THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NUMBER 304 OF 2009

ZEDEKIAH EVANS NYAMONGO ACHIRA.....1ST PLAINTIFF

RUTH MORAA ACHIRA(MRS).....2ND PLAINTIFF

-VERSUS-

SAVINGS AND LOAN KENYA LIMITED.....DEFENDANT

RULING

The Applicant (herein **"the Defendant")** filed a Certificate of Urgency Application dated 28th October 2019, urging the Court to urgently grant the following orders on grounds that;

a) On 23rd February 2018, pursuant to an unopposed Notice to Show Cause dated 7th February 2018, the Plaintiffs' instant suit was dismissed for want of prosecution.

b) Over one year later and by an Application dated 1st April 2019 and filed on 2nd April 2019, the Plaintiffs sought to reinstate their suit against the Defendant to which the Bank responded to vide a Replying Affidavit dated 9th May 2019.

c) The Application dated 1st April 2019 was scheduled mention for directions on 26th September 2019 on which date neither the Plaintiffs nor their advocates attended court to offer reasonable explanation for the delay in prosecuting the matter.

d) However, on the said 26th September 2019 at 11.30 am under unclear circumstances and without the presence of the Defendant and/or its advocates the matter was called out and scheduled for directions on 9th October 2019.

e) On the said 9th October 2019, the court erroneously held that the Plaintiffs' Application for reinstatement was not opposed. As such, the same was allowed and the main suit was scheduled for hearing on 26th November 2019.

f) Further, neither the Defendant nor its advocates were aware whether the orders issued on 26th September 2019 were appealed and subsequently overturned by the Court of Appeal.

g) As such, the subsequent proceedings at 11.30 am on 26th September 2019 and 9th October 2019 were entirely improper and/or un-procedural. Therefore, if the Application filed herewith was not certified urgent, the said matter heard would have proceeded on 26th November 2019.

In a Notice of Motion Application filed herewith the certificate of Urgency, pursuant to **Order 45 Rule 1, 2, Order 51 Rule 1 of the Civil Procedure Rules, section 1A, 1B, and 3A of the Civil Procedure Act** and all other enabling provisions of the law; the Applicant sought orders;

a) That the Court stays any further proceedings in this matter pending the *inter partes* hearing and determination of this Application.

b) That the Court reviews and/or sets aside the Court orders issued on 9th October 2019 reinstating the Plaintiffs' instant suit.

c) That the costs of this application be awarded to the Defendant/Applicant

d) That the Court grants any further orders as it deems fit.

APPLICANT'S SUBMISSIONS

The Applicants relied on the case of ***Peter Kiriki Githaiga & another vs Betty Rashid [2016]eKLR***; the Court held:

> ***"In our view, the position espoused by this Court and by Kasango J., represents the correct position, as they allow for recognition of the fact that while the law does not expressly demand that the order/decree be attached, it is at times necessary that the same be extracted for purposes of enabling the court have clarity as to the orders complained about.***
>
> ***Of course an order or decree is the formal expression of the decision of the court. An order emanates from a ruling whereas a judgment gives rise to a decree and should ordinarily be extracted. As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court's attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective."***

See also ***Shiekh Ali Taib vs George Ellom Wekesa & Another [2017]eKLR;***

RESPONDENT'S CASE

The Respondent filed a Replying Affidavit to the Application filed on 14th November 2019 and stated as follows;

That this suit was dismissed on 23rd February 2018 on the basis of NTSC application dated 7th February 2018 which was served upon the Defendant's advocates but which the Plaintiff's advocates were never served with and were therefore unaware of.

That being aggrieved by the said dismissal, the Plaintiffs moved the Court through Notice of Motion application of 1st April 2019 seeking to reinstate the suit which the application was set down for hearing on 15th May 2019 and subsequently on 26th September 2019.

That unfortunately, due to circumstances that were unforeseeable and completely beyond control, the Plaintiff's advocate developed a stomach upset on the way to Court on 26th September 2019 when the matter was listed for directions on the application and was delayed getting to Court.

That Counsel arrived in Court and the Court's indulgence and explained the circumstances leading to Plaintiff's advocate's absence. The Court gave the date of 9th October 2019 as the date both parties would attend Court for directions and a notice was to be served upon the Defendant.

A mention notice dated 27th September 2019 was duly served upon the Defendant's advocates on record which was duly received as evidenced by attached copy of mention Notice and Affidavit of Service.

The Respondent indicated that the Court orders of 9th October 2019 were issued by a competent Court and the Defendant did not tender evidence to show that it exercised its discretion improperly in making the said orders and that they were issued improperly.

RESPONDENTS' SUBMISSIONS.

