



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.208 OF 2011

EQUITY BANK LIMITED.....PLAINTIFF

VERSUS

URBANUS KYONG'OI MULE t/a KANYANGI COMPLEX...DEFENDANT

RULING

[1] The Notice of Motion dated 14th January 2016 was filed by the Plaintiff herein, **Equity Bank Limited** for orders that:

[a] **The court be pleased to set aside its orders of dismissal of this suit issued on 13th June 2014 and reinstate the matter for trial on its merits.**

[b] **The costs of this application be provided for**

[c] **The Court be pleased to grant any other orders that it deems right and just to grant.**

[2] The application is supported by the two affidavits sworn by **MANDELA K. CHEGE** on 18th January 2016 and 21st April 2016, including the annexures thereto. The grounds emerging therefrom are that although the Notice to Show Cause dated 24th April 2014 was served upon the Plaintiff's Advocates, the appointed date was 2nd May 2014, on which date the Plaintiff attended court ready to show cause why the suit should not be dismissed, but that the matter was not listed on the Cause List for the day. That upon making inquiries, the Plaintiff was informed by the Court Assistant and the Court Registry staff that the court file could not be traced. It was further the plaintiff's case that subsequent attempts at having the file traced did not bear fruit until about **June 2015** when the plaintiff caused the matter to be fixed for mention on 19th June 2015, and that it was while serving notice upon the Defendant's advocates for 19th June 2015 that they came to learn that the matter had been dismissed on 13th June 2014.

[3] It is the contention of the Plaintiff that no Notice to show cause was served upon the Plaintiff prior to the dismissal of 13th June 2014; that the alleged service on their Advocates' Secretary was declined in error by the said Secretary; and that this is a mistake for which the Plaintiff should not be penalized.

[4] In its written submissions filed herein on 8th June 2016, Counsel for the plaintiff urged the court not

to drive the Plaintiff away from the seat of justice on account of an error by its Advocate's Secretary. Counsel relied on the decision of the Court of Appeal in the case of **Richard Ncharpi Leiyagu vs IEBC & Others [2013] eKLR** in supporting his argument that the door of justice should not be closed because of a mistake made by a lawyer; and the case of Philip **Chemowolo & Another vs Augustine Kubede (1982-88) KAR 103** for the proposition that unless there is fraud or an intention to overreach, there is no error of default that cannot be put right by payment of costs. The Court was thus urged to allow the application and have the suit reinstated for hearing and disposal on its merit, as no prejudice will thereby be suffered by the Defendant that cannot be sufficiently compensated by way of costs.

[5] The application was opposed by the Defendant as demonstrated by the averments in his Replying Affidavit sworn on **17th March 2016**. His contention is that the suit was rightfully dismissed on **13th June 2014** after the Plaintiff failed to attend Court in spite of service. The Defendant further averred that the Plaintiff's application has no merit as no good reason has been given as to why the suit should be reinstated, adding that the Plaintiff's conduct herein has been mischievous and in bad faith, and as such the Plaintiff is not entitled to the exercise of the Court's discretion.

[6] In his written submissions filed on **28th June 2016** the Defendant argued that litigation ought to be conducted expeditiously and efficiently, and that the Plaintiff's indolence should work against it as otherwise the Court would be assisting a party who has deliberately sought to obstruct or delay the course of justice. He relied on the cases of **Gideon Sitelu Konchella vs Daima Bank Ltd [2013] eKLR** and **Thomas Mwaura Gitau & Another v. Eric Mohati and & 2 others [2012] eKLR** to buttress his submission that litigation must be conducted expeditiously and efficiently and that the Court should not exercise its unfettered discretion in favour of a litigant who is out to steal a march on his opponent or wants to merely obstruct or delay the course of justice. Defendant thus urged that it is in the interests of justice that the Plaintiff's application dated **14th January 2016** be dismissed with costs.

[7] The Court has carefully perused and considered the Grounds set out in notice of Motion dated **14th January 2016**, the affidavits in support and opposition thereof, the pleadings filed as well as the proceedings to date. The plaintiff's Complaint dated **17th May 2011** sought judgment against the defendant in the sum of **Kshs. 4,149,242/-** together with interest and costs being sums outstanding in respect of loan facility advanced to the defendant by the Plaintiff. The Defendant filed his written statement of Defence on **12th July 2011** signaling his intention to contest the claim. As far as can be ascertained from the Court record, the Plaintiff took no step in the matter thereafter, and in consequence thereof, the court, acting *suo motu* pursuant to **Order 17 Rule 2 of the Civil Procedure Rules**, issued a Notice to Show Cause for the dismissal of the suit dated **9th May 2014**. That Notice was scheduled for **13th June 2014**. There is no dispute that that Notice was duly served on counsel for the Plaintiff on **27th May 2014** but service was declined, though the Plaintiff now contends that the Secretary who declined service was acting without proper instructions. In the result, Counsel dealing had no notice that the suit was up for dismissal on **13th June 2014**. Consequently, and as the Court record confirms, the suit was dismissed on **13th June 2014** for want of prosecution.

