



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 108 OF 2006

1. HACO INDUSTRIES LTD

2. SOCIETE BIC.....PLAINTIFFS

VERSUS

1. DOSHI IRON MONGERS LIMITED

2. KENYA BUREAU OF STANDARDS.....DEFENDANTS

RULING

1. On the 14/11/2018 this court recorded a consent order to the following effect:-

- i. Let the plaintiff (counterclaimant) service witness statements and bundles of documents within 30 days from the date today.**
- ii. Upon service the defendant shall have a period of 30 days from the date of service to file and serve further witness statements and or bundles of documents, if need shall arise.**
- iii. If the plaintiff (counterclaimant) at shall fail to comply with these orders by the 15/12/2018, the suit shall stand dismissed with costs on that date.**
- iv. Parties to attend court for case conference on 31/01/2019.**
- v. Costs in the cause.**

2. It would appear from the court record that there was never compliance, with the consequence that the counterclaim stood dismissed hence the counter claimant has now approached the court pursuant to the notice of motion dated 25/01/2019 and made prayers that:-

- i) "spent.**
- ii) spent.**
- iii) The order made on 14th November 2018 by Justice P.J.O. Otieno be and is hereby reviewed and/or set aside ad be substituted with an order extending the time within which the 1st Defendant should file and serve its documents and witness statements.**
- iv) The documents and witness statements filed by the 1st Defendant be deemed as properly filed.**
- v) The 1st Defendant's suit by way of counterclaim be reinstated for hearing and disposal on its merits.**
- vi) Costs be in the cause".**

3. The main reason advanced for failure to comply with the court order was that the Defendants/Counter-claimant's director and only witness conversant with the case, was taken ill and proceeded abroad on treatment on 12/11/2018 and only returned on 8/01/2019. That the time limited for filing the witness statement and bundle of document lapsed while the person was on treatment outside Kenya but the said witness statements and documents had since been filed. The defendant/counter claimant further contend that unless the matter is reinstated there

would be prejudice suffered as the failure was never deliberate but explicable.

4. The application was opposed by the plaintiff/defendant to the counterclaim by the Grounds of Opposition and list of authorities dated 20/2/2019. Those grounds fault the application on the basis that the orders of 14/11/2018 was never an imposition upon the defendant/counterclaimant by the court but an imposition by the law and that there had been inordinate delay of 13 years since 2006. When the counterclaim was filed and a delay of 9 years since the rules were amended to demand filing of witnesses statements and documents. It was then added that the reason cannot be genuine because the documents filed have always been in the court file hence cannot convince any reasonable person properly applying his mind to the matter and lastly that there were no grounds advanced to merit review.

5. When parties attended court to urge the application both sides offered oral submissions and cited to court decided cases for guidance. The totality of the submission and the law cited sum up to the fact that a person in default has the burden to explain the delay to the satisfaction of the court and that the court has a wide and unfettered discretion to set aside and review its decision where no decision has not been reached on the merit but merely on account of default.

6. Being guided by the decided cases and hearing on when a court would set aside timelines set and extend same to meet the dictates of justice, I have come to the conclusion that the only issue for determination is whether an explanation has been given to warrant the courts' discretion to set its timelines set and to extend time for compliance.

7. In seeking to resolve that issue it is noted that what remains pending determination in these proceedings is the defendants' counterclaim because the claim in the plaint was itself ordered dismissed on 10/7/2015 for want of prosecution.

8. When parties attended court on the 14/11/2018 Mr. Oluga for the defendant/counterclaimant sought indulgence by the court for time to file witness statements and bundles of document. That request was not opposed by Mr. Karina who is recorded to have told the court:-

“No objection but request that we get corresponding leave to file additional documents if need shall arise”.

9. Accordingly the timelines set were imposed by and at the discretion the court which took the view that the matter was taking too long in court.

10. With that history in mind and the explanation given that the witness, to make the witness statement was taken ill and sought treatment outside Kenya together with the uncontested fact that at the time of arguing the application the witness statements and documents had infact been filed and while I do note that there has been a default, which I do not consider willful or a deliberate design to defeat the course of justice.

11. That being my finding and being reminded that a court of law reserves the discretion to set aside and undo what has happened merely on account of default, I do set aside the order that deemed the counterclaim dismissed; I enlarge time for the defendant/counterclaimant to file the witness statements and documents and therefore deem the documents filed on the 25/01/2019 properly on record.

12. On costs however the Defendant/Counterclaimant did occasion the need of the application by his default and even though it has succeeded the law under Order 50 Rule 6 dictates that it meets the costs of the application. The costs of the application are this awarded to the Respondent/plaintiff.

Dated and delivered at Mombasa this 31st day of May 2019.

P.J.O. OTIENO

JUDGE