REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 86 OF 2008

AMESNET ENTERPRISES LIMITED.....PLAINTIFF

VS

EDWARD LENJO MUSAMULI.....DEFENDANT

RULING

1. For determination is the Notice of Motion dated 22.9.2016 and seeking orders that the court sets aside its orders made on the 8.7.2015 dismissing the plaintiffs suit for want of prosecution and to reinstate the suit for hearing on the merits. That application is premised on the grounds among others that;

i. The matter was dismissed at the instance of the court *suo motto*.

ii. That the matter was not in court on the 25.2.2013 but was adjourned to enable the plaintiff apply to substitute the defendant who was then alleged dead.

iii. That an application to substitute was filed on 2.12.2015;

iv. That the delay was occasioned by the former advocates on record which default should not be visited upon the plaintiff

and

v. That there is an order by Sergon J, compelling the defendant to furnish security in the sum of kshs. 4,350,000 and in default he would lose the right to defend it suit.

2. Those facts are reiterated in the affidavit in support sworn by one JAMES MWANGI MBUGUA with addition and clarification that the current advocates were instructed on the 23.10.2015.

3. Without preemption, the application is more of a show of cause why the suit should not be dismissed and fails to give reasons or ground for setting aside the dismissal order. However I will deal with that aspect later in the determination.

4. The application was opposed by the Replying Affidavit of one Odongo Bernard Orwa sworn on the 19.11.2016 and filed in court on the same day. The affidavit faults the application for having been filed with inordinate delay and that there is no valid reason advanced to justify failure to prosecute the suit between 18th March 2010 and July 2015 when the suit was dismissed.

5. When the application was scheduled for hearing the plaintiff were represented by Mr. Munyithya while the defendant was represented by Mr. Odongo.

6. In his submissions, Mr. Munyithya raised an issue not in the application and concerning the *locus standi* of Mr. Odongo on the basis that the defendant having died, the advocate had no client to represent and was to that extent an imposter to the suit. That objection was dealt with by the court *sua sponte* for reasons contained therein. I need not repeat what I said then but only need to add that by dint of Order 5 Rules 8,9,12, and 13 once an advocate is retained and files a notice of appointment such an advocate can only cease to be an advocate on record if and only if;

i). There is a notice to act in person filed;

ii). A notice change of advocate is filed or

iii) The advocate himself applies and obtains leave to cease acting for the party.

There is a good reason why it is not left to whim of an advocate to walk in and walk out of the representation of a party to a suit.

7. On the merits, Mr. Munyithya submitted that the defendant having died on the 4.12.2012 the suit stood abated on the 4.12.2013 by operation of the provisions of order 24 Rule 3(2) Civil Procedure Rules hence on the date of dismissal there was no suit to dismiss hence there is an error. He then added that the defendant has all along disobeyed court orders of 12.7.2008 compelling it to provide security for the sum sued for.

8. He stressed that even on the date the suit was dismissed the plaintiff was never represented. He concluded, after reiterating the grounds on the application and affidavit that the defendant left behind a vast estate which will be sufficient to meet the decree thus resulting.

9. On his part Mr. Odongo, opposed the application and relied on the Replying affidavit as aforesaid only adding that the application on the law cited does not avail to the plaintiff the orders sought and that there was no explanation for failure to prosecute and failure to give explanation why the application to set aside was not brought with promptitude having been brought after some 14 months.

10. He then added that the finding by Sergon J, that the defendant would lose the right to defend in default to provide security, Mr. Odongo submitted that there would be no need to substitute the personal representatives of the deceased who would have no right to defend.

11. In his closing submissions, Mr. Munyithya only asked the court to pose for itself the question as to who would be prejudiced if the suit is reinstated.

Analysis and determination

12. Where a court of law has given an order merely on account of default of a party, it reserves the right to revisit that order, and based on grounds advanced, may tinker with the order or just set it aside all together.

13. An order of setting aside is one made pursuant to judicial discretion. As is now well established every discretion given to a court must be exercise judiciously to mean that there must be reason founding the decision or else if cease to be a judicial discretion if it be grounded on no reason; it then becomes a whim or caprice.

14. Now, in this matter, the court did dismiss the suit on 8.7.2015 on the basis that the matter held remained un-prosecuted since 2013. None of the parties has denied that they were served with the Notice to Show cause. That state of affairs leaves this court with nothing at all to lay its heeds on in order to find that there was an error in making the order of 8.7.2017 hence the need to set aside.

15. In the entire application there is no reason preferred why the plaintiff did not attend court to show cause. There is no allegation that they were not aware of the date set. In fact the application is evidently a resistance to the noticed to show cause rather than on seeking to set aside the dismissal order.

16. Without an explanation why a default was made by the plaintiff, I am afraid I have no basis to exercise why discretion to set aside. The application to that extent lacks merit and is dismissed.

17. There is an argument advanced by Mr. Odongo that as things stood today, even without the dismissal, it would be meaningless to join the administrators of the deceased's estate into the suit so as to purport to exercise the right to defend the suit where the deceased defendant, as at the time of his death, had no right to defend the suit having defaulted to provide the security ordered by the court.

18. This point can be best understood by looking at the ruling of Judge Sergon dated the 24.7.2008. the Judge said at the relevant portion:

> ***"In default the claimant will be at liberty to obtain summary Judgment since the defendant will have lost the opportunity to defend the suit"***

19. It is said by both sides that an appeal challenging that decision was dismissed by the Court of Appeal way back on before 18.3.2010. To this court by that time and during the life of the defendant he had lost the right to defend the suit and to this court a personal representative fits into the shoes of the deceased. He only exercises the rights of the deceased and acquired no right the deceased did not possess at death.

20. I therefore agree with Mr. Odongo, although I note that this is not an application to reinstate an abetted suit, that it would be futile to substitute the personal representatives of the defendant on the suit for purposes of them defending the suit where they have no such a right. I equally doubt if the application dated 22.09.2016 being premised on the provisions of Order 24 Rule 3, is available to the plaintiff to enable it prosecute a suit that has abetted on account of death of the defendant.

21. All in all, the application dated 22.9.2016 is hereby **dismissed**. As the deceased is dead and has not incurred any costs in this matter, I make no orders as to costs.

Dated, signed and delivered at Mombasa this 29th day of August 2017.

P.J.O. OTIENO

JUDGE