REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NUMBER 201 OF 2012

FAMILY BANK LIMITED..PLAINTIFF

-VERSUS-

BERNARD GIKUNDI MWARANIA..1ST DEFENDANT

MARGARET KARWIRWA MWONGERA..................................2ND DEFENDANT

STEP UP HOLDINGS(K) LIMITED...3RD DEFENDANT

PETER MURITHI MWARANIA...4TH DEFENDANT

CECILIA NYARUAI KIRAGURI..5TH DEFENDANT

JOHN MUTHAMI MURITHI...6TH DEFENDANT

RULING

1. **Background to the application dated 29th March 2018**

This suit was filed on the 7th September 2011 against the defendant Mt. Kenya University. Thereafter, six defendants and an Interested party were enjoined to the proceedings. Each of the parties filed numerous applications that were duly heard and rulings given, including orders directing the manner of dealing with the suit money in various bank accounts and also release of suit properties held by the plaintiff to the 1st, 2nd and 3rd defendants which were done, pursuant to an application dated 16th September 2013 by the 3rd defendant, Step Up Holdings (K) Limited.

2. The court further directed that the plaintiff was to take steps towards prosecution of the suit within 90 days of the ruling dated 15th September 2016, and that default would render the consent orders issued on the 15th April 2013 to lapse. By that time the defendants had filed their statements of defence as well as counter-claims against the plaintiffs claims.

3. It appears that since the orders of the 15th September 2016, substantial money held in the plaintiff's bank had been released to the defendants aforesaid, and that the case had been substantively compromised by way of various consent orders. The court proceedings show that the plaintiff did not take any steps towards prosecution of the case and no hearing date was taken by the plaintiff or any of the defendants. However, the Interested party took it upon itself and fixed a hearing date for the suit for hearing on the 9th May 2017 and served all other parties to the suit, including the plaintiff's advocates.

4. On the 9th May 2017, when the suit was scheduled for hearing all parties attended court save the plaintiff's representative and its advocates Ochieng, Onyango, Kibet and Ohaga Advocates.

Counsel for the Defendants and Interested party urged the court that the plaintiff had failed to comply with the court orders issued on the 15th September 2016 by failing to take hearing dates for the suit, and despite being served with the hearing notice, they had further failed to attend court, and that none of its representative was in court. They sought dismissal of the suit for non attendance of the plaintiff and its advocates.

5. Upon consideration of urguments, and being satisfied that a hearing notice had been properly served, and further that no hearing date had been taken 90 days after the 15th September 2016, the court proceeded to dismiss the suit with costs and further went ahead to direct that the

counter-claims filed by the 3rd and 4th defendants against the plaintiff would proceed to hearing on the 4th July 2017.

6. **The application**

On the 29th March 2018, the plaintiff filed the application under review based on the provisions of **Article 159(2)(d) of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Order 12 Rule 7, Order 51 rules 1 and 15 of the Civil Procedure Rules**, and sought orders to set aside the dismissal order dated the 9th May 2017 as well as an order for reinstatement of the suit for hearing based upon grounds stated on the face of the application and a supporting affidavit sworn by the plaintiff's Advocate, John M. Ohanga, sworn on the 19th March 2018.

7. The application was strenuously opposed by the respondents by their replying affidavits. However, on the 21st June 2018 when the application came up for hearing before me, the Interested party, Mount Kenya University by its Advocate Mr. Biko, sought leave to withdraw his Replying Affidavit in opposition to the application stating that the Interested party would be supporting the application for setting aside the dismissal order and reinstatement of the suit as circumstances had changed. The Replying Affidavit sworn by Prof. Tom Ojienda, SC, on an undisclosed date but filed on the 25th May 2018 was thus withdrawn.

8. **Submissions on the application and findings**

Oral submissions were offered by the parties advocates in support of their rival positions.

The only reason advanced for failure by the plaintiff's advocate to attend court as averred in the affidavit in support is "**inadvertent mistake by the Advocate.**" This inadvertent mistake was not elaborated or explained at all. Failure by the plaintiff to fix a hearing date for the suit in compliance with the court order dated 15th September 2016 was also not explained. The court record shows that no representative of the plaintiff was in court contrary to argument by the Applicant.

