REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 278 OF 2012

(FORMERLY: MOMBASA HIGH COURT CIVIL CASE NO 16/2000

AFROFREIGHT FORWARDERS LIMITED.....APPLICANT/APPLICANT

- VERSUS -

KENYA RAILWAYS CORPORATION LTD.....RESPONDENT

RULING

1. ***Afrofreight forwarders limited***, the plaintiff has moved this court by its application dated ***6th July 2017***. The plaintiff by that application seeks an order to set aside the court's proceedings and the consequential order of ***19th June 2015.*** By the order of that date, this court dismissed the plaintiff's suit for want of prosecution.

2. The order of the court of ***19th June 2015*** was in the following terms:

> *"**Court order (Order 17 Rule 2)** after the inordinate delay of three years since the last step was taken on **17th December 2012**, with a view to proceed with the suit, and service of the notice, having been affected to show cause why this suit should not be dismissed and there being no satisfactory response, the court in exercise of the powers conferred upon it by **Order 17 Rule 2 of Civil Procedure Rules** hereby orders this suit dismissed."*

3. The plaintiff's director in the supporting affidavit set out the basis upon which that order of **19th June 2015** should be set aside. The director referred to various suits including this suit which are between the plaintiff and **Kenya Railway Corporation,** the defendant, which were filed in Mombasa High Court. They are:

a. **Mombasa HCCC No. 16 of 2000** – this suit No. 16 of 2000 on being transferred from Mombasa High court to Milimani Commercial & Admiralty Division in Nairobi was allocated Civil Case No. 278 of 2012. This is the present suit.

b. **Mombasa HCCC 362 of 2002**

c. **Mombasa HCCC No 2 of 2008**

d. **Mombasa HCCC No 144 of 2006**

4. The plaintiff by the Notice of Motion dated ***26th January 2012***, sought consolidation of the above stated suits. The Court recorded a consent order of the parties on ***20th April 2012,*** by which order **Mombasa HCC No 16 of 2000**, **Mombasa HCC no 2 of 2008** and **Mombasa HCC No 144 of 2006** were to be transferred to the Nairobi Milimani Commercial & Admiralty division. From the correspondence in this file, however, between the Deputy Registrar of this court and of Mombasa High Court, it is apparent that **Mombasa HCC No 2 of 2008** was not transferred to Nairobi. This correspondence continued being exchanged upto ***January 2014.*** It is not clear from the court record whether the file **Mombasa HCC 2 of 2008** was ever brought to this court. Despite the earlier confirmation of the Deputy Registrar of this court that **Mombasa HCC No 144 of 2006** had been transferred, when the matter appeared before court, on ***19th July, 2013***, this court noted that, that file had not been transferred. What followed was further exchanges of correspondence between the respective Deputy Registrars.

5. The matter again appeared before court on ***17th December, 2013*** when this court requested the Deputy Registrar of this court to inquire from Mombasa High Court the whereabouts of bundles of documents of this matter and the complete file of **Mombasa HCC No 2 of 2008.** Further mention of the matter for the purpose of ascertaining that inquiry was given for ***24th February, 2014***. The matter however was not listed on that date. The record of this file does not show if the bundle of documents was ever received by this court. Thereafter there seems

to have been a lull in the matter from that date until the dismissal of the suit on ***19th June, 2015***.

6. The plaintiff through its director deponed that it was not served and neither was the defendant served with the notice of the dismissal of the suit for want of prosecution. Further it was deponed that the plaintiff learnt of that dismissal on ***14th October, 2016***.

7. The director stated that the parties had engaged in negotiations in this matter and are keen to settle the same. In that regard, he annexed to the supporting affidavit a reconciliation report dated ***25th May, 2011***. The plaintiff's director stated in the affidavit that the plaintiff's claim against the defendant was meritous, bona fide and which should be fairly determined.

8. The application was opposed by the defendant through the affidavit of ***Hellen Mungania,*** its corporation's secretary. In that supporting affidavit , the deponent gave a histrory of the matter ; that is that the suit was filed on ***14th January, 2000***; the defendant filed a Memorandum of Appearance on ***27th Januray, 2000***; and a defence and counter claim were filed on ***7th February, 2000***. It was deponed that there had been intentional delay of 18 years on the part of the plaintiff. That the plaintiff statement that it had not been served with a notice to dismiss the suit for want of prosecution was unmeritious and unreasonable by virtue of **Order 17 Rule 2 of the Civil Procedure Rules**. In the defendant's view, the notice of the dismissal under **Order 17** need not mandatorily be served by the court.

9. The defendant's corporation's secretary deponed that if the suit is reinstated, the defendant stands to suffer gross prejudice because its right to fair hearing will be curtailed since its documentation relating to this case were placed in the archives; and because its witnesses who were former employees have since retired. The deponent further stated that there was no consent to consolidate the matters between the parties as stated by the plaintiff.

ANALYSIS AND DETERMINATION

10. **Order 17 rule 2(1)(2)** provides as follows:

> ***"2.(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.***
>
> ***(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit."***

11. It is not disputed by both parties that there was no service effected by the court before the order of dismissal of the suit for want of prosecution. It is pertinent to note that the cases relied upon by the counsel for the defendant, in opposition to the application, clearly show that the parties were served with the notice and had therefore an opportunity to show cause why their suits should not be dismissed. Those cases cited by the defendant were **Rajesh Rughani Vs Fifty Investments Limited & Another [2016] eKLR** and **Netplan East Africa Limited Vs Investment & Mortgages Bank Limited [2013]eKLR**.

12. I have noted the holding in the case **Fran Investments Limited Vs G4S Security Services Limited [2015] eKLR** and **Mwangi S. Kaimenyi vs Attorney General & another [2014] eKLR** that the judges expressed themselves in respect to **Order 17 Rule 2 (1)** that such service contemplated in Civil action was not mandatory in respect to that order.

13. In my view, consideration of **Order 17 Rule 2 (1)** calls upon this court to consider the use of the word ***'may'*** in that order. What this court needs to consider is whether the use of the word ***'may'*** connotes mandatory requirement of service before a suit is dismissed for want of prosecution.

14. In my considered view, whether or not ***'may'*** is in mandatory terms can only be ascertained by reading **Order 17 Rule 2 (1) and (2).** That rule is reproduced above in this ruling. It is clear from that rule that a party is requred to show cause why his suit should not be dismissed for want of prosecution. Such calls, in my view, cannot be shown if a party has not been served. It is therefore very clear that the drafters of that rule required service to be effected to enable a party to have an opportunity to show cause. I therefore find and hold that service upon the parties of the notice before a suit is dismissed is mandatory under **Order 17 Rule 2.**

15. My above findings get support from a Court of Appeal decision the case **Sony Holdings Ltd Vs Registrar of Trade Marks & Another [2015] eKLR.** In that case the Court of Appeal considering whether the use of the word ***'may'*** is mandatory stated as follows:

> *"It cannot, therefore, be overemphasized that while the court must rely on the language used in a statute or in the rules to give it proper construction, the primary purpose is to discern the intention of the Legislature (or Minister) in enacting or making of the provision. In **project Blue Sky Inc. Vs Australia Broadcasting Authority [1998] 194 CLR 355**, the Australian High Court emphasised the thinking thus:-"*
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> > ***"...a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory, whether there has been substantial compliance. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.....In determining the question of purpose, regard must be had to the language of the relevant and the scope and object of the whole statue." (Emphasis added)***
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> *Whether the words **'shall'** or '**may'** convey a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters. The supreme Court in its advisory opinion **In the matter of the principle of Gender Representation in the***

National Assembly and the senate, *Application No. 2 of 2012 found that, the use of* ***'shall'*** *in Article 81(b) of the Constitution on the gender-equity rule as used in the context, incorporates the element of management discretion on the part of the responsible agency or agencies. In contrast in* ***Velji Shahmad Vs Shamji Bros & Propatlal Karman & Co. [1957] EA 432*** *construing the meaning of the word 'may' as used in the former* ***Order XLVI Rule 9*** *of the Civil Procedure Rules providing that:-*

> ***"An appeal from a decree or order of subordinate Court.....to the Supreme court may be filed in the District Registry within the area of which such subordinate court is situate."***

the court held that in the context, the word '***may'*** is mandatory that any appeal from a subordinate court outside Nairobi must be filed in the appropriate district registry:

