



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.411 OF 2008

DATINI MERCANTILE LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LIMITED

JOSEPH KAMANDE MUIRURI

PATRICK MAINA KAMAU

JOHN KIARIE

ASHUT ENGINEER LIMITED

GENERAL PLASTICS LIMITED.....DEFENDANTS/RESPONDENTS

RULING

This is a ruling on two applications the Plaintiff's application dated 23rd August 2017 seeking to place on record the firm of Michael Awuor & Co. Advocates and two, to set aside orders of 8th February 2012 by Justice Kimondo dismissing this suit. The Plaintiff submitted that before the Court dismisses a suit for want of prosecution, it is required red to issue notices in writing to the parties.

Counsel for the Plaintiff submitted that on 8th February 2012 the judge noted that there was no appearance by parties and dismissed the suit but there was no indication as to who fixed the date and whether it was served on the Plaintiff. He cited the case of **MWANGI S.KAIMENYI V ATTORNEY GENERAL & ANOTHER (2014) EKLR** where the judge highlighted conditions which should be considered listed as hereunder:

1. Whether the delay was intentional and abuse of Court process.
2. Whether the delay is intentional inordinate and inexcusable.
3. Whether delay is an abuse of Court process.
4. Whether delay raises substantial risk to fair trial or causes serious prejudice to the Defendant.
5. What prejudice will dismissal occasion to the Plaintiff.
6. Whether Plaintiff has offered reasonable explanation to the delay.
7. Even if there has been delay, what does the interest of justice dictate?

Counsel for the Plaintiff submitted that measure of delay will depend on each case. He submitted that delay of one and half year in Kaimenyi's case was not inordinate. He said delay in this file was for one year 6 months and that it was occasioned by failure to trace the file in the registry. He submitted that reinstatement of this suit will not prejudice the Defendants as they are companies with perpetual succession. He added that the claim is for property worth 290 million and that it is the Plaintiff's constitutional right to own property which should be

taken away by technical procedures as to whether the delay is explained he submitted that Counsel for the Plaintiff requested the Deputy Registrar to reconstruct a skeleton file but the request was not allowed until the search proved unsuccessful. He concluded that the Plaintiff was not indolent but the suit was dismissed due to factors beyond his control.

In response Counsel for the Defendants submitted that the Plaintiff filed application for reinstatement 6 years 6 months after it was dismissed. He admitted that the file went missing but once reconstructed it should not have taken 5 years for the application to be made. He submitted once the matter is concluded, it is indicated in the company's record that it has been concluded and Defendant will not get fair trial if the matter is delayed and that Court should aid the diligent not the indolent.

In response Counsel for Plaintiff submitted that the Plaintiff could not do much as the file was missing and that he presumed the matter was still alive as no notice for dismissal was issued.

I have considered arguments by both Counsels. I have also perused the record and note that this matter was dismissed on 8th February 2012.the application herein was filed on 24th August 2017.the Plaintiff has attached a letter dated 4th April 2011 addresses to Deputy Registrar indicating that the file went missing after pretrial questionnaire was filled.in the letter Counsel for the Plaintiff was requesting a mention date. This was followed by a letter dated 13th September 2011 asking for the Court file to be availed to the Plaintiff or skeleton file to be created if the file could not be traced. More letters followed in 2014 & 2015 dated 28/01/2014,6/02/2013,18/07/2013,03/03/2015,10/06/2015,30/11/2015,29/11/2016,26/01/2017 all asking for the file to be availed or skeleton file to be created.

On perusal of the Court file I have not seen a copy of Notice to Show Cause issued to the parties before dismissal of the suit. It is evident from the letters attached to the Plaintiff's applications that the Court file was missing. It appears the Plaintiff was not notified of the availability of the file at the time it was listed for dismissal. More letters were sent to Deputy Registrar after the dismissal. This confirms that the Plaintiff was not notified of available of the file and intention to dismiss the matter. From annexures to the application, it is evident that the Plaintiff demonstrated interest in prosecuting this matter but was frustrated by unavailability of the file and lack of communication from the Court when the file was traced.

From the foregoing I find that the delay was not intentional but was beyond due to factors beyond the Plaintiff's control. It would therefore be in the interest of justice to give the Plaintiff an opportunity to be heard.

I therefore reinstate this suit on condition that Defendant is paid thrown away costs of Kshs 30,000 within 30 days from today's date and suit be set down for hearing within 60 days from today's date failure which the suit to stand dismissed.

Dated and Delivered at Nairobi this 16th day of March, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

.....COURT ASSISTANT

.....COUNSEL FOR APPLICANT

.....COUNSEL FOR RESPONDENT