



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 257 OF 2008

DHL GLOBAL FORWARDING (KENYA) LIMITED.....PLAINTIFF

- VERSUS -

GLOBAL FRESH AGENCIES.....DEFENDANT

RULING

1. The application before me was brought by the plaintiff, who is seeking the reinstatement of the suit.
2. It is the plaintiff's case that before the court dismissed the suit, on 17th June 2015, the plaintiff was never made aware of the Notice requiring it to show cause why the case should not be dismissed.
3. The plaintiff pointed out that on 19th May 2014, the court had certified the case as ready for hearing.
4. However, subsequent to that certification the Commercial Division of the High Court introduced new Practice Directions.
5. Notwithstanding the earlier certification of the case as being ready for hearing, the case did not pass the test which was introduced by the new Practice Directions. Therefore, the plaintiff set about taking steps which would lead to compliance with the Practice Directions.
6. Having taken the steps deemed appropriate, the plaintiff wrote to the defendant, inviting it to attend at the Court Registry, with a view to fixing a mutually convenient date for the pre-trial conference.
7. According to the plaintiff, it is when they provided the staff at the Court Registry with a copy of the invitation letter which had been written to the defendant, that the staff informed the plaintiff that the suit had already been dismissed.
8. As the plaintiff did not have any prior notice of the court's intention to dismiss the suit, the learned advocate for the plaintiff, submitted that the plaintiff was condemned unheard.
9. In answer to the application, Mr. Muturi, the learned advocate for the defendant, submitted that pursuant to Order 17 Rule 2 of the Civil Procedure Rules, there was no requirement that parties be served before the court can dismiss a suit for want of prosecution.
10. It was the defendant's understanding that the only requirement was that Notice be given.

11. In this case the defendant asserted that Notice was given, through the listing of the case in the court's Cause List.

12. Therefore, when the plaintiff founded its application on the failure to serve it with the Notice To Show Cause, the defendant deems the application as misguided.

13. The defendant also pointed out that although the suit was filed in the year 2008, there had been no steps taken by the plaintiff, to prosecute the case.

14. The period of the alleged inactivity was said to be 8 years, and the plaintiff is said to have failed to account for that long period of inactivity. Therefore, the defendant deems the plaintiff to have slept on their rights.

15. The other issue which the defendant raised is that the reinstatement of the case would be very prejudicial to it, as their witnesses might either be unavailable or might be unable to articulate their evidence as well as they could have done earlier.

16. The defendant asserted that, because it was a Business Name, it was not a legal entity that was capable of suing or of being sued. As the partners who made up the Business Name had not been named, the defendant had lodged its Defence under protest. Accordingly, the defendant submitted that the plaintiff did not disclose any triable issue. Therefore, I understood the defendant to be saying that there was no useful purpose that could be served by reinstating the suit.

17. In a brief reply to the defendant's submissions, the plaintiff pointed out that the facts set out in the supporting affidavit were uncontroverted, as the defendant had not filed any Replying Affidavit.

18. Secondly, the plaintiff pointed out that the steps which it had taken in the case, were clear, from the court records.

19. In **PROFESSOR MWANGI S. KIMENYI Vs. THE HON. ATTORNEY GENERAL & ANOTHER** Hccc No. 720 of 2009, Gikonyo J. stated as follows;

“I should think the question whether notice for dismissal of this suit was given under Order 17 rule 2 of the Civil Procedure Rules (hereinafter CPR) is a matter of preliminary significance. First, there is no mandatory requirement under Order 17 rule 2 of the Civil Procedure Rules that a notice should be given to the plaintiff before a suit which offends the order is dismissed for want of prosecution?.

20. It was the considered view of the learned Judge that notice was given to the plaintiff, when the Court placed in the official website of the Judiciary or in the Cause List, the particulars of the case and the reasons why it was coming up before the court on the specified date.

21. Order 17 rule 2 requires:

a) the court to give notice in writing, to the parties;

b) the notice to ask the parties to show cause why the suit should not be dismissed;

c) the parties to show cause, to the satisfaction of the court, otherwise the suit would be dismissed.

22. It is because the rule uses the word “give” notice, rather than “serve” notice that my learned brother made the distinction between the formal act of imparting or conferring information, (*which is through “giving” notice*); and the legal delivery of process (*which is through “service? of notice*).

23. Speaking for myself, I find the reasoning to be logical. However, notwithstanding the difference

between the meanings of the words “give?” and “serve?”, I hold the view that justice is best served when the party whose case may be dismissed for want of prosecution is given a real opportunity to show cause why it should not be dismissed.

24. I cannot expect you to show cause when you do not have no notice of my said expectation.

25. In any event, it is a matter of fact, which can only be established through evidence, whether or not the case was placed on the Judiciary Website or on the Cause List for the day when the case came up before the court. In the absence of the evidence to demonstrate that the case was on either the Judiciary Website or on the day’s Cause List, it would be wrong to presume that notice was given to the parties.

26. Thirdly, and in any event, the Order in this case read as follows;

“Court Order (Order 17 Rule 2 CPR)

After the inordinate delay of ONE (1) years since the last step was taken on 19/5/14 with a view to proceeding with the Suit and service of Notice having been effected to show cause why this suit should not be dismissed and there being no satisfactory response, the Court in exercise of the powers conferred upon it by Order 17 Rule 2 of the Civil Procedure Rules hereby orders this suit dismissed/closed?.

27. Clearly, the learned Judge dismissed the suit after being satisfied that the parties had been served with a notice requiring them to show cause.

28. The court did not make any reference to the giving of notice either through the Judiciary Website or through the day’s Cause List.

29. As the Court was convinced that the plaintiff had been served, whilst the plaintiff has made it clear that it was never served with the Notice To Show Cause, I find that the plaintiff was condemned without having been afforded an opportunity to be heard.

30. Accordingly, justice demands that the dismissal of the suit be set aside.

34. I also note that from as early as 4th October 2013, the plaintiff had already taken all pre-trial steps required to make its case ready for trial. As at that date, it was the defendant who had not complied with the pre-trial procedures.

32. The court records show that Kimondo J. did order the defendant to pay both a Fine of Kshs. 5,000/- and Court Adjournment Fees. The said order was made on 4th October 2013.

33. The point I am making is that the plaintiff had taken steps to prosecute the suit, contrary to the defendant’s submission that the plaintiff had been inactive for 8 years.

34. This suit was, on 19th May 2014, certified ready for hearing.

35. The plaintiff has explained that in July 2014, the Commercial Division introduced new Practice Directions which were formulated with the intention of helping to fast-track hearings.

36. It is a fact about which the court takes Judicial Notice, that the Practice Directions were duly gazetted on 28th July 2014.

37. The Practice Directions introduced a raft of new pre-trial procedures, which parties were required to comply with.

38. Therefore, I find that the plaintiff has explained the reason why the case was not set down for hearing,

even though it had been certified ready for hearing. There was a need to comply with the Practice Directions.

39. Thirdly, I find that the defendant has not provided any specific indication about the witness who may be unable to articulate his/her evidence as well as he/she could have done earlier. To suggest that witnesses may or may not be able to articulate their evidence as well as they could have done earlier, is speculative.

40. Furthermore, there are Witness Statements signed by each witness. Therefore, the substantive evidence is not dependant upon the memory of the witnesses.

41. In the final analysis, there is merit in the plaintiff's application dated 8th March 2016. Accordingly, the dismissal of the suit is set aside, and the suit is duly reinstated.

42. The costs of the application shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of August 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Nyakundi for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk.