REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 415 OF 2012

PETER KIBOI WILLIE…………........PLAINTIFF

-VERSUS -

FAMILY BANK LIMITED...................DEFENDANT

RULING

1. The Plaintiff has asked the court to set aside the orders made on 15th June 2015, when the court dismissed the suit for want of prosecution.

2. According to the Plaintiff, he had never been served with any Notice, requiring him to show cause why the suit should be dismissed.

3. As a matter of fact, neither of the parties attended court on 15th June 2015, when the suit was dismissed.

4. The is no evidence at all, that the Plaintiff was served with a notice requiring him to show cause why the suit should not be dismissed.

5. But the Defendant submitted that there was no legal requirement that a Plaintiff be served with a Notice before a suit which had been dormant for over a year, can be dismissed. The Defendant asserted that the Plaintiff only needed to have been *"given"* a Notice.

6. However, the Defendant did not explain what was meant by the phrase *"given notice"*. Who was to give the Notice, and how was it to be given?

7. There is no explanation by the Defendant about who was to give Notice to the Plaintiff, or how the said Notice was to be given.

8. There is no evidence to show that Notice was given to the Plaintiff prior to the dismissal of the suit.

9. Of course, if someone requires you to show cause why your case should not be dismissed, he would be expected to give you Notice. Therefore, whether the Notice was supposed to be *"given"* or *"served"*, I find that the Plaintiff had absolutely no Notice, which could have afforded him an opportunity to show cause.

10. By dismissing the suit, without having first given to the Plaintiff the opportunity to show cause, the

court had condemned the Plaintiff unheard.

11. I also note that whilst the form upon which the learned Judge made the order of dismissal is headed;

> **"Court order (Order 17 Rule 2 CPR)"**

The contents of the order reads as follows;

> **"After the inordinate delay of 2 years since the last steps was taken on 27/11/2013, with a view to proceeding with the suit, the court in exercise of the powers conferred upon it by order 17 Rule 12 of the Civil Procedure Rules hereby orders this suit dismissed/closed"**

12. In effect, the court dismissed the suit pursuant to powers conferred upon it by **Order 17 Rule 12 of the Civil Procedure Rules.**

13. As the parties concur, **that Order 17 Rule 12** does not exist in the Civil Procedure Rules, I find that the power upon which the suit was dismissed, lacked foundation.

14. Thirdly, both parties concur that the case was last in court on 17th January 2014, when the Plaintiff was directed to fix a hearing date for the case.

15. Therefore, when the learned Judge held that the case had last been in court on 27th November 2013, he erred.

16. The Defendant accused the Plaintiff of causing the delay of the suit, by first seeking an interlocutory injunction in the case.

17. In my considered view, when a party makes use of procedures and processes which are provided for by law, he cannot be said to be simply "**employing all the delaying tactics possible…"**

18. The alleged delaying tactics actually resulted in an order in favour of the Plaintiff. The court was obviously convinced with the merits of the Plaintiff's applications for an interlocutory injunction. And the decision to grant the interlocutory injunction was made by the court, after giving consideration to both parties. Therefore, it is not right to accuse the Plaintiff of having taken undue advantage of the Defendant.

19. When canvassing the application, the Defendant submitted that the Plaintiff had taken a relaxed attitude to the case going to trial, because the Plaintiff had obtained a permanent injunctive order in the year 2013.

20. The correct position is that the Plaintiff was only given an interlocutory restraining injunction. The court did not issue a permanent injunction.

21. If the interlocutory orders have had or continue to have an unattractive effect on the defendant, it would be wrong to blame the Plaintiff for it. The orders were given by a competent court, after it had given due consideration to the case as it was presented by both parties.

22. If the Defendant felt aggrieved with the orders in issue, it could have taken steps to challenge them through an appeal or through any other appropriate process.

23. Alternatively, it was always open to the Defendant to take steps to move forward the case towards the trial. That would have brought the substantive case to a close sooner, and thus mitigate the prejudice, if any, that the presence of the interlocutory orders was occasioning to the Defendant.

24. In conclusion, I find that the Plaintiff was condemned without having been given an opportunity to be heard. That is an injustice which must be corrected.

25. Accordingly, I now order that the order dismissing the suit, be set aside forthwith. In effect, the suit is now reinstated.

26. As regards the costs of the application, I order that it shall be in the cause. I so order because although the Defendant opposed the application, albeit unsuccessfully, it would not be right to condemn the defendant to pay costs for a step which it had no role in. The Defendant had no role in the Dismissal of the suit. That step was wholly taken by the court.

27. The court cannot be condemned to pay costs.

28. It is for that reason that costs shall be in the cause. The party who is ultimately successful in the case, will also get the costs of the application. It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **19th day** of **December** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Mueni Nyokabi for Kariuki for the Plaintiff

Miyare for Atonga for the Defendant

Collins Odhiambo – Court clerk.