REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 148 OF 2008

TIRTH CONSTRUCTION LIMITED.....PLAINTIFF

- VERSUS -

ORION HOTELS LIMITED.....DEFENDANT

RULING

1. On 17th June 2015 this case was dismissed for want of prosecution. **TIRTH CONSTRUCTION LIMITED**, the plaintiff filed a Notice of Motion application dated 6th August 2019 seeking an order to set aside the dismissal of this case on 17th June 2015.

2. The plaintiff filed this case on 20th March 2008. By this claim the plaintiff sought judgment against **ORION HOTELS LIMITED**, the defendant, for Ksh 12,799,900/-. The defendant filed a defence and counter claim on 19th May 2000. On 7th February 2011 summary judgment was entered by this court, in favour of the plaintiff. The defendant was aggrieved by that order and filed an appeal to the court of appeal. The court of appeal considered the appeal and by its judgment of 6th November 2015 set aside the summary judgment entered in favour of the plaintiff.

3. The plaintiff by the application before court deponed through the affidavit of **Chandresh Babaniya** its director that the order of dismissal of this case for want of prosecution was made when the appeal was still pending at the court of appeal, and that the plaintiff was not served with the notice to show cause before that dismissal. The plaintiff termed that dismissal as irregular, wrongful and unlawful. The plaintiff further stated that after judgment of the court of appeal on 6th November 2015 it instructed its advocate to fix this case, before this court, for hearing but that the said advocate refused and or neglected to do so. That it said advocate failed to communicate with the plaintiff for a long time and on the plaintiff making many attempts to trace the court file at the registry it was unsuccessful. That because of the lack of communication by its then advocate the plaintiff instructed its present advocate A.G.N. Kamau which law firm successfully obtained the file at the court registry and confirmed that this suit had been dismissed for want of prosecution.

4. The defendant opposed the application through the affidavit of Andrew Stuart, its managing director. That deponent stated that the plaintiff's application for reinstatement of this case had been filed after inordinate delay, that is four years after the dismissal of this case.

5. Although, the deponent Andrew Stuart stated that the failure to seek reinstatement was in the light that this case had not been stayed, by its order dated 11th April 2011, this court did indeed stay execution of the summary judgment entered for the plaintiff pending the hearing and determination of the appeal.

ANALYSIS AND DETERMINATION

6. I wish to begin my consideration of the application by first dealing with the issue raised by the defendant that the plaintiff application must fail because the law firm that filed it failed to obtain leave of the court to represent the plaintiff. That argument was based on the provisions of Order 9 Rule 9 of the Civil Procedure Rule. That Rule provides that where a party had been represented by an advocate if that party wishes to either act in person or to instruct another advocate such changes can only be effected, after judgment has been entered, by the leave of the court. I understood the defendant's argument to be that after this case was dismissed for want of prosecution, thereby terminating this case, the plaintiff needed to obtain leave of the court to instruct another advocate.

7. The question that then engages my mind is: does dismissal of a suit amount to a judgment? The word judgment is not defined in the civil procedure Act.

8. It ought to be stated that leave of the court to change advocates is not necessary under that Rule where the outgoing advocate consents to that effect with the incoming advocate. Here the plaintiff neither obtained leave of the court nor did it get consent of the outgoing advocate for it to instruct the advocate now representing it.

9. It is however necessary to understand the mischief that was sought to be addressed by the need to either get leave of the court or consent of the outgoing advocate for change of advocate to be effected. The mischief was to ensure that a client does not seek to change his advocate when judgment has been entered in order to avoid paying the legal fees of that advocate. Is that the case here? I would respond in the negative. Here there is no judgment entered for the plaintiff which the outgoing advocate was denied to benefit from. Here the plaintiff suit was dismissed for want of prosecution. Although that dismissal concluded the suit it did not amount to a judgment being entered as envisaged by Order 9 Rule 9 of the Civil Procedure Rules. For that reason the defendant on that score is over ruled.

10. Going now to the substance of the application. The plaintiff's case, as stated before was dismissed on 17th June 2015 for want of prosecution. The plaintiff alleges that it was not served with the notice to show cause before that dismissal was effected.

11. I have perused the court file and I was unable to find evidence of service of the notice to show cause either on the plaintiff or on the defendant. Service, in that case, should have been effected by the Deputy Registrar of this court because the process for the dismissal of the case was initiated by the court. It is therefore my finding that this court did not affect service on the parties before this case was dismissed for want of prosecution.

12. Further it goes without saying that the dismissal of this suit for want of prosecution on 17th June 2015 was when the defendant's appeal was still pending for determination before the court of appeal. The court of appeal finally delivered its judgment on 6th November 2015.

13. Does the fact that I have found the parties were not served with the notice to show before this case was dismissed for want of prosecution or that that dismissal was during the pendency of the appeal lead me to finding that the plaintiff's case should be reinstated. I must respond to that in the negative.

