



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 180 OF 2012**

**IMPERIAL BANK LTD**

**(IN RECEIVERSHIP).....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**KENYA DEPOSIT INSURANCE CORPORATION..2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**MAHRUS ABDALLA SALIM.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**BARANI TYRES LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**Coram: Hon. Justice Reuben Nyakundi**

**Maina Njanga & Co. Advocates for the Plaintiffs/Applicants**

**Kilonzo Aziz & Co. Advocates for the Defendant/Respondent**

**JUDGMENT**

The applicants Imperial Bank Limited and Kenya Deposit Insurance Corporation brought this notice of motion under Article 159 of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Order 110 Rule 1 Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules for Orders:

***“ for hearing to set aside the dismissal order and reinstate the entire suit. Further, the Court be pleased to stay any execution proceedings and taxation proceedings of the subject matter. Thirdly the costs of the application be in the cause.”***

The grounds in support are contained in the affidavit of **E. H. Njanga** dated 10.3.2020 premised on the following:

- (a). That the applicants’ advocates had instructed an advocate in Malindi to hold brief and attend to the hearing of the matter.***
- (b). That the said advocate failed to appear and did not notify the applicants’ advocate hence the suit was dismissed for non-attendance.***
- (c). That the order for dismissal was never brought to the attention of the applicants’ save for the notice of taxation arising out of the dismissal order.***
- (d). That the applicant stands to suffer great prejudice as a results which should not be visited on the client.***

In reply the respondents filed grounds of opposition dated 17.1.2020 where they deposed:

- (a). That the applicants’ defective abinitio as leave to join the 2<sup>nd</sup> plaintiff as a party to the suit was not sought before filing the application.***
- (b). That the application is incompetent as to the extent that it is seeking to reinstate a suit which was dismissed for non-attendance by this Court on 30.10.2018.***

*(c). That the applicant have failed to demonstrate sufficient evidence that the suit was improperly dismissed.*

*(d). That the applicants are guilty of inordinate delay of about two years and the suit was dismissed on the basis of the application and affidavit evidence.*

Learned counsel submits that the claim at stake against the respondent is a liquidated amount of Kshs.9,767,544.84/= plus cost and interest at Court rates. Secondly, there on record a counter-claim by the respondents for a declaration that the date of the charged properties being Plot No. 7962, 7968 and 7970 is illegal and irregular, fraudulent, null and void. That a declaration to the effect of the respondents not indebted to the applicants for any monies under the guarantee and indemnity.

The applicants' counsel further submitted that the dispute between the parties ought to be canvassed on the merits, for the interest of justice to be served. He contended that the principles in **Esther Wamaitha Njihia & 2 others v Safaricom Ltd {2014} eKLR**, **Wanjiku Kamau v Tabitha Kamau & 3 others {2014} eKLR**, **Lochab Brothers Ltd v Peter Karuma t/a Lumumba, Lumumba Advocates {2003} eKLR** supports judicial discretion under the inherent jurisdiction to have the underlying suit heard and determined in a full trial. That the reinstatement of the suit occasions no prejudice or injustice to the respondent.

On overall perspective, counsel in addressing the application, urged this Court to consider the following issues:

*(a). Whether it is in the interest of justice to reinstate the suit.*

*(b). Whether the mistake of an advocate ought to be visited on his client.*

*(c). Whether the respondents shall suffer prejudice.*

*(d). Finally whether the suit raised triable issues.*

Counsel further argued and submitted that on the basis of the evidence known to the respondents, if the dismissal order is not varied or set aside there would be grave miscarriage of justice to the applicants and unjust enrichment.

Counsel cited and relied on the cases of **Belinda Muras & 6 others v Amos Wainaina {1978} KLR**, **Philip Chemwolo v Augustine Kubede {1982 – 1988} KLR 103**, **Gold Lida Ltd v NIC Bank Limited & 2 others {2018} eKLR**, **CMC Holdings Ltd v Nzioki {2004} 1 KLR 173**, **Ivita v Kyumbu cited in Jim Rodgers Gitonga Njeru v Al-Husnain Motors Ltd & 2 others {2018} eKLR**, **Joshua Chelelgo Kulei v R {2014} eKLR**. With that counsel urged the Court to grant the reliefs sought so as not to have the respondents take advantage of the dismissal order to the detriment of the issues raised in the claim.

In answer to the applicants' submissions it was the contention by the respondent counsel that there is no merit at all for the Court to allow the application. Firstly, counsel submitted that the dismissal of the suit for non-attendance under Order 12 and Order 17 of the Civil Procedure Rules was valid and justified. Secondly, the record is clear that the applicants had taken no step to prosecute the claim since the time of filing in 2012. Thirdly, the applicants have not shown sufficient reasons for the Courts discretionary powers to be exercised in their favour as they are guilty of laches.