[8] The Plaintiff has now approached the Court under section **3A of the Civil Procedure Act and Order 12 Rule 7, CPR** for the setting aside of the dismissal order and the reinstatement of the suit. **Order 12 Rule 7 of the Civil Procedure Rules** provides that:

“where under this Order judgment has been entered or the suit has been dismissed, the court on application, may set aside or vary the judgment or order upon such terms as may be just.” (emphasis added)

[9] Granted that the date of **13th June 2014** was not for the hearing of the suit but for disposal of the Notice to show cause issued pursuant to **Order 17 rule 2**, the dismissal strictly speaking, would not be a dismissal under **Order 12 of the Civil Procedure Rules**, notwithstanding that none of the parties was in attendance. Be that as it may, the Plaintiff did invoke the inherent powers of the Court under **Section 3A of the Civil Procedure Act**, and it is on that basis that I now proceed to consider the merits of otherwise

of the application.

[10] Although the Plaintiff's Counsel averred in paragraph 10 of his Supporting Affidavit that no Notice to Show Cause was served upon their office prior to the dismissal of the suit on **13th June 2014**, the truth of the matter is that service was effected on their Secretary but that the said Secretary declined service, apparently without first consulting the advocate then dealing. Indeed **Order 5 Rule 14** of the **Civil Procedure Rules** recognizes that even where service is declined a return of due service is permissible. I am therefore satisfied that service of the Notice to Show Cause was duly effected. Having so found, the next issue to determine is whether it would be in the interests of justice to re-open this matter in the premises.

[11] The Plaintiff conceded that a mistake was made by its Advocate's Secretary but urged the Court not to visit that mistake on it for the reason that it has a good claim, and that it has always been eager and willing to prosecute this case, but that its efforts were frustrated because the file went missing. In proof thereof the plaintiff annexed several documents to the Supporting Affidavit sworn on **30th April 2014**. First and foremost is a copy of Notice to Show Cause dated **24th April 2014**, marked "MKC1", which confirms the averment that before the notice to Show Cause dated **9th May 2014**, the Plaintiff had been required to attend Court on **2nd May 2014** to show cause why the suit should not be dismissed for want of prosecution.

[12] According to the Plaintiff, an Affidavit deposed to by **Hiram Gachugi Nderitu** on **30th April 2014** was filed in response thereto, explaining that the Court file had been missing and therefore it was impossible to have the matter progressed. Attached to that affidavit were pre-trial documents that had been prepared for filing but could not be filed because the court file went missing. That affidavit has been exhibited herein along with the pre-trial documents and are marked "MKC2".

[13] It was further the plaintiff's contention that its Counsel diligently attended Court on **2nd May 2014** ready to show cause why the suit should not be dismissed, but the matter was not listed on the Cause list for the day. The Cause lists for **2nd May 2014** for **Justices Ogola, Havelock, and Gikonyo**, who were then serving in the Commercial and Tax Division, were also annexed to the Application and marked "MKC3" and indeed they show that this case was not listed for **2nd May 2014**. It is noteworthy too that the court file does not have a copy of the Notice to show Cause dated **24th April 2014** nor does it show on the record by way of proceedings what transpired on **2nd May 2014**, thus lending credence to the Plaintiff's contention that the court file was missing.

[14] Counsel for the plaintiff further deposed that after **2nd May 2014** they sent their clerk to the court Registry on several occasions to find out the position of the matter to no avail. Ultimately they decided to have the matter fixed for mention vide their letter dated **1st December 2014** (marked "MKC4") and were given the date of **19th June 2015**; only to later learn that the case had long been dismissed for want of prosecution.

[15] From the foregoing therefore, it cannot be said that the plaintiff was indolent or that it is merely out to steal a march on the Defendant. To the contrary there is credible evidence to show that the court file went missing and that this hampered its efforts to prosecute the claim. The documents exhibited further show that Counsel was not aware that service of the Notice to show cause dated **9th May 2014** had been declined by their Secretary, for, why would they continue to seek for a mention date as they did? Obviously then the blunder by the Secretary is one for which neither the Plaintiff nor his Counsel should be blamed as it is the sort of blunder that the Court had in mind in the case of **Philip Chemwolo & Another vs Augustine Kubande (1982-88) KAR 103** when it stated 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 the purpose to imposing discipline.”

[16] In this case, there is no allegation of fraud on the part of the plaintiff or of intention by it to overreach the Defendant. There is nothing to show that the Defendant will be prejudiced in any way or that an award of costs would not suffice. In the premises, I would allow the application dated **14th January 2016** and grant orders that:

- (1) The dismissal order of **13th June 2014** be and is hereby set aside;
- (2) The suit is hereby reinstated for trial and disposal on its merits.
- (3) Costs of the application to be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21st DAY OF SEPTEMBER 2016.

.....

OLGA SEWE

JUDGE