



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 317 OF 2015**

**APEX SECURITY SERVICES LIMITED ..... PLAINTIFF**

**VERSUS**

**FAMILY BANK LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiff (**Apex Security Services Limited**) filed this suit on 2<sup>nd</sup> July 2015. The Plaintiff while filing its Plaint simultaneously filed a Notice of Motion application dated the same date.
2. The Plaintiff's claim against **Family Bank Limited** (the Defendant) is declaration that all transaction, on its bank account with the Defendant, which were transacted without the Plaintiff's instructions and in contravention of the account signing mandate, are illegal and an order be made for reversal of those transactions. The Plaintiff, by this action, also prayed for an injunction to restrain the Defendant from fraudulently operating the Plaintiff's bank account at Defendant's Kilimani Branch.
3. The Plaint, summons and the Notice of Motion application, as stated in the affidavit of service of Noel M. N. Munyithya, were served upon the Defendant on 7<sup>th</sup> July 2015.
4. The Notice of Motion application was before Court on 16<sup>th</sup> July 2015, for hearing interpartes. The Defendant was not represented and did not also file any document in opposition. The Court on hearing the Plaintiff's Learned Counsel granted the injunction order as sought.
5. The Plaintiff from 16<sup>th</sup> July 2015 only wrote one letter inviting the Defendant to fix this case for hearing on 25<sup>th</sup> August 2016. Of interest is that on the said letter the Defendant endorsed the following words:  
  

***“We have never been served with pleadings of this matter.”***
6. There is no evidence on the Court file on what occurred on the date the case was due to be fixed for hearing.
7. Since no action had been taken on this matter for a prolonged period the Plaintiff was served, by the Court, with a Notice to Show Cause why this suit should not be dismissed for want of prosecution. That Notice to Show Cause was fixed for hearing, before Court, on 1<sup>st</sup> October 2018.
8. On 1<sup>st</sup> October 2018 the Learned Advocate Mr. Gaita attended Court. This is what he informed the Court on being requested to show cause why the suit should not be dismissed for want of prosecution. He stated that the money the Defendant held for the Plaintiff had not been released because the Plaintiff's Director passed away and the Defendant wished to deal with personal representatives. The Learned Advocate also stated there was criminal investigation which would have a bearing on this suit and which investigation would conclude in two weeks.
9. For the reasons given by the Learned Advocate Mr. Gaita the matter was adjourned to 30<sup>th</sup> October 2018 on which date the Plaintiff was required to show cause why the suit should not be dismissed for want of prosecution.
10. On 30<sup>th</sup> October 2018 the Plaintiff's Advocate failed to attend Court and this suit was dismissed for want of prosecution.
11. Before me is the Plaintiff's Notice of Motion application dated 14<sup>th</sup> November 2018. The Plaintiff by that application seeks the setting aside of the dismissal order of 30<sup>th</sup> October 2018.

12. The grounds upon which the Plaintiff seeks that order is that the previous Advocate on record, Mr. Gaita, informed the present Advocate for the Plaintiff, Simon Ndege, that Plaintiff's were required to show cause on 1<sup>st</sup> November 2018. That Mr. Ndege checked the cause list of 1<sup>st</sup> November 2018 and did not see this matter listed. He subsequently was informed that this matter was before Court on 30<sup>th</sup> October 2018 when the suit was dismissed for want of prosecution. The Advocate stated his mistake ought not to be visited on his client.

13. Charles Ndugu Ndirangu a Director of the Plaintiff swore an affidavit on 29<sup>th</sup> October 2018.

14. By that affidavit that Director deponed that another Director of the Plaintiff Stephen Mukora Thiongo was one acquainted with this case and was the one who signed documents related to this case, including the Plaintiff's witness statement. The deponent stated that the said Thiongo had passed away. The Plaintiff Company on 31<sup>st</sup> May 2017 resolved to instruct another Advocate to act for the Plaintiff instead of Gaita Advocate. That the new Advocate informed the Plaintiff they needed to amend the Plaintiff whereupon the Plaintiff began the process of procuring relevant documents from the Defendant, which the Defendant declined to provide. That as a consequence the Plaintiff has had to use government agencies to obtain the necessary information.

15. The Plaintiff's cause for why this suit should be reinstated are wholly vague and fail to meet the threshold of setting aside a dismissed suit.

16. Firstly the Plaintiff's Director, Thiongo was said to have died and hence why there was no progress made in prosecution of this case. There was no evidence presented to Court to prove the death of that Thiongo. Even if there was such evidence he was not the only Director of the Plaintiff. The remaining Director/s failed to state why they were unable to prosecute this suit.

17. The Plaintiff, it was stated was unable to get a date for hearing on 2<sup>nd</sup> August 2016 because issues in this matter had not been formulated. If that can be believed the Plaintiff failed to explain why it had failed to comply with Order 11, of the Civil Procedure Rules, and obtain a Certificate that the suit was ready for trial. In any case I doubt that this is a case where issues needed to be formulated because the Defendant has to date not filed a defence. At least there is none on record.

18. The Plaintiff curiously stated that it resolved to appoint another Advocate to act for it. That resolution was not attached to the application. Even if the Plaintiff so resolved it failed to prove what documents it needed in order to amend the Plaintiff as advised by it supposes new Advocate. That new Advocate did not also come on record in May 2017 when the alleged company's resolution was passed. As a matter of fact the change of Advocate only occurred on 30<sup>th</sup> October 2018 the day this suit was dismissed for want of prosecution.

19. It behooves an applicant, such as the Plaintiff to place all necessary documents/information in support of an application to enable the Court exercise its discretion in considering the prayer sought. That in my view is rudimentary. In this case it was not observed. The Plaintiff did not present an iota of evidence to lead me to exercise my discretion in its favour. All the Plaintiff did was to make vague statements, not backed by any documentary evidence.

**20. It is because of the above finding that the Notice of Motion dated 14<sup>th</sup> November 2018 is dismissed with costs to the Defendant.**

Orders accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>TH</sup> day of JULY, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**