REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

HIGH COURT CIVIL CASE NO. 193 OF 2007

CANNON ASSURANCE (K) LTD.....PLAINTIFF/APPLICANT

VERSUS

THE ORIENT INSURANCE AGENCIES LTD.....DEF/RESPONDENT

RULING

[1] The Notice of Motion dated **8 October 2015** was filed by the Plaintiff/Applicant herein pursuant to the provisions of **Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** as read with **Order 9 Rule 9 and Order 51 Rule 1 of the Civil Procedure Rules, 2010** for the following orders that:

> **[a] That the firm of Njoroge Regeru & Company Advocates be granted leave to represent the Plaintiff in this matter in place of the firm of A. Thuo Kanai;**
>
> **[b] That the Order made by this Court on 31 January 2012 dismissing this suit for want of prosecution be set aside;**
>
> **[c] That an Order do issue reinstating this suit.**
>
> **[d] That the Court do issue such other order or directions for expedited hearing and determination of the suit.**

[2] The grounds upon which the application is based are that, although the suit was dismissed on **31 January 2012** for want of prosecution, the Plaintiff is still desirous of prosecuting the same to conclusion on the ground that it has a strong and meritorious case against the Defendant, and that it will suffer great injustice and irreparable loss in form of unpaid premiums for policies of insurance issued and valued at about **Kshs. 11,474,772** if the suit is not reinstated as prayed. It was further urged on behalf of the Plaintiff/Applicant that the Defendant/Respondent will not be prejudiced or disadvantaged in any way if the suit is reinstated. The Plaintiff/Applicant further contended that its attempts to file and prosecute the instant application have been frustrated by the non-availability of the court file at the Registry; which circumstances are beyond its control.

[3] The Application is supported by the Affidavit of **MARTHA MUTORO** attached thereto, in which she deponed that the Plaintiff commenced this suit vide the Plaint dated **12 April 2007,** and instructed **Mr. Thuo Kanai**, its Legal Officer at the time, to represent it in the suit; and that on account of the

inaction by the said Counsel, the suit was dismissed for want of prosecution on **31 January 2012** by **Musinga J** (as he then was). It was further deponed on behalf of the Plaintiff/Applicant that it thereupon instructed the firm of **Messrs. Njoroge Regeru & Company Advocates** to take over this matter on **6 November 2013**, but that their attempts to file a Notice of Change and an application for reinstatement of the suit hit a snag because the court file could not be traced in the Registry. It is therefore the Plaintiff/Applicant's case that it is ready and willing to prosecute this case to conclusion, should this application be allowed, and that that it risks suffering injustice and irreparable loss of **Kshs. 11,474,772** if the case is not reinstated; for which reason it is ready and willing to pay the costs of such reinstatement.

[4] Thereafter, on the **17 June 2015**, an application was filed by **WANAM SALE ADVOCATES** for leave to come on record in place of **SIMANI & ASSOCIATES**, for the Defendant. This application was consented to by the firm of **SIMANI & ASSOCIATES**. Thus, on **13 July 2015,** the application dated **17 June 2015** was allowed and orders granted as prayed, thus setting the pace for the hearing of the contested Application dated **8 April 2015**. The application is contested from two fronts; firstly by the Plaintiff/Applicant's erstwhile Counsel, **MR. ANTHONY THUO KANAI**, and secondly by the Defendant/Respondent. In its Replying Affidavit filed on **4 June 2015**, **Mr. Kanai** deponed that the Plaintiff lied and concealed material information from the Court. In particular, it was averred that **Martha Mutoro** concealed the fact that the inaction in fixing the suit for hearing was entirely the Plaintiff's fault in failing to provide Counsel with the relevant documentary evidence in support of its claim despite numerous and constant reminders. Counsel annexed to his affidavit a file note marked **"ATK2"** dated **5 April 2011** and an email dated **6 February 2012** in support of the aforementioned situation. It was further contended that **Martha Mutoro** concealed the information that although **Mr. Kanai** was then employed by the Plaintiff as a Legal Officer, the suit was being handled by the firm of **A. Thuo Kanai Advocates.**

[5] The Plaintiff's Counsel further raised the issue of service of Notice to Show Cause as ordered by **Justice Muga Apondi** on **4 December 2009** and contended that the default is material and should warrant the striking out of certain paragraphs in the Affidavit of **Martha Mutoro**. According to **Mr. Kanai**, it was the Court that failed to ascertain the issue of service, or how the suit was fixed for Notice to Show Cause, which would then explain why neither the Advocate for the Plaintiff nor the Defendant appeared in Court on **31 January 2012;** and that the Learned Judge who handled the matter on **31 January 2012** ought to have been keen to establish that service had been effected before proceeding to make any adverse orders without according the Plaintiff a right to be heard.

