF 2016

NEW MILIMANI SACCO LIMITED.....PLAINTIFF

VERSUS

SACCO SOCIETIES REGULATORY AUTHORITY (SASRA)....DEFENDANT

RULING

1. The Defendant's Notice of Motion application dated 28th August 2019 and filed on 29th August 2019 sought the dismissal of the Plaintiff's suit for want of compliance of the order of the court issued on 16th May 2019. The same was supported by the Affidavit of its advocate, Kevin Wakwaya, which was sworn on 28th August 2019.

2. The Defendant pointed out that in its Ruling of 16th May 2019, this court directed the Plaintiff to deposit into a joint interest earning account in the name of its advocate and the advocates of the Plaintiff, a sum of Kshs 10,000,000/= within sixty (60) days from the date of the said Ruling failing which it (the Defendant) was at liberty to take such action to safeguard its interests. It contended that from the failure to deposit the said monies, it was clear that the Plaintiff would not be able to pay its advocate's costs in the event it successfully defended the suit herein.

3. It averred that the court had jurisdiction to dismiss the suit for want of compliance of its orders and thus urged this court to allow its application as prayed.

4. In response to the said application, on 4th December 2019, Rev Julius Kiburi Wambugu, the Plaintiff's Chairman, swore the Replying Affidavit on behalf of the Plaintiff herein. The same was filed on 11th December 2019.

5. The Plaintiff stated that it instructed its advocates, M/S Maina Ragoi & Co Advocates, to set aside, vary and/or review the said order immediately it was made. It said that it only became aware of its advocates' inactivity when the Defendant moved the court to dismiss its suit. It was its further averment that the Defendant would not suffer any prejudice in the event its application was dismissed and it was allowed to prosecute its suit, which it asserted was strong as it was premised on a matter that was ruled in its favour. It therefore urged this court to dismiss the present application.

6. The Defendant submitted that under Order 26 Rule 1 of the Civil Procedure Rules, 2010, a court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any party and that where it is not paid, the court shall dismiss the application unless a plaintiff has been permitted to withdraw the suit as provided in Order 26 Rule 5 (1) of the Civil Procedure Rules.

7. In this regard, it relied on the cases of **Bulk Medicals Limited (In Receivership) vs Paramount Universal Bank Limited & 2 Others [2012] eKLR**, **Beatrice Oloo Odhiambo vs Regina Ngundo & 3 Others [2014] eKLR** amongst other cases where the common thread was that a suit will be dismissed where a party does not give reasons why it did not comply with an order to deposit security of costs.

8. On its part, through M/S Okuno & Co Advocates, its newly appointed advocates, the Plaintiff placed reliance on the cases of **Martha Wangari Karua vs IEBC & 3 Others [2018] eKLR** and **Philip Chemwolo & Another vs Augustine Kubede [1986] eKLR** where the principle of the holdings therein was that no party should be driven away from the seat of justice without being given an opportunity to have his or her case heard on merit irrespective of mistakes that may have been made along the way by its advocates and/or because there had been technicalities. It thus asked this court to look at the substance of the suit herein and not the technicalities.

9. It further submitted that the Defendant had not come to court with clean hands because despite having been restrained from making advertisements or publications either on print or electronic media in **Civil Suit No 317 of 2015 New Milimani Sacco vs Sacco Societies**

Regulatory Authority, a cursory search in Google revealed adverse information that had put out by the Defendant herein against it. In this regard, it relied on the case of **Kyangaro vs Kenya Commercial Bank Limited & Another [2004] eKLR** as cited in **Patrick Waweru Mwangi & Another vs Housing Finance Co of Kenya Limited [2013] eKLR**.

10. It therefore argued that it would be unjust if the Defendant's application was allowed on the basis of contempt of court orders yet it had refused to follow the directives of the court.

