



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO.169 OF 2015**

**L.G ELECTRONICS AFRICA LOGISTICS FZE.....PLAINTIFF/APPLICANT**

**VERSUS**

**ENCAPSULATED EAST AFRICA LIMITED.....DEFENDANT/RESPONDENT**

**R U L I N G**

(1) Before Court is the Notice of Motion dated **28<sup>th</sup> August 2018** in which the Plaintiff/Applicant sought the following Orders:-

**“(1) SPENT**

**(2) THAT this Honourable Court be pleased to review or set aside the ex-parte orders made on the 02/05/18 by this Honourable Court, the Learned Justice Sewe, and which orders were inter alia to the effect that the main cause be dismissed for non-attendance.**

**(3) THAT consequently this Honourable Court do hereby reinstate the suit.**

**(4) THAT this Honourable Court do hereby set down the main cause for hearing on a priority basis; and**

**(5) THAT costs be in the cause.”**

The application was premised upon **Article 159** of the **Constitution of Kenya**, **Order 12 rule 7**, **Order 17 rule 3**, **Order 51** of the **Civil Procedure Rules 2010**, and **Section 1A, 1B and 3A** of the **Civil Procedure Act Cap 21**, Laws of Kenya and all other enabling provisions of the law. The same was supported by the Affidavit sworn by **JOB ACHOKI** on even date.

(2) The Respondent filed Grounds of Opposition dated **23<sup>rd</sup> October 2018**. Pursuant to directions given by this court the application was disposed of by way of oral arguments on **29<sup>th</sup> October 2018**.

(3) This application arises from orders made by **Hon Justice Olga Sewe** on **2/5/2018**, dismissing the Plaintiff's suit for want of prosecution. Counsel for the Applicant submitted that although that hearing date had been taken by consent, he inadvertently recorded the date for hearing for the suit as **18/5/2018 instead of 2/5/2018** and this explained the failure of counsel for the Plaintiff be in Court on **2/5/2019** when the matter was called out for hearing. Counsel further explains that **18/5/2018** (the date he had inadvertently recorded as the hearing date) the trial Judge who had been transferred to Eldoret High Court was not sitting. Accordingly the Plaintiff advised his client that they proceed to engage in negotiations with the Defendant whilst awaiting the availability of new hearing dates.

(4) Counsel for the Respondent submitted firstly that the application was incompetent. He further submitted that there had been gross delay in filing this application to have the suit reinstated. Counsel insists that the Plaintiffs suit was rightfully dismissed as the hearing date had been taken by consent and he urges the court to dismiss this application with costs.

(5) I have carefully considered the facts of this matter as well as the rival submissions by counsel. It is not in contention and it is clear from the record that the suit first came up for hearing on **11<sup>th</sup> October 2017**. However on that date counsel for the Defendant sought an adjournment which the court granted. The matter was then slated for hearing on **2<sup>nd</sup> May 2018**. On that date there was no appearance by

counsel for the Plaintiff or his client. Upon being urged by the Defendant's advocate the court dismissed the suit for want of prosecution.

(6) Counsel for the Respondent submitted that the present application was for striking out for reason of incompetence as the Supporting Affidavit was deponed by counsel instead of by the Plaintiff. It is submitted that the client (the Plaintiff herein) ought to have filed an affidavit to indicate what if any prejudice they stood to suffer if the suit was reinstated. Without an affidavit from the Plaintiff the application was incompetent.

(7) I do agree with counsel for the Applicant who countered that in his affidavit he raised matters which fell within his own personal knowledge as counsel. In the circumstances, I find that a second affidavit sworn by the Plaintiff was not necessary and failure to file the same did not render this application incompetent. I therefore decline to strike out the application on this ground.

(8) **Mr. Achoki** for the Plaintiff has explained that due to inadvertent error he recorded the hearing date as **18<sup>th</sup> May 2018**. Indeed this is the date that counsel communicated to his client via e-mail. I (**Annexure "JA 11"**). As such I am convinced that counsel's claim that he inadvertently recorded the wrong hearing date is not merely an afterthought. As it transpired on **18<sup>th</sup> May 2018**, the trial Judge **Hon Olga Sewe** as evidenced by the Notice in **Annexure "JA 14"** was not sitting. I do take judicial notice of this fact. It was not until **30<sup>th</sup> August 2018** that the file came up before **Justice Kasango** who gave directions concerning this application.

(9) It is pertinent to note that between May to **28<sup>th</sup> August 2018** the Plaintiff, being unaware of the dismissal of their suit, continued to engage the Plaintiff in negotiations with a view to settling the case (**Annexure "JA 14"**). The Plaintiff would not have so engaged the Defendant if they had knowledge that the suit had been dismissed. On their part despite being fully aware of the dismissal of the suit (given that their Advocate was in court when the suit was dismissed) the Defendant did not appraise the Plaintiff of this fact. Instead they continued to play along with the purported negotiations – a sign of bad faith on the part of the Defendants.

(10) I am satisfied that it was not until **30<sup>th</sup> July 2018** (**Annexure "JA 15"**) when the Plaintiffs wrote to the Deputy Registrar seeking a hearing date, that they became aware of the dismissal of their suit. Thereupon the Plaintiff acted promptly in filing this application. I am satisfied that the Plaintiffs non-attendance on **2/5/2018** was due to an excusable error in recording the hearing date. The Plaintiffs desire to have the suit proceed is clear from their actions. They did not abandon their suit nor did the Plaintiff sit by idly and do nothing. When the hearing failed to take off the Plaintiffs engaged the Defendants in negotiations which negotiations however did not succeed.

(11) Accordingly, I do allow this application in terms of Prayer (2) thereof the Plaintiff's suit is hereby reinstated for hearing.

Dated in Nairobi this **26<sup>th</sup>** day of **April**, 2019.

**Justice Maureen A. Odera**