



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. E073 OF 2020**

**GEM INVESTMENTS LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**PRAFULCHAND RAJA.....DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. Vide Notice of Motion Application dated the **14<sup>th</sup> October 2021**, the Plaintiff/Applicant has sought for the following Reliefs;

**a. ....Spent.**

**b. *The Ruling delivered and order issued by this Honourable court on the 14<sup>th</sup> October 2021, Dismissing this Suit for Want of Prosecution be and is hereby set aside Ex-Debito Justitiae and the Plaintiffs'/Applicants' suit be reinstated.***

**c. *Hon. Mr. justice Oguttu Mboya do hereby recuse himself from presiding over this Matter and the Hearing of the Notice of Motion filed herewith.***

**d. *Costs of this Application be provided for.***

2. The subject Application is premised on the various grounds which are contained at the foot thereof and same is further supported by the affidavit of the counsel for the Plaintiff/Applicant, which is sworn on the **14<sup>th</sup> October 2021**.

3. Upon being served with the subject Application, the Defendant/Respondent filed a Replying affidavit sworn on the **12<sup>th</sup> November 2021**, and in respect of which the Defendant/Respondent has enumerated the chronology of events, culminating into the Dismissal of the plaintiff's/Applicant's suit for Want of Prosecution.

**BACKGROUND:**

4. The subject matter was fixed for hearing of the main suit on the **14<sup>th</sup> October 2021**, when it was expected that the Plaintiff/Applicant would call her witness and present her case, in line with the provisions of **Order 18 of the Civil Procedure rules 2010**.

5. However, when the subject matter was called out, counsel on record for the Plaintiff/Applicant informed the court that same was not ready and consequently, same sought for an adjournment, on the basis of various grounds.

6. Upon making the Application for adjournment, the court enquired from counsel whether the grounds which were being advanced by and/or at the instance of the Plaintiff/Applicant, met the threshold to warrant the exercise of judicial discretion and in particular the grant of an adjournment.

7. On the other hand, it is worthy to point out that the application for adjournment, by and/or at the instance of the Plaintiff/Applicant was vehemently opposed by the Defendant/Respondent, who signaled that same was ready and that the Plaintiff herein was merely trying to delay and/or obstruct the hearing and finalization of the suit.

8. After listening to the submissions by the Plaintiff/Applicant, as well as the Defendant/Respondent, the court was obliged to make a determination as to whether to grant and/or refuse the application for adjournment.

9. For coherence, the court proceeded to and declined to grant the adjournment sought, stating that the reasons that were advanced by and/or on behalf of the Plaintiff/Applicant, did not meet the threshold for the grant of an adjournment and that in any event the court would not dignify Slovenliness with an exercise of discretion, where it was apparent that counsel and client were not taking the business of the court seriously.

10. Having made a decision and/or ruling on the Application for adjournment, the court thereafter proceeded to allocate time to the Plaintiff to bring forth his witnesses and in this regard, the court directed that the matter shall proceed for hearing at 12:30 pm.

11. Suffice it to say, that the advocates for the Parties appeared before the court, on or about at 12:30 pm, whereupon the Plaintiffs counsel rose up and made a similar application for adjournment, on the same basis and grounds, which had hitherto been dealt with and addressed vide the ruling declining the request for adjournment.

12. As was expected, the court was obliged to render another ruling and true to it, the court rendered a ruling and observed that the question of adjournment had been dealt with in the forenoon. Consequently, the court observed that the same was *Functus officio*.

13. Immediately upon the rendition of the ruling in respect for the second application for adjournment and upon counsel for the Plaintiff being called upon to present his Evidence, if any, counsel addressed the court and stated that same would rely on the Pleadings and the documents filed in proof of the Plaintiffs case.

14. On the other hand, counsel for the plaintiff retorted that the Defendant/Respondent could then give his evidence and be cross examined, once the documents filed by the Plaintiff/Applicant are admitted by the court.

15. Curious though, the court was called upon to make a further ruling as to whether Documents filed by a Party can be admitted and treated as evidence, without any witness being called to testify, identify same and thereafter produce the documents in line with the provision of the Evidence Act, Chapter 80 Laws of Kenya.