[6] On behalf of the Defendant, reliance was placed on the Replying Affidavit sworn by **Jagdeep Singh Naul** on **31 July 2015** in which it was averred that the Plaintiff's suit was rightfully dismissed by the Court for want of prosecution. The Defendant cited Paragraph 3 of the Replying Affidavit of **Mr. Kanai** aforementioned and the emails attached thereto by which the Plaintiff's Counsel informed the Plaintiff that it stood the risk of having its suit dismissed for want of prosecution; and that in the premises, the Plaintiff cannot escape the consequences of its actions by blaming its advocates, while at the same time claiming that the said Advocate was its employee.

[7] It was further the contention of the Defendant/Respondent that no explanation was proffered by the Plaintiff/Applicant as to why it took it up to **6 November 2013** to instruct another Counsel to handle the matter, granted that the suit was instituted way back in **2007;** or why it took up to **10 April 2015** to move the Court for re-instatement of the suit, granted that the Deputy Registrar, vide the letter dated **15 April 2014**, informed the Plaintiffs that the file was available in the Registry.

[8] Finally, it was deponed on behalf of the Defendant/Respondent that after the matter was dismissed on **31 January 2012**, the Defendant's Advocates advised it to hold on for a period of at least 12 months, after which it should be at liberty to consider the matter closed if no action was taken by the Plaintiff/Applicant herein. That, accordingly, the Defendant has since closed this matter and returned the documentary evidence to the Plaintiff's insured. It is therefore the Defence case that in the event that the Plaintiff's application is allowed, it will be greatly prejudiced, as it shall no longer have the means with which to defend itself. The Defence therefore urged for the dismissal of the Plaintiff's application dated **8 April 2015** with costs as this is what would be in the interests of justice.

[9] The parties hereto canvassed the instant application by way of written submissions. In addition thereto, at the instance of **Mr. Kanai, Martha Mutoro**, the Plaintiff's Legal Officer was availed for purposes of cross-examination on the averments in her affidavit sworn on **8 April 2015,** pursuant to the provisions of **Order 19 Rule 2(1) of the Civil Procedure Rules**. What stands out from the cross-examination is the approbation of the averment that when the suit was instituted by the firm of **A. Thuo Kanai Advocate**, Mr. Kanai was an employee of the Plaintiff. The same situation obtained at the time of dismissal. It was further clarified by **Martha Mutoro** that she did not see any Notice to Show Cause that was issued herein, and that all she saw was a letter from the firm of **Njoroge Regeru & Co. Advocates** to that effect.

[10] It was the contention of **Mr. Kanai** that he could only represent the Plaintiff/Applicant as an Advocate and not as a Legal Officer. He cited **Section 34 of the Advocates Act, Chapter 16 of the Laws of Kenya**, which forbids an unqualified person from taking instructions, drawing or preparing any document to be used in any legal proceedings, and **Section 35** of the aforesaid Act, which requires and advocate who draws or prepares a document as aforementioned to endorse his firm's name on the proceedings. While it is noteworthy that **Section 32A of the Advocates Act** does recognize the right of in-house advocates to act as Advocates under the Act, it may not fall within the scope of this matter to inquire into whether it was in his capacity as the Plaintiff's Legal Officer, and therefore employee, that **Mr. Kanai** acted herein; or whether it was proper that as the Plaintiff's Legal Officer, he could still file papers as an independent legal practitioner. Nevertheless, it appears that **Mr. Kanai**, by citing **Order 9 Rule 9 of the Civil Procedure Rules** in his submissions as well the cases of **Isaac Kaesa Mwangangi & Anne Mwangangi vs Jacob Kipchumba & Yasin Swaleh Waswa [2014] eKLR and Otieno Ragot & Company Advocates vs Capital Construction Ltd & Others [2014] eKLR,** is keen on ensuring that before another firm of Advocates is granted leave to come on record in his stead, the Plaintiff/Applicant be required to give an undertaking to settle the fees earned by **A. Thuo Kanai Advocate** for the services rendered in filing this suit.