9. The plaintiff failed to swear an affidavit to explain itself on its non compliance with court orders and failure of its representatives to attend court. I am minded that the applicant has expressed remorse and submitted that the two pending counter-claims against the plaintiff by the 3rd and 4th Defendants would weigh heavily on it should the case not be reinstated for hearing which would cause them prejudice. It is further urged that if the suit is not reinstated, the respondents fraudulent activities would go unpunished, and the plaintiff would suffer loss as the activities were done by its employees.

10. In their totality, the respondents supported each other in opposing the application and urged that no sufficient reason were advanced, that the inadvertence of the unnamed advocate were not disclosed, and as the said advocate had not sworn any affidavit to state why he failed to attend court, then nothing turns on that ground. It is further urged that there is no suit to try as the same had since been compromised by the various consent orders, and that the only matter left for hearing are the 3rd and 4th respondents counter-claims which are not dependent on the plaintiff's case.

11. On the matter of inordinate delay from the date of dismissal of the suit to the filing of the present application, no reason or at all was offered, and so the court was urged to construe such as lack of interest in the suit. It is instructive to note that the applicant/plaintiff went to sleep and was only awokened by the service of the Decree upon it with a demand to pay costs that had already been taxed.

12. I have considered the submissions as well as authorities cited by the parties. It is not true that the plaintiff's representatives were present in court when the suit was dismissed, because if they were present, they would have informed their advocates of the dismissal order. This court is a Court of record. I have confirmed the day's proceedings and I am satisfied that the plaintiff's representative were not in court, and if they were, the fact was not brought to the courts attention. It is not the duty of defendants to take hearing dates for suits as that burden lies squarely on the plaintiffs shoulders- **Ivita -vs- Kyumbu(1984) KLR 441 and Communications Courier & Another -vs- Telkom (K) Ltd (1999) e KLR.**

13. Inordinate delay to prosecute a suit always prejudices the defendants. In such circumstances, the court will exercise its discretion in favour of doing justice to the prejudiced party – **Omar Shariff & 2 others -vs- Millicent Chiluanyi (2013) e KLR,** taking into account the overriding objective stated under **Section 1A and 1B** of **the Civil Procedure Act** invoked by the plaintiff which is to "---**facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act"** and while doing so, the court shall handle all matters presented before it with a purpose to achieve the just determination of the proceedings and the efficient disposal of the business of the Court.

14. The plaintiff failed in its primary duty to prosecute its case. The delay and disobedience of court orders portrays a litigant who is not interested in its case. This is so evident in that despite being made aware of the dismissal of its case, it kept quiet in its comfort and only woke up when the decree was served upon it. I am not satisfied by its arguments that it was not aware of the dismissal orders. Its advocates ought to have followed up with the alleged Advocate who had been tasked to attend court to prosecute the case, as the duty to do so lay on it and ought not have waited for seven months as was the case.

See **Jaribu Credit Traders Ltd -vs- Mumias Sugar Col Ltd HCCC No 465 of 2009.**

15. Numerous authorities were cited by the applicant. I have looked at them. In the **Okiya Omtata Okoiti & Another -vs- Ag & 4 Others – Civil Application No.15 of 2015, the Court of Appeal** stressed that sufficient cause must be advanced for a court to exercise its discretion to set aside its dismissal orders, by looking at what caused the event. The **Court of Appeal in Wellington Nzioka Kioko -vs- AG- Civil Appeal No. 268 of 2016 (Nairobi)** held that when a reasonable explanation is not given for inordinate delay in taking action, the court cannot be faulted for dismissing the suit.