16. Based on the foregoing Application, the court proceeded to and rendered yet another Ruling, where it was observed that the Documents which were filed by the Plaintiff/Applicant, could not be admitted as Evidence and/or relied upon, either in the manner proposed by the counsel or at all. Clearly, the invitation by the counsel for the Plaintiff/Applicant was unconventional.

17. Following the refusal by the court to admit the documents which were filed by and/or on behalf of the Plaintiff via the unconventional method, which was being propagated by the counsel for the Plaintiff, it became evident that the Plaintiff had no evidence to offer.

18. Premised on the foregoing, and based on the fact that the defendant was not admitting any part of the Plaintiff's claim, the court had no alternative, but to dismiss the Plaintiff's Suit for want of Prosecution, in line with **Order 17 Rule 4 of the Civil Procedure Rules 2010**.

19. Based on the foregoing, the subject Application was provoked and Counsel for the Plaintiff, who had hitherto sought to adjourn the matter and which Application, was declined has now returned to Court, albeit with an Application for Recusal and for restoration of the Suit, which was Dismissed for Want of Prosecution in his presence.

#### **SUBMISSIONS:**

20. The subject matter came up on the **6<sup>th</sup> December 2021**, whereupon the advocates for the Parties agreed to canvass the Application by way of written submission and in this regard, timelines were therefore set for the filing of the respective written submissions.

21. Following the directions on the filing of the written submissions, the Plaintiff proceeded to and filed her written submissions on the **3<sup>rd</sup> December 2021**, whereas the Defendant filed his written submissions on the **6<sup>th</sup> December 2021**.

22. Suffice it to point out, that the two-sets of submissions are on Record and the same have been duly considered and taken into account.

#### **ISSUES FOR DETERMINATION**

23. Having reviewed the Application dated the **14<sup>th</sup> October 2021**, the Supporting Affidavit thereto and the Replying Affidavit, filed in opposition thereto and having similarly considered the written submissions filed by and/or on behalf of the respective parties, the following issues are germane for determination;

a. *Whether the Application for Recusal should be heard by a Separate Judge, in the manner sought and/ or requested by the Plaintiff/ Applicant or Otherwise.*

b. *Whether the Application for recusal has met the threshold to warrant such Recusal or at all.*

c. *Whether an Application for recusal, which is anchored on bias and/or lack of impartiality, which require Evidence can be anchored on an Affidavit of an advocate or otherwise.*

d. *Whether the Court has Jurisdiction to set aside an order for Dismissal for want of Prosecution made in the presence of the Parties.*

## ISSUE NUMBER 1 & 2

**Whether the Application for recusal should be heard by a separate judge, other than the Judge who is requested to Recuse him/herself.**

**Whether the Application for Recusal has met the threshold to warrant such Recusal.**

24. Before delving into whether or not a basis has been laid to warrant recusal, it is worthy to point out that limb three (3) of the Application required that this court should not hear this matter and particularly, **the hearing of the Notice of Motion Application filed herewith.** For clarity, the Notice of Motion Application in question is the one beforehand.

25. I must point out, that when the Application came up for hearing, counsel for the Plaintiff willingly and voluntarily took directions relating to the disposal of the application before me and agreed to file his Written Submissions.

26. For clarity, at the point of taking directions, the counsel did not request that the Application be sent to any other judge to hear and determine same and curiously, to make an order as to my Recusal.

27. Having failed to make such kind of an Application and/ or request, which in any event would have been quiet interesting, it is taken that counsel for the plaintiff, therefore conceded that the Application for Recusal can only be heard by myself and not any other Judge.

28. Suffice it to point out, that having not pursued the limb that the Application should be heard elsewhere, it is therefore evident that the limb of the Application, which had sought that the Application be heard elsewhere, was waived.

29. In support of the observation premised and/or based on the issue of waiver, I adopt and rely in Decision in the case of **748 Air Services Limited v Theuri Munyi [2017] eKLR**, where the Court of Appeal observed as hereunder;

Closer home in the case of **Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd [2007] eKLR** the Court stated thus:

**“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right.”**

30. Having addressed the foregoing limb, where counsel for the Plaintiff required that the Application be heard by a Judge other than this court, which limb was not pursued, the next issue that now requires to be addressed is whether the Plaintiff has met the threshold for Recusal.

31. Suffice it to state, that in the course of hearing of Dispute by a court of law, the court is obliged to make decisions, which would go one way or the other. Simply put, Litigation unlike football can never result into a Draw or end in a Stalemate.

32. In respect of the subject matter, an Application for adjournment was made before the court and hence the court was called upon to determine same. Clearly, the Plaintiff, would not be entitled to an automatic adjournment.

33. In any event, having made the Application for adjournment, it was incumbent upon the court to make a determination and which determination was made, according to and in exercise of the discretion of the court.

34. In my humble view, the making and/or rendition of a decision by the court, does not ipso facto make the court biased and/or lack impartiality. For clarity, if such were the position then no case would proceed for hearing and determination, because either Party against whom an adverse decision is made, would be asking the court for the recusal. Consequently, the Court business would ground to a halt and the Rule of Law, would be defeated.

35. In support of the foregoing observation, I invoke and adopt the holding the court of appeal in the case of **Galaxy Paints Company Limited v. Falcon Guards Limited [1999] eKLR**, had held thus:

**“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”**

36. Based on the foregoing and taking into account the background relating to the subject proceedings, which were captured herein before, it is my finding that it would amount to a travesty of justice to recuse myself, merely because I exercised a Constitutional mandate that is bestowed upon me and made a decision that is adverse against one of the Parties in the subject matter.

## ISSUE NUMBER 3

**Whether an Application for Recusal, which is anchored on bias and/or lack of impartiality, which requires Evidence can be anchored on an affidavit of an Advocate.**

37. In respect of the subject matter, the crux of the complaint is that the Plaintiff is therefore reasonably apprehensive that same would not get fair treatment before the the judge and in any event, that the judge had exhibited a clear bias and personal prejudice against the Plaintiff

and his witnesses.

38. It is important to note that the person who is said to have developed reasonable apprehension that there exists a clear bias and personal prejudice, is the Plaintiff. However, despite the alleged bias and/or prejudice being attributed to the Plaintiff, the Plaintiff, has not been called upon to make and swear any affidavit to substantiate the said allegations.

39. Be that as it may, the supporting affidavit, has been sworn by the advocate retained by the Plaintiff, who is separate and distinct from the Plaintiff, in terms of adduction or better still, production of evidence. Simply put, and advocate retained in a matter cannot adduce evidence, in contentious issues and/or evidentiary matters which are in dispute.

40. Given the nature of the allegations that have been made herein, which revolve around bias and personal prejudice, against the Plaintiff and undisclosed witnesses, it is my humble view that the advocate herein could not depone to and or swear the supporting affidavit. For clarity, the Issues alluded to are Evidentiary in nature and may lead to Cross- Examination of the Maker thereof.

41. In the premises, the supporting affidavit which delves into contentious evidentiary issues, but which is sworn by the advocate for the Plaintiff, is incompetent and thus incapable of anchoring and/or grounding the subject Application, whatsoever.

42. In support of the foregoing observation, I invoke and adopt the position of the law as captured in the Decision in the case **Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] eKLR**, where the Honourable Court of Appeal observed as hereunder;

*“On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In Simon Isaac Ngugi vs Overseas Courier Services (K) Ltd 1998 e KLR and Kisya Investments Ltd & Others vs Kenya Finance Corporation Ltd, it was held that .*

*“.....it is not competent for a party’s advocate to depose to evidentiary fact at any stage of the suit”.*

*In addition, Rule 9 of the Advocates Practice Rules prohibit advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate’s affidavit creates a legal muddle with untold consequences.”*

43. Owing to the foregoing I find and hold that the affidavit in support of the subject application is incompetent, misconceived and legally untenable. Consequently, same be and is hereby struck out. In this regard, the Subject Application, which has been propagated by Counsel for the Plaintiff, is rendered bereft of any Evidential backing.

#### **ISSUE NUMBER 4**

***Whether the court has Jurisdiction to set aside an order for Dismissal for want of Prosecution made in the Presence of the Parties:***

44. On the **14<sup>th</sup> of October, 2021**, Counsel for the Plaintiff applied for an adjournment, on various reasons, details which were captured in the proceedings of the given date.

45. Following the application for adjournment, the Court was enjoined to consider same and thereafter make a decision. For clarity, upon consideration, the Court came to the conclusion that the Application for adjournment was not merited.