14. This is why it is in the negative. The plaintiff stated that after the court of appeal by its judgment of 6th November 2015 set aside the summary judgment entered against the defendant the plaintiff instructed its advocate to fix this case for hearing. That the said advocate failed to fix the case for hearing and failed to respond to the plaintiff's inquiries.

15. The plaintiff is not an individual. It is a limited liability company. It therefore cannot be that instructions from the plaintiff to its advocate to get on with the case or on subsequent inquiries was oral are not recorded. That cannot be. The plaintiff did not annex any evidence of the instructions it gave, if indeed it did, to its then advocate to proceed with this case.

16. The plaintiff further stated that on not receiving any response to its inquiry from the advocate it went to the court registry but could not have this file traced. Again it goes without saying that production of court file for perusal is effected by the Deputy Registrar on a written request being made to avail the file. Again the plaintiff failed to annex any written request to have the file traced for perusal. And even if the file was unavailable, if the plaintiff can be believed, the plaintiff does not explain why it did not seek the explanation for the absence of the file from the Deputy Registrar. The Deputy Registrar would have advised the plaintiff, as it often happens, to proceed and have the court file reconstructed if indeed it was unavailable.

17. My interrogation of what the plaintiff stated was its reason for not proceeding with this matter is because the defendant through its managing director stated that the reinstatement of this suit would be greatly prejudicial in view of the fact the contract between the parties which is the basis of the present claim was entered in the year 2006 and the defendant's employees have since left the employment of the defendant's company.

18. In my view the prejudice the defendant alluded to that it would suffer if this case was reinstated in a very important factor to consider while determining the present application. The plaintiff did not delay for one month, or three months or six months not even one year before seeking to reinstate the present case. The plaintiff waited for four years to seek to reinstate the case. The case was dismissed on 17th June 2015. The plaintiff's application dated 6th August 2019 was filed in court on 15th August 2019. There is no doubt a presumption of prejudice against defendant in that delay to seek reinstatement. See a **Canadian case Arellano v Wong 2013 BCSC 2093 (Can Lii)**

> ***"A starting point for dismissal for want of prosecution is the decision of Mr. Justice Goldie in Busse v. Robinson Morelli Chertkow, 1999 BCCA 313 (CanLII), where he writes:***
>
> ***[18] In my view, it is open to this Court to adopt the principle that once a defendant has established the delay complained of has been inordinate and is inexcusable a rebuttable presumption of prejudice arises."***

19. The plaintiff cannot seek to explain delay in seeking to reinstate this case by blaming its advocate. This case belongs and always belongs to the plaintiff. The plaintiff had a duty to ensure that action was taken in its case. In this regard I refer to the case **Edney Adaka Ismail v Equity Bank Limited (2014) eKLR** thus:

> "*However, it is not in every Case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court. In* ***Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 Kimaru, J*** *expressed himself as follows:-*
>
> ***"Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of***

prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favbour of such a litigant. (emphasis added)"

20. The plaintiff failed to provide reasonable explanation for delay in seeking reinstatement of this case. The delay of four years was inexcusable. I am aware that dismissal of a suit is a draconian action and that in considering such dismissal and whether or not there ought to be reinstatement of this case the most important consideration is the interest of justice. Justice cuts both ways, it is a double edged sword. The interest of justice must look at both sides. That is the plaintiff's side and the defendant's side. In my consideration of what parties have presented before me I find the interests of justice on the defendant's part outweigh the plaintiffs. It is the plaintiff who sued and thereby brought the defendant to this court. The plaintiff had an obligation to ensure that this case, which was filed in the year 2008, was proceeded with once the court of appeal pronounced itself. I will use the words of the case of South Australia which perfectly captures the facts of this case, that is **Beverage Bottlers (SA) Ltd (in liquidation) and ARVO v ABODE ENTERPRISES PYT let (2009) SASC 272** where the Judge stated:

"There must come a time when the party has so conducted the litigation that it would be appropriate to shut that party out of that party's litigation even if the point is arguable. Justice delayed can be justice denied. Both the Plaintiff and the Defendant are entitled to justice.

If the Plaintiff has conducted his or her case so that the Defendant has suffered prejudice or will suffer injustice in defending the case then the Defendant is entitled to justice, and justice can only be achieved by shutting the Plaintiff out of his or her case."

There comes a time when (the Defendant) is entitled to have some piece of mind and to regard the incident as closed.

The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose."

21. The defendant is entitled to peace of mind after four years of the dismissal of this. Accordingly the application fails with costs.

CONCLUSION

22. In respect to the Notice of Motion dated 6th August 2019 I grant the following order:

The Notice of Motion dated 6th August 2019 is dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiff:

For the Defendant:

ORDER

This decision is hereby virtually delivered this 29th day of July, 2020.

MARY KASANGO

JUDGE