[11] Order 9 Rule 9 of the Civil Procedure Rules under which the instant application has been brought, provides that:

> **"Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court."**

Whereas I am in agreement with **Mr. Kanai** as to the mischief that was intended to be addressed by **Order 9 Rule 9 of the Civil Procedure Rules,** namely to ensure that an erstwhile Advocate is duly notified of any changes in representation so as to take such steps as would be necessary to safeguard their interests, my view is that there would be no need for an undertaking to be made herein by the Plaintiff as to the payment of such fees, granted that the regime set out in Part IX of the Advocates Act is comprehensive enough for such eventualities, noting that it includes an appropriate enforcement mechanism. For this reason, any dispute as to the retainer of **A. Thuo Kanai Advocate**, including the question as to whether or not all fees due to the aforesaid firm have been paid by the Plaintiff/Applicant, would fall for determination under the aforementioned regime.

[12] The Court was urged by both **Mr. Kanai** and the Defendant to take a serious view of the alleged falsehoods deponed to in the affidavit of **Martha Mutoro** and the concealment by her of pertinent facts relative to this matter. In particular, the Court's attention was drawn to **Paragraph 4** of the said affidavit to the effect that a Notice to Show Cause why the suit should not be dismissed was issued and served on Mr. Kanai; and **Paragraph 5** thereof in which **Ms. Mutoro** averred that the suit was dismissed on **31 January 2012** because of non-attendance by Counsel for the Plaintiff to offer an explanation for the Plaintiff's inaction in this matter, yet she was aware that the inaction was due to the Plaintiff/Applicant's failure to provide the requisite documentary evidence to its Advocates on record pursuant to **Order 3 of the Civil Procedure Rules.** It was further urged that **Ms. Mutoro** lied in respect of her averments that the court file went missing until **10 April 2015** when the instant application was belatedly filed.

[13] The court record does show that the first attempt at dismissal of this suit under **Order 17 Rule 2(2)**

of the Civil Procedure Rules was fixed for **18 September 2009**, when neither Counsel attended. It was then ordered that notice be issued for **4 December 2009.** On the **4 December 2009** when the matter came up before **Justice Muga Apondi**, the court directed thus:

> **"Since the Plaintiff has not been served, the Deputy Registrar is hereby directed to insure that he is served for the next hearing date. Notice to show cause to be heard on 22nd January 2010."**

What followed that Order was the dismissal Order dated **31 January 2012** by **Musinga, J** (as he then was). Neither the Plaintiff nor the Defendant was in attendance, and whereas **Ms. Mutoro** averred that Notice was served, there is no such indication on the record, a fact conceded to by **Mr. Kanai**. In any event, **Ms. Mutoro** explained during cross-examination that in making this averment, she relied on communication received from the firm of **Njoroge Regeru and Co. Advocates**.

[14] In the premises, I am not persuaded to the viewpoint that **Ms. Mutoro** lied, given the clarification offered during her cross-examination herein. Since the record shows that there was no appearance for the Plaintiff, **Ms. Mutoro** cannot be faulted for surmising that the dismissal was due to non-attendance by Counsel, for had Mr. Kanai attended court, he would have been in a position to explain that the Plaintiff's inaction was attributable to failure by some individual employees of the Plaintiff to avail the relevant documentation to enable him progress the matter. Certainly, **Justice Musinga**, at that point in time, had no way of knowing that **Mr. Kanai** was experiencing challenges in obtaining documentary evidence, but nevertheless, could conclude from the duration of inaction and Counsel's non-attendance that the Plaintiff was lethargic in prosecuting this case. Thus, **Ms. Mutoro** was truthful in her averments, from the standpoint of the court record.