> ***"....as to hold otherwise would simply subvert the whole rule for it would mean that an advocate or appellant, to suit their own conveniene, could file an appeal in Mombasa from a subordinate court in Kisii or Nairobi."***

16. It follows that since the plaintiff was not served, it was not given an opportiunity to show cause why its suit should not be dismissed. Most probably had it been given that opportunity, it would have cited as some of the reasons why the suit should not be dismissed. That is that the Deputy Registrar Mombasa & this High Court failed to transfer the series of files in accordance with the parties consent before ***Justice Mwera (as then was)*** on ***20th April 2012***; the plaintiff could also have cited the reconciliation of its accounts that took place in the year 2011 between the plaintiff's and defendant's representatives; it also perhaps could have referred to the defendant's report dated ***15th January, 2013*** by its general manager ***Alfred Matheka*** whereby the defendant conceded owing the plaintiff the sum of ***Ksh. 116,928,710***. That reconciliation between the parties seem to have ended on ***21st March, 2016*** when the defendant wrote to the plaintiff indicating that it had instructed its advocate to set down the matter for hearing because it was of the view that the matter should be adjudicated before the court. This letter is evident from the plaintiff's annexture (e) attached to the plaintiff's application dated ***30th September, 2016***.

17. It seems that it was that letter of the defendant dated ***21st March, 2016*** which led the plaintiff to write a letter dated ***25th May, 2016*** indicating that it would henceforth be represented by the firm of Kilukumi & Co. Advocates.

18. From the court record and the affidavit, it seems that the plaitniff was bogged down by mixup in its legal representation. The plaintiff had at one time, and at the same time, two law firms which were on record for it. It was represented by **Kilukumi & Co Advocates** and also its present counsel **Miyare & Co Advocates**. The court on ***6th December, 2016*** noted that confusion of representation and adjourned the matter for that issue to be clarified.

19. I wish to dissuade the defendant's counsel that the plaintiff first knew of the dismissal of the suit in ***May 2016***. In my perusal fo the affidavit referred to by the defence's lead counsel I was able to confirm that indeed the plaintiff knew of that dismissal in ***May 2016***. It was erroneous for the defendant to state that the plaintiff delayed for one year before filing an application to set aside the dismissal.

20. The plaintiff, in view of the confusion of representation, which is referred to above, filed its application on ***21st October, 2016*** through the firm of ***Kilukumu & Co. Advocate*** seeking to set aside the dismissal. For reasons which I could not discern, counsel currently representing the plaintiff Miyare Advocate filed another application on ***18th November, 2016*** again seeking the setting aside of the dismissal of this suit. The application under consideration was filed on ***6th July, 2017*** by ***Miyare Advocates*** and it is a replica of the one dated ***18th November, 2016***.

21.There was no explanation offered why there are three applications by the plaintiff seeking the same prayer which are pending before court

22. It has often been said that the dismissal of a suit is a draconian judicial act. It is more severe when the dismissal occurs without offering the parties a hearing.

23. In view of matters highlighted in this ruling I will accede to the plaintiff's application. But I do note that this case has inordinately delayed in its conclusion for the various reasons stated above.

24. In the end the following are the orders of the court:

a. The dismissal of this suit for want of prosecution on ***19 June, 2015*** is hereby set aside on the following ***conditions:***

i. That parties do ***within 21 days*** from this date hereof comply with pre-trial procedures.

ii. That this suit shall be ***heard not later*** than ***31st October, 2018.***

b. If the plaintiff does not comply with the pre-trial procedure within 21 days from this date hereof, this suit will stand as dismissed with costs to the defendant.

c. If the defendant does not comply with pre-trial procedure within 21 days from this date hereof its defence will stand as struck out and the plaintiff shall proceed to formally proof its case.

d. Because applications dated ***21st October, 2016*** and ***18th November, 2016*** are now spent, they are struck out with no orders as to costs.

e. The costs of the application dated ***6th July 2017*** shall be in the cause.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **22nd** day of **May** 2018.

MARY N. KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

……for the Plaintiff

……for the Defendant