



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 293 OF 2008

SAMIMA INVESTMENT LTD.....PLAINTIFF

VERSUS

LEO INVESTMENTS LIMITED.....1ST DEFENDANT

WHITESTONE AUCTIONEERS (K) LTD.....2ND DEFENDANT

MARCHET AUCTIONEERS LIMITED.....3RD DEFENDANT

JUMBO AIRLINK AUCTIONEERS LIMITED.....4TH DEFENDANT

RULING

The Plaintiff/Applicant filed the application dated the 7th day of June 2018, seeking to set aside the orders that were issued on 5th May, 2017, dismissing the suit for want of prosecution. It has also sought for an order to reinstate the suit and costs of the application.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit sworn by Preston Wawira, on the 7th day of June, 2018.

The applicant has sought to reinstate the suit on the grounds that it was not aware that the suit was scheduled for notice to show cause on the 5th day of May, 2017 when it was listed for dismissal for want of prosecution. It avers that it was not served with the notice to show cause.

In the supporting affidavit, it is deponed that the court file was missing for quite some time before it was listed for dismissal and hence the inability to fix the matter for hearing.

The Applicant further depones that attempts were made at tracing the file not only in the Registry but also in the ELC and Commercial Registries but by the time the same was traced, an order had been made dismissing it for want of prosecution. The deponent states that having made all attempts to trace the file, he prepared an application for reconstruction of the court file and attended court to file the same when he was informed that he could not file the application until it was confirmed that the file could not be traced and a certificate issued by the Deputy Registrar to that effect. He contended that he was shocked when he was informed by the registry staff that the Deputy Registrar had declined to sign the certificate on the basis that the suit had been dismissed for want of prosecution.

In response to the application, the defendants filed a replying affidavit sworn by Barbara Karanja on 6th day of May, 2019. She avers that the application is an abuse of the court process and ought to be struck out. She avers that the applicant has been complacent and casual in the manner he has handled the suit and therefore undeserving of the orders sought. That no good reason has been given nor tangible basis laid for the Honourable Court to exercise its discretion to reinstate the suit.

The deponent contends that since the applicant discovered that the file was missing on the 27th September, 2012, no action was recorded until 14th April, 2013 which was a period of six months with no indication of the steps that it took within that period of time.

In a nutshell, the respondent faults the applicant for being very sluggish and casual in its approach in expediting the process of tracing the file and blames it for the delay in prosecuting the matter. It has been deponed that it would be prejudicial to them to have the matter reinstated.

The court has considered the application together with the supporting affidavit and the replying affidavit by the respondents in opposition thereto.

The applicant has attributed the delay in prosecution of the case to the disappearance of the file without which they could not fix the matter

for hearing. From the affidavit in support of the application, the file disappeared from 14th June, 2012 when it was scheduled for hearing but it was not listed as the file could not be traced at the registry. It was later traced on 20th June, 2012 when the 2nd defendant filed an application seeking an order for extension of time within which to file an appearance and defence which application was scheduled for hearing on 27th September, 2012 when the file disappeared again only to be traced after it had been dismissed for want of prosecution.

The court has noted the letters annexed to the supporting affidavit done to Deputy Registrar seeking for his assistance in tracing the court file. The court has also noted the Deputy Registrar's letter dated the 17th day of June, to the plaintiff's Advocate's firm informing them that the file has been traced but the parties indicated in their letter dated 17th February, 2016 were different from those on the court file. This letter confirms the plaintiff's counsel's contention that the court file was indeed missing.

The court has perused the notices that were served on the parties before the dismissal when the matter came up for notice to show cause. It is not clear whether the advocate for the plaintiff was indeed served with a notice to show cause as required under the Civil Procedure Rules.

However, the court notes the sentiments by the respondents with regard to the prejudice that they stand to suffer should the suit be reinstated which include loss of documents, the impairment of the witness's memories and availability of the witnesses. This is a very old matter which should be disposed off at the earliest.

In the interest of justice, the court will not dismiss the suit but I will direct that the same be heard and concluded within six (6) months from the date of this ruling failing which it shall stand dismissed.

Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2019.

.....

L. NJUGUNA

JUDGE

In the Presence of

.....*For the Applicant*

.....*For the Respondent*