[15] With regard to the averments of **Ms. Mutoro** that the Court file was missing, again I find no reason to conclude that she lied. She may not have attached all the relevant correspondence to her affidavit, but, the record does confirm that the file was indeed missing. There are letters and documentation to this effect in the record as follows:

> [a] An application for reference to the Archives filed on behalf of **Simani & Co. Advocates** dated **19 May 2011**;
>
> [b] A letter dated **28 February 2014** by **Njoroge Regeru & Co**. Advocates seeking the assistance of the Deputy Registrar in tracing the file, which was stated therein to have been missing for a long time;
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> [c] A letter dated **16 January 2015** by **Njoroge Regeru & Co. Advocates** following up on their letter of **28 November 2014** aforementioned;
>
> [d] A letter dated **3 February 2015** by **Simani & Co. Advocates** seeking to ascertain the position of the case;
>
> [e] A letter dated **10 March 2015** by the Court confirming availability of the file and that the suit had been dismissed on **31 January 2012** for want of prosecution.

[16] It is instructive that, whereas there is no knowing when the last letter dated **10 March 2015** was dispatched by the Court or received by the firm of **Njoroge Regeru & Co. Advocates**, the instant application was filed within a month thereof. Again, the Court is not convinced that **Martha Mutoro** lied on this issue as alleged. Accordingly, I find no valid cause for striking out any portions of the Supporting Affidavit filed by **Ms. Mutoro**.

[17] In view of the foregoing, what remains to be resolved is whether there was inordinate delay in filing the instant application. My view is that, given the chronology of events as set out hereinabove, the delay between the dismissal of **31 January 2012** has been satisfactorily explained, and that the delay of one month from the last communication from the court dated **10 March 2015** is not inordinate.

[18] Secondly, it is common ground that there is no evidence that notice was served on the Plaintiff pursuant to the express order of the Court dated **4 December 2009**. The record does not show what proceedings if any took place on **22 January 2010**, or whether notice to show cause was ever served for **31 January 2012**. I note that in its submissions herein, the Defendant posited that the Civil Procedure Rules do not require the **"service"** but the "**giving"** of notice. It relied on the case of **Fran Investments Limited vs. G4S Security Services Limited [2015] eKLR** in which it was held thus:

> **"Order 17 Rule 2(1) of the Civil Procedure Rules does not require service of notice; it uses the word "give notice". The court may give notice of dismissal through its official website or through the cause list. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2(1) of the Civil Procedure Rules."**

[19] I entirely agree with the position expressed in the authority aforementioned, for it accords with the duty of the Court to further the overriding objective of the Civil Procedure Act and the Rules thereunder, as set out in **Sections 1A and 1B of the Civil Procedure Act**, particularly the requirement that, for the purpose of furthering the overriding objective specified in **Section 1A**, the court should handle matters presented before it by leveraging on suitable technology. Notification via the website is, no doubt, one of the options available for use for purposes of **Order 17 Rule 2(1), Civil Procedure Rules**. However, there is no demonstration herein that notification herein was via the cause list of **31 January 2012** or the website. More importantly, this is a matter in which there exists a court order, which order has not been set aside, requiring that Notice to Show Cause for dismissal be served on the Plaintiff. Accordingly, I am satisfied that sufficient cause has been shown as to why the dismissal order of **31 January 2012** should be set aside.

[20] In arriving at the foregoing conclusion, I have taken into account the submissions of the Defendant to the effect that it stands to suffer untold prejudice should the suit be reinstated. This, it said, was because the documents it intends to rely on may no longer be available. However, no attempt was made by the Defendant to demonstrate that this fear is warranted. With regard to what amounts to irreparable or insurmountable trial prejudice, **Lenaola, J** had the following to say in the case of **Joshua Chelelgo Kulei vs. Republic & 9 others [2014] eKLR**:

"Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability."

[21] And 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."***

[22] In the premises, I find the Plaintiff's Notice of Motion dated **8 April 2012** and filed on **10 April 2015** meritorious. The same is hereby allowed and orders granted as prayed in prayers (1), (2) and (3) thereof, and that costs thereof, including any thrown away costs, be borne by the Plaintiff.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22nd DAY OF JULY 2016

OLGA SEWE

JUDGE