The Respondents relied on the case of ***Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 others [2013] eKLR***; where the Supreme Court Judges held;

> ***"We therefore, have to consider the concept of "functus officio" as understood in law, Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific reference to its application in Administration Law, (2005) 122 SALJ 832, has thus explicated this concept:***
>
> ***'The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality, according to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter…. The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.'***

This principle has been aptly summarized further in ***Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550;***

> ***'A court is functus when it has performance all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available" [emphasis supplied].***

In ***Telkom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR***; the court stated;

> ***"….The doctrine is not be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued……"***

In the case of ***Equity Bank Limited vs Andrew Kariuki (Trading as Andrew Kariuki (A.K) &Co. Advocates [2016]eKLR***; the Court relied on the case of ***Agip Kenya Ltd vs Highlands Tyres Ltd*** where it was held, the process of the judicial systems requires that all parties before the court should be given an opportunity to present their cases before a decision is given. The following observation by the Privy Council has been consistently accepted by the courts as correct statement of law. The Privy Council observed;

> ***"All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose,…."***

In the leading English case of ***Cropper vs Smith Browen,*** L. J. stated as follows: -

> ***"it is a well-established principle that the object of the courts is to decide the rights of the parties and not punish them for mistakes they make in the conduct in their cases by deciding otherwise than in accordance with their rights… I know of no kind of error or mistake which, if it not fraudulent or intended to overreach, the court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy.***

The Court relied in the of ***Richard Nchapai Leiyangu vs IEBC & 2 Others***; as follows;

> ***"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"***

DETERMINATION

The Court considered the evidence on record pleadings and submissions of Counsel on behalf of parties and the issues for determination are;

a) Whether the Court orders of 26th September 2019 and 9th October 2019 were legal as the Court is deemed to have been *functus officio* and therefore ought to review the said orders.

b) Where there should be stay of proceedings pending the hearing and determination of the application (s)

ANALYSIS

The Applicant reiterated that on 26th September 2019 at 11.30am under unclear circumstances and without the presence of the Defendant and/or its advocates the matter was called out and scheduled for directions on 9th October 2019.

On 9th October 2019, the Court erroneously held that the plaintiff's application for reinstatement was not opposed. As such the same was allowed and the main suit scheduled for hearing on 26th November 2019.

It is noteworthy that the Plaintiff's application of 1st April 2019 was dismissed on 26th September 2019. The Plaintiff has not made any application to set aside or review the dismissal.

Further, neither the Defendant nor its advocates are aware whether the orders of 26th September 2019 were appealed against and subsequently overturned by the court of Appeal.

As such the subsequent proceedings at 11.30 am on 26th September 2019 and 9th October 2019 are entirely improper and/or unprocedural.

The only way to explain the circumstances of 29th September 2019 and 9th October 2019 is to reproduce the record.

COURT RECORD

On 2nd April 2019 the Plaintiff under Certificate of Urgency applied for reinstatement of the suit dismissed on 23rd February 2018 on a NTSC. The Applicant was not served with the NTSC and only learnt of the dismissal on 19th March 2019.

On 2nd April 2019, this Court ordered that the application be served to the Respondent who would file Replying Affidavit and serve. The matter was to be mentioned on 15th May 2019 for directions.

On 15th May 2019, Ms Kenya for the Applicant was present and Mr. Shah was present for the Respondent. The parties had not closed pleadings. The Court granted orders that parties to file pleadings with the Deputy Registrar and once they were through the matter could be mentioned before the Court.

The Plaintiff/Applicant took the date in the Registry, 26th September 2019 and served. On that day, Mr Njanjo holding brief for Mr Shah for the Respondent was present. The Plaintiff/Applicant and/or Counsel were absent.

Mr. Njanjo addressed the Court thus;

> ***"The matter was for directions on reinstatement of the suit. The Plaintiff is not in Court and no explanation has been given or action taken over 3 years. The Plaintiff took the date of today and served us the mention date of today. They are not in Court and have not filed any document to explain the delay. The matter has been dismissed and we do not think it is fair to reinstate it. The matter remains dismissed as the Court has to be moved and no appearance by Plaintiff or explanation or reasons provided."***

LATER AT 11. 30 AM

Ms Kenya for the Plaintiff:

> ***"I came late because I was having a stomachache and I got home and I found the other party is away and I am here***."

Court:

> ***"The application of the Plaintiff may be canvassed in the presence of the Defendant's advocate on 9th October 2019 and serve the Defendant."***

The Court record confirms that at the time the Defendant's advocate was in Court, the Plaintiff's advocate was not present as the matter was dealt with earlier in his presence. The Court had no information for the Plaintiff's advocate's absence, and the matter remained dismissed. Later same day the Plaintiff's Advocate appeared in court and explained absence/delay and the court gave another date where the Plaintiff's Advocate would be present. The Plaintiff's Advocate took the mention date and served the Defendant for the 26th September 2019 mention.

