



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 1264 OF 2004

DAIRYCOM KENYA LTD.....PLAINTIFF

VERSUS

KENYA DAIRY BOARD.....1ST DEFENDANT

BARAZA LIMITED

t/a KENYA TELEVISION NETWORK.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 24th November 2015 and filed on 1st December 2015 was brought pursuant to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Article 159 (2) (d) (**sic**) and Sections 27 and 28 of the Limitation of Actions Act Cap 18 Laws of Kenya and all other enabling provisions of the law. It sought the following orders:-

1. THAT this Honourable court be pleased to reinstate this suit.

2. THAT costs be in the suit.

2. The Plaintiff's Written Submissions were dated and filed on 11th October 2018. The 1st Defendant's List of Authorities were dated and filed on 21st May 2018. The 1st Defendant's Written Submissions were dated 23rd October 2018 and filed on 24th October 2018 while those of the Defendant's were dated 24th October 2018 and filed on 26th October 2018.

3. When the matter came up in court on 30th October 2018, the parties requested it to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

4. The Plaintiff's present application was supported by the Affidavit of its advocate, Peter Wena, that was sworn on 24th November 2015.

5. It stated that the suit herein was filed on 19th November 2004 by M/S Oruko, Imende & Kiriko Advocates and amended on 23rd May 2008 by the firm of M/S Akoto & Co Advocates. The deponent averred that the firm of M/S Miller & Co Advocates where he practised as an advocate took over conduct of the matter in 2009.

6. He said that at the time of filing the suit herein, the Plaintiff did not have in its possession, all the documents it would have relied upon in prosecuting its case.

7. He added that between November and December 2014, the Civil Registry was not giving any hearing dates for matters in which parties had not complied with Order 11 of Civil Procedure Rules. It was also his averment that they filed the requisite documents which the Plaintiff obtained with difficulty from suppliers as it had transacted with them over ten (10) years ago. This is what caused a delay in compliance with Order 11 of Civil Procedure Rules.

8. He also averred that the court file went missing thereafter and they were therefore unable to file the List of Documents. They sought the

assistance of the Deputy Registrar without success which prompted them to file an application for reconstruction of the file but the same could not be filed on account of the suit having been dismissed.

9. He stated that there was a newspaper advert of 5th February 2015 from the Deputy Registrar High Court of Kenya, Nairobi and a notice from the Law Society of Kenya (LSK) indicating that matters, including this particular case, would be dismissed. They filed an Affidavit in response thereto but the same could not be placed in the court file as the same was missing.

10. He further asserted that they requested for the file several times from the Registry but the same was not available. He stated that, in any event, their firm was never served with the Notice to Dismiss the suit for want of prosecution.

11. It was the Plaintiff's case therefore that if the suit herein was not reinstated, it would cause it untold suffering. It therefore urged this court to allow its application as prayed.

THE 1ST DEFENDANT'S CASE

12. In opposition to the Plaintiff application, the 1st Defendant's Managing Director, Margaret Rugut Kibogy, swore a Replying Affidavit on 14th June 2017. The same was filed on even date.

13. The 1st Defendant stated that the Plaintiff had handled the matter casually and even failed to attend court when Onyancha J (as he then was) directed it to file a fresh Verifying Affidavit within seven (7) days of his Ruling delivered on 5th February 2010 and in default, the suit would stand dismissed.

14. It averred that the Plaintiff applied to have the learned judge's order set aside on the ground that it was not notified of the delivery of the aforesaid Ruling but that the said application was dismissed by Muchelule J on 7th October 2010 for citing the wrong provisions of the law and on the ground that the court lacked jurisdiction to hear the matter.

15. It pointed out that almost a year later, the Plaintiff filed an amended Notice of Motion application seeking reinstatement of the suit which application was allowed by Rawal J (as she then was). She directed it to file a Verifying Affidavit within seven (7) days of her Ruling dated 27th June 2011.

16. It was its contention that by the time the suit was dismissed in 2015 following the advertisement in the media and the Notice by Law Society of Kenya on dismissal of the matters, the Plaintiff had still not filed the Verifying Affidavit and that on 8th May 2015, it failed to attend court for the hearing of the Notice to Show Cause why suit could not be dismissed.

17. It was emphatic that it was sufficient that notice was given and it was not mandatory that the same be served personally upon the Plaintiff and/or their advocates.

18. It was also its averment that the present application was filed almost eleven (11) months after the suit herein was dismissed and had been hanging over its head for over five (5) years with no action. It therefore urged this court to dismiss the same.

LEGAL ANALYSIS

19. Notably, the 2nd Defendant did not file any affidavit or grounds of opposition to the Plaintiff's application but as has been shown hereinabove, it filed Written Submissions. The Plaintiff did not also file any further and/or Supplementary Affidavit in response to the 1st Defendant's Replying Affidavit.

20. This court perused the court file and noted that the chronology as had been given by the 1st Defendant, presented the correct position of this matter.

