



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 349 OF 2009**

**BETWEEN**

**KENYA COMMERCIAL BANK LIMITED ..... PLAINTIFF**

**AND**

**ANNE KAJUJU CHARLES alias**

**ANN KAJUJU MAGONDU alias & 24 OTHERS ..... DEFENDANTS**

**RULING**

1. The Plaintiff has moved the court by the Notice of Motion dated 19<sup>th</sup> February 2020 under the provisions of **sections 1A, 1B and 80** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** and **Order 45 rule 1** of the **Civil Procedure Rules** and all enabling provisions of the law seeking to review, vary and/or set aside the order issued on 7<sup>th</sup> February 2020 dismissing the suit for want of prosecution and consequential orders seeking reinstatement of the interim orders that had been in force freezing accounts and restraining the Defendants from transferring or dealing with properties acquired as a result of the fraudulent conduct.

2. Since the application seeks to set aside the order dismissing the suit, it is important to outline the history of the matter to provide the context of the application and in particular the basis of the ruling delivered on 7<sup>th</sup> February 2020.

3. The Plaintiff filed this suit in 2009 seeking several orders against the Defendants in respect of a fraud allegedly perpetrated by the 1<sup>st</sup> Defendant in collusion with the other defendants which caused it to lose about Kshs. 70,000,000.00. The court did issue interim relief at the time by freezing the 1<sup>st</sup> Defendant's accounts and restraining any dealing with properties that had been purchased using the stolen money held by the other Defendants.

4. After some time, the Court issued a Notice to Show Cause why the suit should not be dismissed for want of prosecution. On 13<sup>th</sup> March 2017, Ngetich J., referred the matter to mediation in lieu of dismissal. No steps were taken to start the mediation process as a mediator was never appointed. The 1<sup>st</sup>, 2<sup>nd</sup>, 24<sup>th</sup>, 25<sup>th</sup> & 26<sup>th</sup> Defendants filed an application dated 3<sup>rd</sup> August 2018 to dismiss the matter for want of prosecution under **Order 17 Rule 2** of the **Civil Procedure Rules**. The application was opposed by the Plaintiff and after hearing the parties' arguments, I dismissed the suit by the ruling of 7<sup>th</sup> February 2020.

5. The Plaintiff's application for consideration is supported by the affidavits of Elijah Mwangi, the Advocate dealing with the matter on the Plaintiff's behalf, and Aloys Okaro Ombui, a forensic investigator instructed by the plaintiff to investigate the matter, sworn on 19<sup>th</sup> February 2020. The application is opposed by the 1<sup>st</sup>, 2<sup>nd</sup>, 24<sup>th</sup> and 26<sup>th</sup> Defendants through the 2<sup>nd</sup> Defendant's affidavit sworn on 25<sup>th</sup> February 2020 and the 15<sup>th</sup> Defendant through the replying affidavit of Gitonga Kamiti sworn on 28<sup>th</sup> May 2020. The parties filed written submissions which they highlighted through their respective advocates.

6. The grounds upon which the application is made are summarized on the face of the application. The Plaintiff states that it has a good and valid claim against the Defendants involving Kshs. 70 million and that if the suit is not reinstated the Plaintiff stands to suffer irreparable loss, damage and severe prejudice. It states that it is ready to avail its witnesses for hearing in the shortest possible time should the court direct that the matter be fixed for hearing and that it is necessary to preserve the accounts and assets on an interim basis pending hearing and determination of the suit.

7. The grounds I have set out aforesaid are underlined by the deposition of Mr Mwangi who has stated that while, "*there has been some lethargy in progressing with the matter,*" the plaintiff has always been ready to proceed with the matter. He deponed that even after the initial interim orders were granted, the Plaintiff engaged the Defendants in out of court negotiations which were not successful. That

notwithstanding, the Plaintiff filed its list of witnesses and documents and has made some effort to take steps to prosecute the suit. As counsel on record, Mr Mwangi, “*accepted responsibility for the delay in (not) acting faster and pushing the matter towards a faster conclusion thereof.*” He also deponed that the Plaintiff was ready and willing to deal with the matter and to comply with any orders, including payment of costs, that the court may impose to ensure that the matter is resolved.

8. The thrust of Mr Ombui’s deposition is that there is substantial and sufficient evidence to implicate all the Defendant’s in the fraudulent conduct that led the Plaintiff to lose Kshs. 70 million.

9. The Plaintiff contends that dismissal of the matter has closed the door to justice and that it deserved its day in court and if the suit is reinstated, the Defendants will have an opportunity to challenge and test the Plaintiff’s evidence. It adds that 1<sup>st</sup>, 2<sup>nd</sup>, 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> Defendants did not demonstrate that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant were not available to testify and that they too had a duty to move the court to ensure speedy conclusion of the matter.

10. The 1<sup>st</sup>, 2<sup>nd</sup>, 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> Defendants opposed the application on the basis that in the event the suit is reinstated their right to a fair hearing will be unduly prejudiced as they would be compelled in their defence to gather evidence after a prolonged and unexplained delay of over 10 years by the Plaintiff in prosecuting the suit. They added that the Plaintiff was afforded a fair hearing as it was represented by counsel on the day the application was heard. The Defendants maintained that the Plaintiff has not made out a case for reinstatement of the interim orders.