In the Plaintiff's absence the matter remained dismissed vide the Court orders of 23rd February 2018.

Later, the same day in Court, now at 11.30 am, the Court was moved by Counsel for the Plaintiff, who addressed the Court and the Court file was still in the Court room and the Advocate's submission was recorded verbatim. **Article 50 COK 2010 encapsulates the right to fair hearing.** When a party or Counsel rises to address the Court, the Court cannot possibly anticipate what will be said and on what matter or about which party (ies). It is only after hearing the Counsel's submission that the Court records and grants applicable orders. Therefore, the court indicated that the issue raised by Plaintiff's Counsel on record and indicated that it would only be addressed in the presence of Defendant's Counsel and gave a mention date on 9th October 2019.

From the above circumstances, it is now clear what transpired on the same day, one advocate addressed the Court in the absence of the other advocate and *vice versa* on the same day. The duty of the Court is to hear matters raised or brought up in Court and heard the Plaintiff's advocate's oral application. No orders with regard to the dismissal or reinstatement of the suit were granted awaiting the Defendant's advocate's presence on a later date scheduled on 9th October 2019.

On 9th October 2019, Ms Kenya for the Plaintiff was present. The Advocate for the Defendant was absent.

Ms Kenya addressed the Court as follows;

> ***"The Defendant was served with today's date; we have here in Court the Affidavit of service filed on 7th October 2019. "***

[The Annexed affidavit of Service and the Mention Notice were served to the Defendant's advocate and stamped Mohammed Madhani & Co Advocates Received 1st October 2019 Signed at 10.30 am]

The Court was satisfied that the Defendant's Counsel was duly served and granted the following directions;

> ***"Since the application for reinstatement is not opposed, the application of 1st April 2019 to reinstate the suit is granted as it is not opposed on condition;***
>
> ***a) The Defendant is served with hearing Notice of 26th November 2019 and may file witness statements and relevant documents and serve.***
>
> ***b) The plaintiff to also file the relevant witness statements and bundle of documents.***
>
> ***c) This is an old matter of 2009 and parties failed to attend and complete Pre Trial Proceedings***

d) Full Hearing on 26th November 2019 in default the matter shall stand dismissed for want of prosecution.

The Court on being satisfied that the Defendant 's advocate was duly served and no representation or information was relied to the court to consider that day or thereafter, it was satisfied that there was no challenge to the Plaintiff's application made on 26th September 2019 where Counsel was not in Court at 9.00 a.m that day. Further, the Defendant did not oppose the application for reinstatement of the suit on 9th October 2019. The Plaintiff filed application of 1st April 2019 and failed to appear on 26th September 2019 and the suit remained dismissed even with the reinstatement application on record, so did the reinstatement application carry the day due the Defendant's Counsel's absence on 9th October 2019 even though the Defendant filed the Replying Affidavit on 14th May 2019.

In light of **Order 17 Rule 2 CPR 2010**, this is an old matter and the Court gave directions to expedite the hearing of the same by both parties as follows;

Order 17 Rule 2 CPR 2010 provides;

(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.

It was intimated by Counsel for the Defendant that the Court after the dismissal order was *functus officio*. It lacked jurisdiction to consider the application for reinstatement. The Applicant cited the following cases in support of the said submission.

Motor Vessel Lilian S vs Caltex Oil (K) LTD [1989]

"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Salama Mahmoud Saad vs Kikas Investment Limited & Anor [2014] eKLR **review of Court orders;**

"Applications on this ground must be treated with great caution and as required by R 4(2)(b) the court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed in the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

In ***D. J. Lowe &Company Ltd vs Banque Indosuez Civil Appl. Nairobi 217/98 (UR)*** the court stated;

"***Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."***

The Plaintiff Applicant's application of 1st April 2019 was still on record and was the basis of the reinstatement of the suit. There was no legal basis to file another identical application on the same grounds. Plaintiff's Counsel appeared in Court the same morning but later and the time is on record. The Court had not risen and the Court file was in Court. There was/is no legal basis to prevent Litigant/Counsel from addressing the Court.

The Court finds in the absence of any explanation reasons or circumstances as to the Applicant's absence on 9th October 2019 and on proof of Service, the Court cannot infer a sufficient reason for review of its orders of 26th September 2019 and 9th October 2019.

This Court is guided by ***PKiech Chesimaya vs Limakorwai Achipa (2020) eKLR;***

"On the question of whether either party is likely to be prejudiced as a result of the delay, it is upon the party making the application to show the court the prejudice it would suffer as a result of the delay. In this respect, the court in the Ivita Case(Supra) found that:-

"The Defendant must however satisfy the court that he 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 favour and dismiss the action for want of prosecution."

