



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.383 OF 2010

FIDELITY COMMERCIAL BANK.....PLAINTIFF

VERSUS

LINEAR COACH CO. LTD.....1ST DEFENDANT

ALFRED MOFFAT MICHIRA.....2ND DEFENDANT

DUNCAN MOGAKA MICHIRA.....3RD DEFENDANT

R U L I N G

Before this Court is the Notice to Show Cause dated **8th May, 2015**, brought under **Order 17 Rule 6(1)** of the Civil Procedure Rules. The Notice was served upon the firm of **Muma and Kanjama Advocates** acting for the Plaintiffs on **15th May, 2018**.

In response to that Notice the Plaintiff filed the Replying Affidavit dated **22nd May, 2018** sworn by **MR JAMES OYUKE** the Legal Manager of the Plaintiff Bank as well as the Affidavit dated **22nd May 2018** sworn by **MR ANTHONY SIMIYU** Advocate.

The matter came up for hearing before this court on **9th July, 2018**.

MR KINGARA Advocate for the **2nd** Defendant supported the Motion and submitted that the suit was for dismissal under **Order 17 Rule 6(1)** of the Civil Procedure Rules. Counsel argued that the suit has been dormant for a period of over one year and that the reasons advanced in the two affidavits did not disclose sufficient cause for the suit to remain active.

Finally, **Mr. Kingara** submitted that the **2nd** defendant stood to be prejudiced if the suit was reinstated since having been filed in the year 2010, it may prove difficult if not impossible for the **2nd** defendant to procure witnesses if the matter proceeded to trial.

Mr. Simiyu for the Plaintiff urged the Court not to dismiss the suit. He submitted that the matter was last in court on **8th July, 2016** when **Hon. Lady Justice Olga Sewe** delivered a ruling setting aside the default judgment that had been entered in favour of the Plaintiff. From July 2016 to the present counsel conceded that no further action had been taken on the file.

Counsel explained that the matter had been assigned to four different advocates employed by the law firm of **Muma and Kanjama Advocates**, but all these advocates eventually left the law firm without having set down the suit for hearing. Counsel pleaded with the court not to visit the failings or omissions of these Advocates on their client. He argued that the Plaintiff has a legitimate claim which ought to be heard and determined on its merits. It was submitted that any prejudice which the Plaintiff may suffer through the reinstatement of the suit can be adequately compensated by an award of costs. Counsel urged the court to allow the suit to proceed to a full hearing.

I have considered the submissions made by both counsels in this matter. I note that the Plaintiff in this suit was filed on **4th July, 2010**. However, the matter has not been entirely dormant from that time. The file was active from 2010 to 2013 over questions raised relating to the Summons to Enter Appearance allegedly served upon the defendant. On **15th May, 2015**, **Hon Justice Francis Gikonyo** delivered what he termed a **“Partial Ruling”** on this point. Thereafter the file continued to be active with proceedings recorded therein until **20th August, 2013** when the Defendant filed a Notice of Motion seeking to have the Ex-parte judgment entered in favour of the Plaintiff on **26th October, 2010** dismissed.

This application was prosecuted and was heard by **Justice Olga Sewe**, who delivered her ruling on **8th July, 2016**. From the foregoing, I am satisfied that the Plaintiffs did not simply go to sleep after filing the suit. They have shown their interest and desire to pursue their case.

On **8th July 2016** a ruling was delivered by **Hon. Lady Justice Sewe**, setting aside the judgment in default of defence and admitting into the record the Defendants defence.

From 2016 to May 2018 when the Notice to Show Cause was issued no action was taken to have the suit set down for hearing. The reason for this state of affairs has been explained in the two affidavits filed in court on 23rd May, 2018 being the fact that due to movement of Advocates from the firm of **Muma and Kanjama Advocates** who were acting for the Plaintiffs the suit was never set down for hearing.

I am inclined to accept the explanation offered by counsel for failure to act on the matter. The Plaintiff ought not to be sent away from the seat of justice without a hearing. The court has been assured that the Plaintiff is ready to have the matter proceed to Case Management, at the earliest possible opportunity.

In the interest of justice, I direct that this suit proceed to a full hearing on the merits. Parties to appear before the Deputy Registrar of the High Court on **6th August 2018** for Case Management Conference.

Dated in Nairobi this 31st day of July, 2018.

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Justice Maureen A. Odero

Ruling delivered at the Nairobi High Court this 31st day of July, 2018.

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JUDGE