Counsel relied on the following authorities: **Auto Selection (K) Ltd & 2 others v John Namasaka Famba {2016} eKLR**, **Savings and Loans Limited v Susan Wanjiru Muritu Nairobi Milimani HCC 397 of 2002**, **Ceres Estate Ltd v Kieran Day & 4 others {2013} eKLR**, **Jane Wanja Miriti t/s Sharlimon Foods v Bank of Africa Kenya Ltd {2019} eKLR**, **Utalii Transport Company Ltd & 3 others v NIC Bank & Another {2014} eKLR**.

In essence, counsel submitted and emphasized that delay of justice on the part of the applicants not to prosecute the suit is a denial of justice against the respondents.

#### **Determination**

I have weighed the notice of motion, affidavit evidence by the applicants, grounds of opposition by the respondent and both parties submissions as elucidated by each respective counsel. It is not disputed that from the provisions under Order 12 and 17 of the Civil Procedures Rules considered together with the principles in the case Law referred to by counsels in their submissions, the discretion to reinstate a suit which has been dismissed is indeed unfettered. That being the case, it is for the applicant to satisfy the criteria in circumstances that can enable the Court to exercise its discretion in their favour. What is the legal position in this aspect is as stated in **Ivita v Kyumbu {1984} KLR 441**:

*“The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the 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 favour 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 light of the guidance contained in the above decision, the Court in **CMC Holdings Ltd v Nzioki {2004} 1 KLR 173** laid down the

principles to be taken into account when dealing with exercise of discretion to applications of this nature. Thus:

***“In Law, the discretion that a Court of Law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake in deterrence, accident or error. Such an exercise of discretion would in our mind be wrong in principle we do not think the answer to the weighty issue was to advise the appellant of the recourse open to it, as the Learned Magistrate did here. In doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”***

In reference to the contention by the applicant counsel, I have perused the record since the filing of the suit in 2012. It is shown that both parties took a fairly long period of time to give effect to closure of pleadings with undue delay and non-adherence to Order 11 of the Civil Procedure Rules on successful pretrial conference. These procedures are to be adopted appropriately to narrow and define the issues between the parties to the claim and to proportionately prepare the case for trial. As the record indicates at the outset, some of the applications made to adjourn the case was for enlargement of time for counsels to comply with steps in the pretrial conference on a total assessment. The goals of pretrial conference could have simplified and formulated the issues, dealt with amendment of pleadings, obtain admission of documents and set the timeline which to determine the contested issue to the claim. It is obvious that the Court at one time stood over the matter generally without any scheduling for a pretrial which is a long standing civil administration of justice to guide the Court in fixing formal dates for hearing and determination of the dispute, fairly and expeditiously.

Suffice to say on 28.5.2018, both the applicants' and respondents' counsels were in attendance when the following directions were taken:

***“The plaintiff counsel is given 30 days to take the necessary steps to amend the plaint . Mention on 24.7.2018 to confirm that action has been taken or to have the matter dismissed.”***

That thereafter on 24.7.2018, both counsels did not attend the days proceedings and an order was issued for the Deputy Registrar to ensure parties comply with pretrial directions under Order 11 of the Civil Procedure Rules. As uplifting as it may seem on 30.10.2018, the respondents counsel in absence of the applicants' counsel made submissions before the Court that he had been served with a hearing notice on the matter. The Court in considering the turn of events dismissed the suit for non-attendance by the plaintiffs pursuant to Order 12 Rule 3 of the Civil Procedure Rules. On the wider stage the Court in **Isadru Vicky v Perina Aroma & 6 others CA No 003 of 2014 citing and relying in the decision of Phelps v Button {2016} EWHC 3185 Mbiru J** observed and outlined the importation of such a standard test to characterize exercise of discretion on litigation delay thus:

***“The Court ought to consider the following factors. First, the length of the delay; secondly, any excuses put forward for the delay; thirdly, the degree to which the claimant has failed to observe the rules of Court or any Court order; fourthly, the prejudice caused to the defendant by the delay; fifthly, the effect of the delay on trial; sixthly, the effect of the delay on other litigants and other proceedings; seventhly, the extent, if any, to which the defendant can be said to have contributed to the delay; eighthly, the conduct of the claimant and the defendant in relation to the action; ninthly, other special factors of relevance in the particular case. It requires examining the reasons advanced by the person who is accused of abuse of process. It also means a close examination of facts, taking into account the reasons, if any, advanced by the person accused of abusing the process for the adoption of a particular course and then deciding whether what occurred is a sufficiently serious misuse of the process of the Court to warrant being barred from continuing the case with the consequence that the actual merits of the case are not explored.”***

Having taken into account all the submissions the question is whether in the present case there was sufficient basis to bring the proceedings to a halt on the 30.10.2018 for non-attendance by the plaintiffs. In answering the above question I note the very core of the applicant's case and the power of the Court to exercise discretion it appears that striking out the suit altogether would inflict irreparable harm or likely to obstruct the just disposal of the claim against the respondents. The most striking aspect of this sorry tale of delay stems from the approach taken in this matter by both parties on non-compliance with the Civil Procedure Rules on pleadings and the required directions on pretrial conference.