The Court gave the date of 9th October 2019 for parties to address the Court on dismissal and/or reinstatement of the suit. The Defendant would have indicated the prejudice of delay to the Court.

This Court considered various authorities on the issue of dismissal and/or reinstatement of suit. Where a party moves the Court on an

application, the parties are entitled to be heard on merit. If either party is absent without any explanation or representation and the Court confirms service of process as required under Order **5 CPR 2010**, then the Court shall grant the orders sought as the other party duly served failed to present any objection.

The issue of the Court being *functus officio* upon granting the order of dismissal of the suit on the morning of 26th September 2019 is not tenable as the Court was moved by the Plaintiff's submission on the same day but later in the day. Secondly, the authorities below confirm that the court has jurisdiction to hear and determine issues presented but not those with final determination on the subject matter can be heard twice. ***In Telkom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR*** supra, on 26th September 2019, the court stated reaffirmed the dismissal order on record in the absence of the Plaintiff to canvass the application for reinstatement of suit. It was not a merit-based decision but was due to non- attendance of the Plaintiff.

The following authorities illustrate instances of delay where the Court reinstated the suit and principles of dismissal and/or reinstatement of the suit.

In ***Kamlesh Mansukhlal Pattni & Anor vs Central Bank of Kenya[2016] eKLR*** *partly reads;*

> ***"3. At one point, the suit was dismissed under Order XVI Rule 6 of the old Civil Procedure Rules for failure of any party to move the court in the six year period between December 2002 and April 2008; an application for reinstatement was dismissed by the court; then the suit was reinstated by the Court of Appeal; it has been subject to a multitude of other applications necessitating numerous rulings;…."***

In ***Busuru Richard Mark vs Barclays Bank of Kenya Ltd [2020] eKLR***; the court relied on the case of ***Argan Wekesa Okumu vs Dima Collage Limited & 2 Others [2015] eKLR***; where it was held;

> ***"The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long tile of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of Ivita –vs- Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."***

In Mwangi S. Kimenyi –vs- Attorney General & Another, Civil Suit Misc. No. 720 of 2009;

> ***"When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the act straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties – the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;***
>
> ***1) whether the delay has been intentional and contumelious;***
>
> ***2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court;***
>
> ***3) whether the delay is inordinate and inexcusable;***
>
> ***4) whether delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and***
>
> ***5) what prejudice will the dismissal cause to the Plaintiff? By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."***

CONCLUSION

From the above authorities, a Court has jurisdiction to reinstate a suit upon hearing of the application by both parties when served and attend Court. The suit herein was dismissed in 2018. The Plaintiff filed an application to reinstate the suit but on the date for prosecuting, the Applicant failed to attend Court that morning. The Court retained the dismissal of the suit.

On the Plaintiff's advocate's application on the same day explaining reasons for non -attendance, the Court gave a date for *interpartes* hearing of the application. The Defendant despite service failed to attend Court. The Court granted the application as the Plaintiff's reasons for absence was due to unforeseen circumstances.

The Court finds there is no order to be reviewed on grounds outlined by **Order 45 CPR.**

There are no proceedings to warrant stay of proceedings at this stage as the hearing of the suit was stayed because upon the Defendant's application being filed proceedings were stayed for the instant application to be heard first and Counsel made oral submissions.

On 26th November, 2019 when the matter was scheduled to proceed for *inter partes* hearing, and the Plaintiff had 2 witnesses ready to

proceed. The Plaintiff's Counsel informed the Court that he had this instant application to challenge the manner in which the suit was reinstated. The Court granted orders staying the hearing of the suit pending the hearing and determination of the application. Both Counsel submitted on the application on 9th December 2019 and Ruling scheduled to 23rd February 2020.

The Court was not *functus officio* as Plaintiff's Counsel moved the Court on the same day and the Court gave a date for *inter partes* hearing which the Defendant failed to attend.

DISPOSITION

1. The application is dismissed with Costs

2. The parties /Counsel to engage in CMC before DR Commercial & Division within 30 days

3. Thereafter the parties to take a hearing date.

4. If the hearing does not commence in 2020 the suit shall stand dismissed for non-prosecution.

5. This Court is mindful of the current Corvid 19 pandemic lockdown of the Courts by CJ on 16th April 2020 and reopening via virtual hearing on 15th June 2020, which may affect the timelines. However, parties/Counsel should make effort to have virtual hearing of the matter.

6. If any party wishes to exercise right of appeal, the Court grants 30 days stay of these orders.

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND JUNE 2020.

(VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. NJANJO FOR THE DEFENDANT/APPLICANT

B.M. MUTIE & CO ADVOCATES FOR RESPONDENT – N/A