REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 467 OF 2009

FRAN INVESTMENTS LIMITED…….....PLAINTIFF/APPLICANT

-VERSUS-

G4S SECURITY SERVICES LIMITED…...…..….DEFENDANT/RESPONDENT

RULING

Reinstatement of suit

[1] The Applicant filed a Motion Application dated the 20th February 2014 seeking for reinstatement of this suit which was dismissed for want of prosecution on the 5th day of March 2012. The application is supported by the affidavit of Rose Onsare. The application has been opposed by Respondent through the Replying Affidavit sworn by Anthony Okulo on the 3rd March 2014.

The Applicant's case

[2] This suit was commenced by way of a Plaint dated the 29th June 2009 and filed in court on the 2nd July 2009. The brief facts are that the Plaintiff, who was carrying on the business for buying and sale of petroleum and petroleum products within Karen and elsewhere within Kenya entered into a contractual relationship with the Defendant/Respondent, whereby the Respondent would provide security services for the Applicant's cash in transit (proceeds of the sale of petrol and petroleum products) from the Applicant's business premises to the relevant bank for depositing into the Applicant's Bank account as instructed. On 2nd of June 2009, the Respondent through its servants and/or employees or agents collected a total sum of Kshs. 614,300/= both in cash and cheque for purposes of banking into the Applicant's Bank account No. 065 1014271 with Barclays Bank of Kenya Limited. The Cash amount was Kshs. 607,000/= but this amount was never deposited save for the cheques hence the filing of the suit for claim of the money as well as loss of business opportunity and profits at the rate of Kshs. 22,745.60 per day with effect from 2nd June 2009; General mental anguish, stress and inconvenience; Costs of the suit; and any other relief the court deems fit to grant.

[3] The Defendant/Respondent entered appearance and filed its Defence which was generally an admission of liability. The Applicant applied vide a Motion dated 3rd August 2009 for judgment on admission to be entered against the Respondent in the sum of Kshs. 607,000/- together with interest and costs. Judgment on admission was entered for the Plaintiff on the **6th day of November 2009**. The

Applicant again through a Chamber Summons Application dated the 1st August 2009 applied for the Respondents Defence to be struck out on the basis that it was scandalous, frivolous and vexatious; may prejudice, embarrass and/or delay the fair trial of the suit, and that the filed Defence was otherwise an abuse of the court process and a sham as it did not raise any triable issues. Justice Muga Apondi on the 12th October 2010 delivered his Ruling on the application, where he agreed with the Applicants submissions and struck out the Respondents Defence with costs to the Applicant. The Defendant/Respondent being aggrieved by the decision of Apondi J. filed a Notice of Appeal dated 25th October 2010 challenging the said decision. The same was never set down for hearing, and neither did the Respondent file or serve the Record of Appeal. The Applicant desirous of concluding the matter sought to fix the same for formal proof hearing for purposes of proving its pleaded strand of special damages. However, this intention was quickly stalled in its tracks as upon perusal of the court file, it was discovered that the suit had been dismissed for want of prosecution on the 5th day of March 2012. The Applicant alleged that no Notice of Intention to dismiss the suit which was ever served upon the Applicant.

[4] The Applicant formulated the issue for determination to be:-

a. Whether the Applicant's suit should be reinstated and set down for Formal Proof Hearing.

The Applicant submitted that Order 17 Rule 2 (1) of the Civil Procedure Rules provides that where in any suit no step has been taken by either party for one year, the court has to give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. Whereas, the wording of Order 17 Rule 2 (1) of the Civil Procedure Rules is not couched in mandatory terms, it a practice that has gained traction and notoriety is that notice should be given to parties before a suit is dismissed under the said order. The Applicant was neither given notice as contemplated under Order 17 Rule 2 (1) of the Civil Procedure Rules nor served with a Notice to show cause and/or a Notice of Dismissal of Suit. And, perusal of the court file, the record does not reveal whether there was an inquiry as to whether or not the Applicant's advocates were served with a Notice to Show Cause. They submitted further that their position herein is fortified by the decision of Azangalala J. (as he then was) in ***Associated Warehouse Co. Ltd & Others – vs- Trust Bank Ltd HCCC NO. 1266 of 1999*** *(unreported)* Quoted with approval by Mutungi J. in ***Ibrahim Athman Said (suing in his capacity as Administrator Ad Litem) v. Ibrahim Abdille Abdullah & Another (2014)eKLR*** *where he stated:-*

"Rule 2 (1) of order 16 (repealed Civil Procedure Rules) presupposes service before dismissal. It is also clear under this rule that even where cause is not shown, dismissal is not mandatory as the rule is permissive. In this case the plaintiffs were not given a chance to show-cause why their suit should not be dismissed. The plaintiffs have this persistent complaint regarding alleged "Bearer certificates of Deposit". The plaintiffs may have misinterpreted the effect of the interlocutory order made by Gacheche, Commissioner of Assize as she then was. This reason for delay in prosecuting this suit may be unsatisfactory, but I will not hold it against the plaintiffs. In any event the Defendant has not demonstrated the prejudice it will suffer.