Pursuant to the decision for dismissal it was necessary that the process set in motion on 24.7.2018 by **Weldon J** in his order was appropriately complied with by the Deputy Registrar. A party to a suit however may encounter some delay in one way or another in the course of the Court process within which he has to comply with a practice direction, rule or Court Order. Nevertheless, it is incumbent upon the Court to exercise discretion by taking into account various criterion, founded on the adjudication of the dispute on the merits unless circumstances to determine substantive rights of the parties are inexcusable.

The statutory anchorage on the unfettered discretion under Section 1(A) & (B) of the Civil Procedure Act in furthering the overriding objective. It consist of distinct strands for the Court to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act. In the case of **Pardy v Cambrian {1999} ALL ER DC 1518** the Court observed interalia:

***“... One element expressly included in Rule 1, (1) (2) on overriding objective as guiding the Court towards dealing with cases justly is that the Court should ensure, so far as practical that cases are dealt with expeditiously and fairly. Delay is, and always has been the enemy of justice. The Court has to seek to give effect to the overriding objective which exercises any powers given to it by the rules. This applies to application to strike out a claim. Rather is it necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective.”***

Given the facial textual of the record the inherent authority of the Court under Section 1A, 1B and 3A of the Civil Procedure Act to regulate its own proceedings contributed to the prolonged adjudication of the claim in a timely manner. The underlying philosophy of the new procedure is to bring about the disposition of every case on the merits promptly. Again summary Judgment of dismissal suits is a drastic

sanction only to be resorted to as a last resort for a neglected or discarded suit by the parties. The Court referred to this exercise of power in some of the directions taken in the presence of the parties. To put the importance of this feature in context apparently, since 2012 the litigants were left to govern and take control of their litigation.

The applicants in their application, urged this Court to exercise its discretion in their favour on the basis that the delay was occasioned by the fact of non-attendance of counsel instructed to hold brief on 30.10.2018. Further, it was their contention that the delay to obtain the outcome of what transpired on the scheduled date when the suit was dismissed for non-attendance, took a bit of time. The Court in **Mwangi S. Kimenyi v Attorney General & Another Civil Suit No. 720 of 2009** addressing the exercise of discretion expressed itself as follows:

***“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the outside or the other or to both, the Court may in its discretion dismiss the action 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:***

***(a). Whether the delay is inordinate and inexcusable***

***(b). Whether the delay is one that give rise to a substantial risk to a fair trial in that it is not possible to have a fair trial of the issues in action or causes or likely to cause serious prejudice to the defendant and***

***(c). 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 both parties.”***

It is evident from the procedural history of this suit there has been delay occasioned by a number of factors. It is also arguable that the Court is clothed with both constitutional and statutory tools to give effect to the right to have any trial begin and concluded without unreasonable delay (see **Article 50 (2) (E) of the Constitution**). Therefore, in my opinion under Section 1A and 1B of the Civil Procedure Act an extraordinary relief is given to the applicant to restore the suit dismissed for non-attendance during the normal case scheduling events. It is clear in the above analysis that in the present case there is absolute absence of any abuse of the Court process or any reasonable probability of mischief on the part of the applicants to warrant the Court not to depart from the dismissal order. In particular the suit against the respondents apparently involve a colossal sum estimated at Kshs.9,767,544.84/= plus cost and interest. In substance its alleged that the respondents operated a bank account with the 1<sup>st</sup> applicant referred as 0160025005 and 7500000 in the name of **Barani Tyres Company Ltd**. The position as averred is that the respondents put into motion an application for a loan and overdraft facilities with the 1<sup>st</sup> applicant which was duly processed and advanced to the respondents. For a period before the filing of the suit, the respondents remained indebted to the applicants necessitating the claim behind the suit; requiring a trial by the Court to determine it on the merits.

I therefore quite agree that the circumstances that arise owing to the dismissal order would occasion a higher risk of prejudice to the applicants in refusing the relief against a non-complying counsel retained to safeguard their interest in the proceedings. In my view, its in the interest of justice that the blunders, errors, mistakes and omissions contributed to by the applicant’s counsel thereof be inevitably excused keeping in mind all the relevant factors by setting aside the dismissal order of 30.10.2018.

Having ordered as such the following orders shall abound:

***(1). The applicants to pay throw away costs of Kshs.25,000/= to the respondents within 21 days from todays costs.***

***(2). The Deputy Registrar in the interim period do fix the suit for a pretrial conference under Order 11 of the Civil Procedure Rules to certify compliance with the order with a priority listing of the trial within the term which ends on 20.12.2020.***

***(3). In order to achieve efficacy, just and expeditious resolution of the suit a pretrial conference ought to be scheduled within 14 days from today’s date and delivery of the Ruling.***

***The upshot the motion dated 10.3.2020 has merit and is granted with costs in addition to the ones in clause (1) of the order.***

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 23<sup>RD</sup> DAY OF OCTOBER, 2020**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Ms. Kimetto holding brief for Maina Njanga advocate for the plaintiffs/applicants

2. Ms. Mulwa holding brief for Kilonzo Aziz advocates for the defendant/respondent