11. The 15<sup>th</sup> Defendant has also opposed the application on the basis that the court already exercised its discretion in dismissing the suit. They stated that in any case, the delay in prosecuting the suit has been inordinate and no justifiable reasons have been given for the delay.

12. This is an application for review made under **section 80** of the **Civil Procedure Act (Chapter 80 of the Laws of Kenya)** and **Order 45 rule 1** of the **Civil Procedure Rules**. **Section 80** of the **Civil Procedure Act** provides: -

*80. Any person who considers himself aggrieved-*

*(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is allowed by this Act,*

*May apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

While **Order 45 Rule 1** of the **Civil Procedure Rules, 2010** provides as follows: -

**45 Rule 1(1)** *Any person considering himself aggrieved-*

*a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.[Emphasis mine]*

13. Under these provisions, an applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter or for any other sufficient reason for the court to review. As I understand, the Plaintiff’s argument is not that new and important evidence which was not available at the time the application was urged is now available or that there is a mistake or error on the face of the record. The Plaintiff seeks review of my previous decision under the rubric of sufficient reason which it has been held need not be analogous to or *ejusdem generis* to the grounds set out in the **Order 45 rule 1** of the **Civil Procedure Rules** as this could be a clog on the unfettered discretion of the court under **section 80** of the **Civil Procedure Act** (see **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** and **Wangechi Kimita & Another v Charan Singh (CA No. 80 of 1985 (UR))**).

14. Counsel for the plaintiff relied heavily on the Court of Appeal decision in **D. Chandulal K. Vora Ltd v Kenya Revenue Authority NRB CA Civil Appeal No. 283 of 2012 [2017] eKLR** where the court summarized the principles applicable in considering an application for review. The facts of that case are not dissimilar to the facts of this case. The trial court dismissed the suit for want of prosecution whereupon the plaintiff moved the court for review of the order of dismissal. The trial judge dismissed the application precipitating the appeal to the Court of Appeal.

15. Counsel for the Plaintiff relied on that decision to support its position that the court should lean towards substantive justice by giving the parties the opportunity to ventilate the case. The Court also emphasized that:

*The main consideration for the court is to do justice to the parties in a suit. The discretion to dismiss a suit or to strike out an appeal or pleadings generally should be exercised sparingly and judicially and only in deserving cases which cannot be mitigated. The practice nowadays is to elevate substantial justice to the parties over and above the strictures of the rules of procedure, which have been stated to be mere hand maidens of justice.*

16. In exercising its discretion, the court has to weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party if the court dismisses the case. In the case at hand, the Court of Appeal concluded as follows:

*No doubt the appellant or its representatives should have been more prudent or keen in the prosecution of the suit. However, as at 3<sup>rd</sup> February 2012, the appellant was still inviting the respondent to fix a hearing date and showing attempts to prosecute the suit. This was before the suit's dismissal on 10<sup>th</sup> February 2012. In our view, there cannot be said to be inordinate delay in the scenario as such. The attempts to set the suit down for hearing ought to count for something and it was wrong to brush them off as inconsequential. To avoid injustice to either party in the circumstances of this case, and to prevent prejudice to one party, justice behoves thus court to allow this appeal. In *Essaji & Another v Solanki* [1968] EA 218 it was observed:*

*The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.*

17. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> Defendants submitted that the decision was distinguishable based on the fact of this case. First, that the plaintiff did not explain the delay and that its advocate admitted the delay. Second, that the application for dismissal in this case was opposed and determined on merits. Lastly, reinstatement of the case would require the defendants to call witnesses who would be required to recall events that took place 10 years ago.

18. Unlike the plaintiff in *D. Chandulal K. Vora Ltd v Kenya Revenue Authority (Supra)*, the plaintiff herein had the opportunity to put forth its case in a replying affidavit. Further, the Court of Appeal was even satisfied that the plaintiff in that case had taken steps to fix the suit for hearing a few weeks before the dismissal. In this case, the Plaintiff was already on notice to take steps to prosecute the suit hence it bore a greater responsibility to ensure that it took steps to prosecute the suit. That fact that the suit was based on a fraud of Kshs. 70 million clearly buttressed that responsibility on the plaintiff and its counsel and thus the nature of case cannot be a ground to excuse tardiness.

19. The Plaintiff has not been denied the right to a fair hearing. It has been afforded an opportunity within the rules that guarantee a fair hearing to all parties to prosecute its case. It was unable to put its case before the suit was dismissed. What the Plaintiff calls this court to do now is to review the exercise of its discretion in dismissing the suit. All the facts it has put before the court now were before the court when the application for dismissal was urged and the ruling delivered. An application for review is not intended to be an appeal against a decision made by the same judge.

20. Taking the aforesaid factors into consideration, I do not find any reason to review my order of 7<sup>th</sup> February 2020 dismissing the suit. Consequently, the Notice of Motion dated 19<sup>th</sup> February 2020 is dismissed with costs.

**DATED and DELIVERED at NAIROBI this 31<sup>TH</sup> day of AUGUST 2020.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango

Mr Mwangi and Ms Akonga instructed by Macharia-Mwangi and Njeru Advocates for the Plaintiff.

Mr Simiyu instructed by Muma and Kanjama Advocates for the 1<sup>st</sup>, 2<sup>nd</sup>, 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> defendants/applicant.