46. Subsequently, the Court ordered and/or directed that the matter proceeds for hearing, but however, the Plaintiff was not able to summon her witness to come to Court and to offer evidence, in support of the Plaintiff’s case.

47. Owing to the foregoing, the Court was constrained to deal with the matter forthwith, in accordance with the Law and particularly in line with **Order 17 Rule 4 of the Civil Procedure rules, 2010**, which provide as hereunder:

***“Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith.”***

48. My reading of the foregoing provision of the law, suggest and/or connotes that where a Party has been afforded and/or availed sufficient and/or reasonable opportunity to tender evidence, but same has failed to do so, the court is at liberty to determine the suit forthwith.

49. It is apparent, that by the usage of the Word; by determining the suit, the court is granted the liberty to either enter judgment, where there is a limb of the claim that is admitted by the adverse party or better still dismiss the suit as against the Defendant.

50. Nevertheless, it is imperative to note that even where the suit is dismissed for want of prosecution, such a dismissal constitute or amount of a judgment in favor of the Defendant.

51. Whereas, a dismissal which is done in the absence of the parties or one of the parties, is amenable to be set aside pursuant to an application under Order 12 Rule 7 of the Civil Procedure Rules 2010, a Dismissal for want of prosecution, made and/or undertaken in the

presence of the Parties leads to an inter-partes judgment, in the nature of a dismissal and same does not lend itself to setting aside.

52. In the circumstances, it is my humble position that having entertained arguments from both the Plaintiffs and the Defendants, on the 14<sup>th</sup> October 2021, the resultant decision is one that can only be appealed against and not otherwise.

53. In support of the foregoing observation, it is imperative to take cognizance of the Decision in the case of **Njue Ngai v Ephantus Njiru Ngai & Another (2016) eKLR**, where the honourable court of appeal observed as hereunder;

*“Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR stating:-*

*Rule 4(1) does not say “judgment shall be entered for the defendant or against the plaintiff”. It uses the word “dismissed”. The Civil Procedure Act does not define the word “judgment”. According to Jowitt’s Dictionary of English Law 2<sup>nd</sup> ed p 1025:*

*Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several.”*

*Mulla’s Indian Civil Procedure Code, 13<sup>th</sup> Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order,” “Judgment – in England, the word judgment is generally used in the same sense as decree in this code”.*

**In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order 1XB or under any other provision of law. A dismissal of a suit, under Rule 4(1) is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order 1XB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order 1XB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8”. [Emphasis added]**

54. From the foregoing case law, it is apparent that the Dismissal for non-attendance and/or want of prosecution, if done in the absence of the Advocates for Parties or of the Parties, themselves, then an application for setting aside can be entertained and duly dealt with.

55. However, that is not the situation in respect of the subject matter and in this regard, I find and hold that this court is not seized and/or possessed of the Jurisdiction to entertain the subject Application whose import and tenor, is calculated to have the court sit in Appeal on own decision, albeit, disguised as setting aside.

#### **FINAL DISPOSITION:**

56. I have considered the Application dated the 14<sup>th</sup> of October, 2021, and in my humble view, the subject Application was informed by lack of appreciation of the import, tenor and Scope of the Jurisdiction of the Court pursuant to and/ or under the Provisions of **Order 17 Rule 4**.

57. Owing to the foregoing, I now make the following orders;

- a. An application seeking recusal of a judge must be handled and/or entertained by the judge whose recusal is sought and not otherwise.*
- b. The Affidavit in support of the subject Application, which has been sworn by the Advocate, is Incompetent and contrary to Rule 9 of the Advocates Practice Rules.*
- c. Consequently, the Supporting Affidavit be and is hereby struck out.*
- d. The subject Application is Devoid of Merits.*

58. In a nutshell, the Application dated 14<sup>th</sup> October 2021, be and is hereby dismissed with costs to the Defendant/Respondent.

59. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>th</sup> DAY OF FEBRUARY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

JUDGE

**IN THE PRESENCE OF;**

**JUNE NAFULA COURT ASSISTANT**

**MR. ISAAC RENEE FOR THE PLAINTIFF/ APPLICANT.**

**MS. OCHOGO FOR THE DEFENDANT/ RESPONDENT**