[5] The Applicant insisted that it learnt of the suit's dismissal on the 17th day of February 2014, which was much after the suit was dismissed, but the delayed discovery was not deliberate or intended to obstruct or delay the course of justice. They took immediate action and filed this application. Once the suit is reinstated, the Applicant undertakes to set the suit down for formal proof hearing to establish its claims of special damages as pleaded in the Plaint at paragraph 15 (b-e) thereof, which are:

i. Bank charges for the unpaid cheque No. 204820 at Kshs. 1,000.00;

ii. Plaintiff's/Applicant's advocates collection charges on the unpaid cheque No. 204820 at Kshs. 19,155.00 plus VAT @ 16% thereon totaling Kshs. 22,219.80;

iii. Loss of business/profits at the rate of Kshs. 10,865.60 on diesel fuel per day with effect from the 2nd June 2009 until payment in full; and

iv. Loss of business/profits at the rate of Kshs. 11,880.00 on unleaded fuel per day with effect from 2nd June 2009 until payment in full.

They pleaded to the court to give them an opportunity to be heard and such course would not prejudice the defendant. The Respondent has not alluded to any prejudice they are likely to suffer.

The Respondent opposed reinstatement of suit.

[6] The Respondent contented that it filed a Notice of appeal on 26th of October, 2010 after it was dissatisfied with the ruling of Hon. Justice Apondi Muga delivered on the 12th October, 2010 to dismiss its defence and that the reason for the filing of the appeal was not to delay the process of prosecuting the suit. Further the appeal did not act as a stay proceedings and they even paid the Plaintiff Kshs. 607,000/= in satisfaction of the ruling. Certified copies of the proceedings were delivered to them on 2nd October, 2012 and that is when they realized that the suit was dismissed by the court on its motion for want of prosecution. The Plaintiff did not bother to set down the suit for hearing for more than one year and also was not interested in prosecuting the suit as they were served with notice to show-cause why the suit should not be dismissed for want of prosecution on 5th of March, 2012. This application is, therefore, an abuse of the process of this honourable court and should be dismissed with costs to the Defendant. They cited the case of *Eric Oluoch Olele vs. Kenneth O. Obae ELC No.322 of 2009* pg 2-3 where the court held;

"In the circumstances of this case the Plaintiff was complacent and casual in the manner he handled the suit and I am not persuaded he has furnished any or any valid or reasonable reason for not attending the court to show cause on 3.2.2012 and further I am, not persuaded the reason proffered for the delay in the prosecution of the Plaintiff's suit is reasonable. There was no order staying the proceedings. The information given by the applicant that there was an order staying proceedings in this suit was misleading and there was no basis for the same. In the premises there is no basis upon which I can exercise my discretion to reinstate the suit dismissed by Hon. Justice Mwilu and I accordingly dismiss the Plaintiff's application dated 6th February, 2012 with cost to the Defendant".

[7] The Applicant is not vigilant litigant and in accordance with the maxim of equity that equity aids the vigilant and not the indolent, the Applicant should not be allowed to reap from his indolence. The application is also an afterthought since the court rightfully exercised its discretion in dismissing the suit for non-attendance when the matter came up for hearing on the notice to show-cause why the case should be dismissed. The application for reinstatement was filed twenty three (23) months after the dismissal of the suit and we contend that this is a greater illustration of the Plaintiff's indolence and lack of interest in his suit. The party seeking to reinstate a suit must demonstrate good faith and the application should be brought to court without unreasonable delay. Lastly, they submitted that the suit was properly dismissed and it has not been shown that the court's discretion was not exercised properly. The application lacks merit and should be dismissed with costs to the Defendant.

DETERMINATION

[8] Order 17 Rule 2 (1) of the Civil Procedure Rules grants the court power to dismiss a suit in which no step has been taken for one year. The Order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit. This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think, it is so especially when one fathoms the requirements of article 159 of the Constitution and the overriding objective which demands

of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial ‘’sword of the Damocles’’. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff. This is the test I shall apply here.

[9] 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. But nothing precludes the court from serving the notice as per Order 5 of the Civil Procedure Rules. In this case, notice was served for **5th of March, 2012, but the Applicant did not appear before court to show-cause why the suit should not be dismissed for want of prosecution. What is surprising is that on 12th October, 2010 the court delivered a ruling dismissing the defendant’s defence but since that time, the Applicant did not bother at all to progress its case. I agree with the submission of the Respondent that despite the appeal filed, there was no stay of proceedings and so it is a farce for the Applicant to hang on the pendency of the appeal to justify its indolence. Again, if the Applicant was as vigilant as it claims to be, it is quite irreconcilable that they discovered the suit had been dismissed on the 17th day of February 2014-four years since the defence had been struck out. Such delay is not inadvertent as alleged by the Applicant; it is deliberate as a party is expected to prosecute their cases without delay. The delayed has not been satisfactorily explained and is a source of prejudice to the Respondent as well as to the fair administration of justice. These are sufficient reasons to refuse to reinstate a suit and let it lie in peace in judicial grave. The amount of time which has passed by will not allow any and is not conducive to having a fair trial in this matter. Here I must confess that** the decision of Azangalala J. (as he then was) in the case of ***Associated Warehouse Co Ltd & Others vs. Trust Bank Ltd HCCC NO 1266 of 1999*** *(unreported)* which was *q*uoted with approval by Mutungi J. in ***Ibrahim Athman Said (suing in his capacity as Administrator Ad Litem) v. Ibrahim Abdille Abdullah & Another [2014] eKLR*** was attended to by very different circumstances. **Accordingly, and with a lot of trepidation, I dismiss the application dated** the 20th February 2014. I will, however, not condemn the Applicant to costs as he has already lost its right to be heard on merit. It is so ordered.

Dated, signed and delivered in court at Nairobi this 18th February 2015

F. GIKONYO

JUDGE