



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 30 OF 2012

AUGUSTO ARDUINI.....PLAINTIFF/APPLICANT

VERSUS

SARAF CO. LTD.....DEFENDANT/RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Michira Messah Advocates for the Plaintiff/Applicant

Muli & Ole Kina Advocates for the Defendant/Respondent

RULING

The plaintiff filed a suit against the defendant on 26.1.2012 seeking an order compelling the defendant to reimburse to the plaintiff Kshs.4,400,000/= with interest at bank rates.

The defendant filed its defence and counter claim on 27.3.2012. Subsequently the suit was expected to be set down for hearing upon closure of pleadings on 7.11.2013. The plaintiff filed a notice of motion seeking orders that the defendant's defence filed on 27.3.2012 be struck off and Judgment be entered accordingly as prayed in the Plaintiff.

The motion was duly heard and determined by **Meoli J.** on 7.7.2014. That decision was appealed against before the Court of Appeal and in the Judgment delivered on 1.7.2016. The appeal was dismissed for want of merit with costs.

The main suit was never set down for hearing. Notwithstanding a Notice to Show Cause issued on 7.5.2018 the plaintiff failed to appear in answer to the notice why the suit should not be dismissed for want of prosecution.

In a considered Ruling by **Weldon J** on 28.5.2018, an order for dismissal under Order 17 Rule 2 of the Civil Procedure Rules was granted against the entire suit. That order is now a subject of the notice of motion dated 24.1.2020 seeking a substantive order in terms of Section 1A, 3, 3A, 63(e) of the Act and Order 12 Rule 7 of the Civil Procedure Rules to have the dismissal order set aside for the suit to be heard on the merits. In support of the motion is an affidavit by **Mr. Michira**, counsel for the plaintiff counsel for the defendant filed grounds of opposition contradicting that the plaintiff is guilty of laches.

Determination

I have carefully considered the notice of motion and the grounds raised by the plaintiff within the affidavit in support and the grounds of opposition by the defendant. The question to be answered is whether this Court has the discretion to vary the dismissal order to have the suit reinstated for hearing on the merits. The principles applicable and governing exercise of discretion are authoritatively stated in the case of **IVITA v KYUMBU {1984} KLR 441** where the Court stated thus:

“The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is to both plaintiff and defendant, so both parties to the suit must be considered and the position of the Judge too, because it is no easy task for the documents, and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the Court. That it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the Court will exercise its discretion in his favor and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the Court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will

be ordered that it be set down for hearing at the earliest available time.”

In the application of this nature discretionary power is donated by Order 12 Rule 7 of the Civil Procedure Rules. As stated in the case of **Philip Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende {1982 – 1988} 1KAR**

The appreciation of the principles associated with the exercise of discretion were clearly laid down as follows:

“The main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given it by the rules. On the other hand, the Court would not usually set aside the Judgment or order unless it was satisfied that there were triable issues which raised a prima facie defence which should go for trial when deriving meaning from the text of the statute on discretion by its very nature the Courts in Patel v E. A. Cargo Handling Services {1974} EA 75 Shah v Mbogo {1967} EA 116 explicitly emphasized that the discretion is a free one and is intended to be exercised to avoid injustices or hardships but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice and the discretion being a judicial one must be exercised upon facts and not on whims and caprice. It should be remembered that to deny a party a hearing should be the last resort of a Court.”

Looking at the matter from a Constitutional perspective the Court in **John Nahashon Mwangi v Kenya Finance Bank Ltd (In Liquidation) {2015} eKLR** stated that:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically Article 159 of the Constitution; Article 50 compiled with Article 159 of the Constitution on the right to be heard and the Constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the Court in making a decision on such matter of reinstatement of a suit which has been dismissed by the Court. These principles were enunciated in a masterly fashion by Courts in a legion of decision which I need not multiply except to state that: Courts should sparingly dismiss suits for want of prosecution, for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seal of Judgment. Such acts are comparable only to the proverbial sword of the Damocles.” Which should only draw blood where it is absolutely necessary. The same test will apply in an application to mistake a suit and a Court of Law should consider whether there are reasonable grounds to reinstate such suit of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the plaintiff will suffer if the suit is not reinstated.”

In the instant case, the central issue is whether the applicant/plaintiff has exercised reasonable diligence. As observed the statutory challenge to dismissal of suits and subsequent motions for reinstatement the Court is bound to consider:

- (i). The length of time a claim has been filed and in existence without initiating a prosecution.*
- (ii). The extent of activity in the case file.*
- (iii). Whether a trial date setting has been requested by the plaintiff and*
- (iv). The existence of reasonable excuses for the delay. There is indeed no single factor is dispositive.*

In essence this requires a weighing up of the nature and importance of the rights that are to be adjudicated upon together with the extent of the limitation of the Court not to condone laxity and abuse of the rules of procedure which govern administration of justice.

Looking beyond the formal defects of the applicant’s delay in prosecuting the suit issues raised with regard to the process of an appeal preferred to the Court of Appeal in one way or another may have redacted some of the valuable time to hear and determine the suit.

In my conceded view the extent of the delay has been explained by the applicant applicable to the present circumstances. The issues involved between the parties remain outstanding and within the definition of a claim, and an action brought by another must be conclusively determined by the Court on the merits. All that delay canvassed by the defendant counsel cannot be visited on the plaintiff to disentitle him an opportunity to be heard in the case against the defendant.

In view of the foregoing, I grant the substantive prayer in the notice of motion dated 22.1.2020 with the following conditions attached:

- (a). That the plaintiff abides by meeting throw away costs of Kshs.20,000/= payable before the next hearing date.*
- (b). That a pretrial conference in terms of Order 11 of the Civil Procedure Rules on Case Management directions be held by the Deputy Registrar.*
- (c). That the pending suit be scheduled for hearing not later than forty –five (45) days from todays date.*
- (d). Each party be at liberty to apply*

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF JUNE 2020

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Ole Kina for the defendant