11. As was pointed out by the Defendant herein, on 16th May 2019 this court ordered as follows:-

> **1. THAT the Plaintiff shall deposit into a joint interest earning account in the name of its advocates and the name of the Defendant's advocates the sum of Kshs 10,000,000/= within sixty (60) days from today i.e. by 17th July 2019.**
>
> **2. THAT in the event the Plaintiff shall not comply as aforesaid, the Defendant will be at liberty to take such appropriate steps to safeguard its interests.**

12. On the said date, this court delivered its decision in the presence of counsel for the Plaintiff and counsel for the Defendant. The Plaintiff contended that it instructed its advocates to have the order set aside, varied and/or reviewed immediately after the delivery of the Ruling but the said advocates did not act accordingly. Save for asserting that it instructed its advocates as aforesaid, it did not demonstrate to the court how the same was done.

13. If the instructions were in writing, no letter was annexed in its Replying Affidavit so that it could have inferred negligence on its advocates and thus excuse the blunder as no litigant ought to be punished due to the mistakes of his counsel. If the instructions were verbal, there was no averment in the said Replying Affidavit making reference to how those instructions were given.

14. In Paragraphs (6) and (7) of its Replying Affidavit, the Plaintiff had stated as follows:-

> **6. THAT the Plaintiff/Respondent immediately instructed the advocates on record, MAINA ROGOI & CO ADVOCATES to move this Honourable Court to set aside/vary and/or review the above order compelling the Plaintiff/ Respondent to deposit the security for costs.**
>
> **7. THAT despite the aforementioned instructions being communicated in a timely manner, the Advocates on record by then failed to effect the instructions without the knowledge of the Plaintiff/Respondent.**

15. Without pre-empting the Plaintiff, it did not give this court a glimpse of its reasons in respect of the setting aside, varying and/or reviewing of its order of 16th May 2019 so as to have persuaded it (the court) to allow it prosecute its application before orders could be granted in the present application. Indeed, nothing would have been easier than for the Plaintiff to have attached its draft application seeking the said orders so that this court could consider if it was in the interests of justice to permit it to argue its application before this application could be heard.

16. The fact that the Defendant had not purportedly obeyed the directions in **Civil Suit No 317 of 2015 New Milimani Sacco vs Sacco Societies Regulatory Authority** and continued to make adverse advertisements or publications against the Plaintiff which could be found in Google was not sufficient reason for this court not to allow the Defendant's application. The aforementioned proceedings were not before this court to enable it make a finding that the Defendant had approached this court with unclean hands.

17. It was immaterial that the Plaintiff had a strong case because once an order for deposit of security of costs had been made, it had to be complied with failing which a court would have no option other than to dismiss its suit, unless of course, it had been permitted to withdraw the suit herein.

18. Notably, Order 26 Rule 5(1) of the Civil Procedure Rules states that:-

> **"If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall** (emphasis court)**, upon application, dismiss the suit."**

19. The key word in that provision is **"shall."** This connotes the mandatory nature of the provision.

20. Having said so, the party against whom a suit is dismissed still has a recourse under Order 26 Rule 5(2) of the Civil Procedure Rules that provides that:-

"If a suit is dismissed under subrule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court may set aside the order dismissing the suit and extend the time for giving the required security."

21. Accordingly, having considered the affidavit evidence and the parties respective written submissions, this court came to the firm conclusion that whereas dismissal of suit for want of prosecution for whatever reason is a draconian step that should be taken as a last resort, this court was persuaded to find and hold that there was a possibility of the Defendant facing difficulties in recovering its costs from the Plaintiff, which as this court had noted in its Ruling of 16th May 2019 had indicated that its claim was for sum of Kshs 522,302,287/= and that it had assets of over Kshs 1,000,000,000,000/=.

22. Hence, weighing the Plaintiff's fundamental right to have its dispute a heard and determined in a court as stipulated in Article 50(1) of the Constitution of Kenya, 2010 and the equally important fundamental right of the Defendant that justice shall not be delayed as provided in Article 159(2)(b) of the Constitution of Kenya, this court was of the considered view that the Defendant's right would have to triumph over that of the Plaintiffs. It had to be set free from the shackles of this suit herein.

DISPOSITION

23. For the foregoing reasons, the upshot of this court's decision was that the Defendant's Notice of Motion application dated 28th August 2019 and filed on 19th August 2019 was merited and the same is hereby allowed as prayed.

24. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **26th** day of **May** 2020

J. KAMAU

JUDGE