21. The Plaintiff did not furnish it with a plausible explanation why it did not comply with the Ruling of Rawal J (as she then was) or why it did not attend court on 8th April 2015 when the matter was scheduled for the hearing of a Notice to Show Cause why suit could not be dismissed under Order 17 Rule 2 (1) of Civil Procedure Rules. It did not also explain why it had not filed the Verifying Affidavit by the time the suit was being dismissed almost four (4) years later.

22. Indeed, the firm of M/S Miller Co Advocates was already on record by the time Rawal J (as she then was) extended time to the Plaintiff to file a fresh Verifying Affidavit as aforesaid on 27th June 2011. Notably, they filed their Notice of Change of Advocates dated 23rd October 2009 on 6th November 2009.

23. The non-attendance by the Plaintiff and/or its advocates in court was also of concern to this court because they appear to have been aware of the matter coming up in court on 8th April 2015 since an affidavit to the said Notice to Show Cause had been prepared with the only reason it was not filed being that the court file was missing.

24. If indeed, the said court file was missing as the Plaintiff has contended, nothing would have been easier than for it and/or its advocates to have attended court on that day of 8th April 2015 and sought indulgence of Aburili J for them to file the same before she could make orders in the file. The fact that the file had been listed for hearing of Notice to Show Cause on that date and infact was heard by Aburili J was proof that the court file was not missing.

25. It was not mandatory that the Plaintiff and/or its advocate be served with the Notice to Show Cause as the Plaintiff had submitted. Order 17 Rule 2 (1) of the Civil Procedure Rules provides as follows:-

1. In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing (emphasis court) to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

26. The provision is very clear that notice only has to be **given and not served** (emphasis court). The primary purpose is to notify a party of a particular event. The very fact that the advocates had prepared an affidavit in response of the Notice to Show Cause was sufficient proof that the Plaintiff’s advocates had been duly notified of the Notice to Show Cause. Insisting on service of the Notice to Show Cause was an afterthought and a mere technicality. In this regard, this court fully associated itself with a similar holding in the case of **Mwangi S Kimenyi vs Hon Attorney General & Another [2014] eKLR** that had been relied upon by the 1st Respondent where it was held that under Order 17 Rule 2 of Civil Procedure Rules, it was sufficient if a notice of the Notice to Show Cause why suit should not be dismissed was given and not served.

27. Going further, by the time the suit was dismissed in 2015, it had been in court system for about eleven (11) years. No plausible explanation was given to demonstrate why the Plaintiff could not have complied with the provisions of Order 11 of Civil Procedure Rules.

28. Its advocates assertions that documentation was required to prove its case appeared to have been intended to hoodwink this court. The Amended Plaintiff that was dated 25th November 2004 and filed on 26th November 2004 sought the following reliefs:-

a. An apology and retraction of similar prominence as the defamatory publication;

b. General damages;

c. Costs of this suit;

d. Any other relief this court may deem fit to grant.

29. It appeared to this court that no documentation in the magnitude the Plaintiff’s advocates informed the court to have been the cause of delay in complying with Order 11 of Civil Procedure Rules was required, the defamatory words complained of having been in the media. If the said documents were critical to its case, the Plaintiff did not demonstrate why it required documents from third parties for preparation of Audited accounts when it was mandatory for limited liability companies to prepare audited accounts every year in compliance with the law.

30. This court found itself in agreement with both the 1st and 2nd Defendants that **“equity aids the vigilant and not the indolent”** and that any reinstatement of the suit herein would only occasion them great prejudice.

31. This court is aware of the competing interests of litigants. Under Article 48 of the Constitution of Kenya, 2010 that has been relied upon by the Plaintiff, it is stipulated that:-

“The State shall ensure access to justice for all persons...”

32. On the other hand, Article 159 (2) (b) of the Constitution of Kenya provides that:-

“Justice shall not be delayed.”

33. As Gikonyo J observed in the case of **Fran Investments Ltd vs G4s Security Ltd [2005] eKLR** that was relied upon by the 2nd Defendant, **“reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously. Justice is to all parties and not only to the Plaintiffs...”**

34. Bearing in mind the circumstances of this case and weighing the provisions of Article 50 of the Constitution of Kenya that provides that every person has a right to have any dispute decided in a fair and public hearing before a court *vis-a-vis* the provisions of Article 159 (2) (b) of the Constitution of Kenya, and being aware of how drastic it is to deny a party an opportunity to have his day in court, this court nonetheless found that the prejudice the 1st and 2nd Defendants would suffer due to the reinstatement of the suit on account of several issues amongst them witnesses not being traced or memories of witness fading, far outweighed this court’s discretion to reinstate the Plaintiff’s suit herein.

35. This court formed the opinion that this matter was not handled with the seriousness it deserves as court orders and notices were not adhered to. The Plaintiff must therefore suffer a penalty for not having been vigilant. It was its case and it ought to have followed up the matter with its advocates.

DISPOSITION

36. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiff’s Notice of Motion application dated 24th November 2015 and filed on 1st December 2015 was not merited and the same is hereby dismissed with costs to the 1st and 2nd Defendants.

37. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of January 2019

J. KAMAU

JUDGE