16. Mistake or inadvertence as averred by the applicant is a mistake not withstanding that it is committed by an advocate – See **Belinda Murai & Others -vs- Amos Wainaina (1987) KLR 278(Madan J)**, where it was held:

> ***"A mistake is a mistake. It is no less than a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by Senior Counsel, though in the case of Junior Counsel the court may feel compassionate more readily.---"***

17. The problem I have with the **"inadvertent mistake"** by the alleged advocate who failed to attend court is that no affidavit by the said advocate, or the plaintiff were filed to explain the mistake. The court is not expected to assume that indeed there was an advocate deputized by the law firm to attend court on its behalf on the hearing date. No evidence of such was adduced to that effect.

I agree with the respondents submissions that the plaintiff's advocates are purely guilty of professional negligence for which the plaintiff has a recourse against the said advocates.

18. When a court exercises its discretion to dismiss a case, it does so to protect its integrity and abuse, that would amount to injustice to the opposite party. I am aware that there are two counter claims pending for hearing. They are independent causes of action and can easily be heard without the plaintiff's case. I see no prejudice whatsoever that may be occasioned to the plaintiff if the counter-claims were to be heard as distinct causes of action against the plaintiff.

I am also minded that summary dismissals of cases, for that matter for non-attendance by parties, may be draconian. But again, each case must be considered on its peculiar circumstances. The right to be heard is a constitutional imperative under **Article 25(c) and 50 of the Constitution** – but this right is not absolute, it is subject to other parties rights as well.

19. The Respondents were no doubt prejudiced by the delay leading the court to put a time limit upon which the suit ought to have been fixed for hearing. The plaintiff/Applicant did not appreciate the seriousness of the court orders. It can not cry foul when the suit was dismissed for their indolence, and obvious lack of interest.

Every action that a party takes has consequences, and choices have consequences.

20. As stated in the case **Rover International Ltd -vs- Cannon Film Ltd (1986) e ALL ER 772**,

> ***"The court has wide discretion to set aside a dismissal order and reinstate a suit for hearing, upon terms. In that regard, it is a fundamental principle that the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to be wrong---"***

21. While exercising such discretion it is not lost to me that the Respondents/Defendants would be prejudiced by being dragged back to the court corridors and courtrooms if the suit is reinstated. It is a balancing act of different interest and one must weigh against the other in a bid to do justice and for justice to be seen to be done fairly to all the parties – See **D.T. Dobie & Co. Ltd -vs- Joseph Mbaria Muchina CA 37 of 1978** and **Peter Mutua Ndeto & 3 Others -vs- Anthony Kangethe Kariuki (2017) e KLR.**

22. The plaintiff's advocates have expressed remorse in the manner they handled the plaintiff's case over the years.

Though no satisfactory reasons were given to persuade me to exercise my unfettered discretion in its favour, the right to be heard is enshrined **in the 2010 Constitution** and in particular, **Article 50. Article 159(2) (d)** enjoins the court to dispense substantive justice as opposed to undue regard procedural technicalities. In that regard, I shall exercise the discretion in favour of the applicant and allow it to approach the seat of justice by having the order of dismissal of the suit set aside and reinstate the suit for hearing inter parties, but upon terms.

23. The Respondents will not go home frowning. They will be compensated in costs for being brought back to the courtrooms. I direct that they hold their horses in the taxation of their well deserved costs, and await outcome of the hearing of the case.

Towards that end, I shall award them costs, to purposively lessen the prejudices they are likely to suffer as a consequence of having to go back to court and more so in view of the many years this case has been pending in court.

24. **Consequently**, **I hereby set aside** the dismissal order of this court **dated the 9th May 2017 and reinstate the suit for hearing but upon the following terms and conditions**:

> ***1. That the applicant/plaintiff shall, within a period of 30 days from the date of this ruling, pay throw away costs to each of the 1st, 2nd, 3rd, 4th, 5th and 6th defendants, assessed at Kshs.30,000/= to each.***
>
> ***2. That failure to comply with Order No.1 above shall reverse the orders setting aside the dismissal order and reinstatement of the suit for hearing.***
>
> ***3. That this case shall be listed down for hearing on the earliest date available as may be given by the court.***
>
> ***4. No order as to costs on this application, such costs having been taken care of in Order 1 above.***

Dates, signed and delivered this 31st Day of July 2018.

J.N. MULWA

JUDGE