REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 688 OF 2004

CO-OPERATIVE BANK OF KENYA LIMITED…….…...PLAINTIFF

-VERSUS-

KARANJA MUNGAI…...……..….....DEFENDANT

RULING

1. This Ruling is in respect of the Plaintiff's Notice of Motion dated **1st October, 2012** and filed on even date. That application is expressed to have been brought under the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act** as well as **Order 12 Rule 7** of the **Civil Procedure Rules, 2010**. The orders sought thereby are as hereunder:-

a. **THAT this Court's order of 1st October 2012 dismissing the Plaintiff's suit for want of prosecution be set aside or varied.**
b. **THAT the Defendant's application dated 21st June 2012 be reinstated for hearing *inter partes*.**
c. **THAT the costs of this application be provided for.**

2. The application is based on the grounds set out therein, namely, that the failure by the Plaintiff's advocate to attend court on 1/10/12 was due to inadvertence and excusable mistake and was not designed to obstruct or delay the course of justice; that the reinstatement of the Defendant's application dated 21st June 2012 will serve a useful purpose because the Plaintiff has raised a triable and reasonable answer to the same, and that the application was filed without undue delay.
3. The application is supported by the Affidavit sworn on 1st October, 2012 by **ROSEMARY KURIA**, an Advocate of the High Court of Kenya, who has the conduct of this suit on behalf of the Plaintiff**.** She deponed that on the 1/10/12, the matter was coming up for hearing of the Defendant's application seeking to have this suit dismissed for want of prosecution. The deponent had instructions from the Plaintiff's Advocates, Mukuria & Co. Advocates, to oppose the application. She averred that she unfortunately got held up in traffic on her way to Court and by the time she arrived, the matter had just been dealt with and orders for dismissal granted.
4. It is the Plaintiff's case that they have been keen to prosecute this case and had filed an application for amendment of the Plaint which was scheduled for hearing on 12th October 2012. It is the deponent's assertion that the reinstatement of the application dated 21st June 2012 will serve a useful purpose and that the Plaintiff has triable and reasonable answers to the same. It was further her assertion that the current application was filed without delay on the same date of 1/10/12.
5. In response to the application, the Defendant filed the Replying Affidavit sworn by him on **18th**

October, 2012. He opposed the Application stating that the Plaintiff had time and again abused the process of the Court. He averred that since the Plaintiff filed the suit in the year 2004, it had not taken any steps towards having the suit fixed for trial until almost five (5) years later when it filed a Statement of issues and list of documents. He further stated that that it took the Plaintiff eight (8) years after the close of the pleadings, to file an application seeking the striking out of the Defence, which application was filed on 30th January, 2012.

6. The Defendant further averred that the Plaintiff had neglected to serve a Notice of Motion that it had filed seeking leave to amend the Plaint which had been listed for hearing on 14th June, 2012, and in consequence thereof that application was dismissed on account of the Plaintiff's non-attendance; and that the Plaintiff purportedly filed a similar application to amend the Plaint dated 26th July, 2012 which was also dismissed for non-attendance.
7. In the circumstances foregoing, it is the Defendant's case that the Plaintiff is not deserving of the discretion of the Court, granted its failure to prosecute this suit that it filed way back in 2004. He therefore urged for the dismissal of the application dated 1/10/12.
8. The application proceeded by way of written submissions. The Plaintiff filed its written submissions dated **15th June, 2015** on even date while the Defendant filed his submissions dated **8th July, 2015** on 9th **July, 2015**. I have considered the pleadings filed, the proceedings held to date, as well as the written submissions by Counsel in support and opposition to the application.
9. The principles guiding the setting aside of *ex parte* orders are now well settled, namely that the court has wide powers to set aside such *ex parte* orders so long as the discretion is exercised on terms that are just. In **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173** it was held that:

> ***"In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order… was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."***

10. The Plaintiff's Counsel has explained the circumstances that led to her arriving in court late, which circumstances are excusable and were clearly not pre-meditated or calculated at obstructing justice. The Plaintiff further demonstrated that it acted without delay in bringing the present application.
11. The Defendant on the other hand urged this Court not to grant the prayers sought by the Plaintiff. The Defendant invited the Court to not only concentrate on the events of 1st October, 2012 when the suit was dismissed but also to consider the slothful manner with which the Plaintiff has been prosecuting its claim.
12. Going by the court record, it would appear that the Plaintiff has not been keen on prosecuting this matter. The Plaintiff filed the suit in the year 2004 and it is now almost eleven (11) years yet the same has not been set down for hearing. The Defendant is correct in positing that that the Plaintiff has been in the habit of filing applications and abandoning them. Nevertheless, the issue for determination is whether good cause has been shown for the granting of the orders sought in the instant application.
13. In the supporting affidavit, Counsel for the Plaintiff has explained why she was not in court on 1/10/12 at 9.10 a.m. when the order dismissing this suit for want of prosecution was made, namely, that she got held up in traffic. She further deponed that she arrived shortly after the order was made and met Counsel for the Defendant, Mr. Amolo within the court room. These averments have not been refuted by the Defendant. The Court is therefore of the view that the reason given by Counsel for non-attendance on 1st October, 2012 is plausible and therefore excusable.
14. In the case of ***Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103 Apaloo, J.A.*** *(as he then was),* expressed himself thus:

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

15. It has not been said that Counsel's lateness was deliberate or that there was an intention thereby to overreach the Defendant in any way. It is also evident that the present application was brought without undue delay having been filed the very day the suit was dismissed for want of prosecution. Clearly therefore, any prejudice or delay caused to the Defendant by failure of the Plaintiff's Advocate to attend Court on the material day are such that can easily be compensated by way of costs. I take the view therefore that it would be unjust to deny the Plaintiff the opportunity to have its suit heard and determined on its merits, when it has been demonstrated that the lateness of its Counsel on 1/10/12 was inadvertent.
16. The Plaintiff's second prayer was that the Defendant's application dated 21st June 2012 be reinstated for hearing inter partes.That application sought the dismissal of the Plaintiff's suit for want of prosecution. In my view, that application was spent when the order of 1/10/12 was made. No useful purpose would be served in re-opening it for arguments on merit as that would go against the grain of the Overriding Objectives set out in Sections 1A, 1B and 3A of the Civil Procedure Act. The Plaintiff should not be heard to be saying that he wants the Defendant's application seeking the dismissal of the suit reinstated for it to defend the same. Instead it should be interested in having the main suit fixed for hearing.
17. In the premises, the Plaintiff's Notice of Motion dated **1st October, 2012** and filed on even date is hereby allowed only in terms of prayer (a) thereof, namely that the order of 1/10/12 dismissing the Plaintiffs suit for want of prosecution is hereby set aside. The Plaintiff shall pay the costs of the application as well as thrown away costs to the Defendant.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY 2016

OLGA SEWE

JUDGE