



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 1813 OF 2000

ETHIOPIAN AIRLINES ENTERPRISES.....PLAINTIFF

VERSUS -

BEAUTTAH ANSELMO MAALI.....DEFENDANT

RULING

1. This application seeks to set aside an order which was made on 1st February 2012, dismissing the plaintiff's suit.
2. The record shows that on the material day the case was listed before Kimondo J. for Notice To Show Cause why the suit should not be dismissed.
3. None of the parties to the suit appeared before the learned Judge on the said day. In the circumstances, the court concluded that no cause had been shown. Therefore, the learned Judge ordered that the suit be dismissed.
4. Although the suit was dismissed on 1st February 2012, it was not until 19th February 2013 when the plaintiff filed this application, to try and revive the case.
5. Mr. Agimba, the learned advocate for the defendant has faulted the plaintiff for the delay in taking any action after the suit was dismissed. It was the defendant's view that the delay speaks of the plaintiff's disinterest in the case.
6. The defendant also pointed out that the application was not prosecuted for over 2 years.
7. In the circumstances, it is the considered opinion of the defendant that he would be seriously prejudiced if the case was reinstated.
8. The prejudice would be particularly serious if it was considered that the case was filed in the year 2000, and that the delay in prosecuting it had been attributable to the plaintiff all along: that is the defendant's position.
9. I have perused the record of the proceedings. It is very clear that there are several instances when the case was adjourned at the instance of the defendant. For instance, on 27th October 2003 the case was adjourned because Mr. Agimba, the learned advocate for the defendant was unwell.

10. And, on 5th February 2007 the case was adjourned because the defendant's principal witness was out of the country.
11. Those 2 examples suffice to demonstrate the fact that it was not the plaintiff who had always sought adjournments of the case, as had been alluded to by the defendant.
12. The record of proceedings also shows that on 28th January 2005, the court recorded a consent order pursuant to which the advocates for the respective parties each received Kshs. 764,270/80 from **ALICO (K) LIMITED**.
13. At the time, each of the parties lay claim to the sum of Kshs. 1,528,541/60 which Alico (K) Limited was holding as the Pensions Benefits payable to the Defendant.
14. The parties agreed that each of the parties would, through their respective advocates, hold one-half of the benefits, until the case was determined.
15. To my mind, that is a significant factor in the present application because the case was never determined on merit. I say so because the dismissal of the suit on the grounds that the plaintiff had failed to show cause, did not determine the party who was entitled to the Pension Benefits.
16. Furthermore, the plaintiff has demonstrated that it was never served with the Notice To Show Cause, before the court dismissed the suit.
17. In effect, the plaintiff was condemned without being accorded an opportunity to be heard.
18. The Notice to Show Cause was dated 20th January 2012. It informed the plaintiff that it was required to show sufficient cause why the suit should not be dismissed.
19. However, there is no evidence at all, that the plaintiff was served. If anything, the only person who has spoken about the absence of service is the plaintiff; and it has made it clear that it was never served. I therefore find that the plaintiff was never served with the Notice To Show Cause.
20. In the event, the plaintiff was condemned un-heard, when the court itself had prepared a Notice which was to have alerted the plaintiff that it was required to show cause; but thereafter failed to serve the Notice upon the plaintiff.
21. Even after the suit had been dismissed, the court did not inform the plaintiff about that development.
22. Clearly, the plaintiff was unaware of the dismissal, as it continued to invite the defendant's advocates to the High Court Registry, for purposes of fixing a Hearing Date.
23. The conduct of the plaintiff confirms their lack of information about the dismissal.
24. I would also say that the defendant's advocates, too, were unaware of the dismissal. I so find because they readily endorsed the invitations from the plaintiff on 13th February 2012 and 14th August 2012, when they had been invited to the Registry to fix Hearing dates. If they had known that the case had been dismissed, the defendant's advocate would have been expected to inform the plaintiff about the fact, so that there would then have been no need to attend at the Registry to fix trial dates.
25. But the defendant's advocates did not indicate that they had knowledge of the dismissal of the suit. I therefore presume that the defendant had no such knowledge.
26. The plaintiff has said that the court file was missing from the Registry until November 2012. That assertion has not been disputed by the defendant. Therefore, I accept it as an uncontroverted fact.

27. Having only learnt about the dismissal of the suit 9 months after that had happened, the plaintiff cannot have brought the application earlier than that.

28. I hold that there was no inordinate delay on the part of the plaintiff, in filing the application.

29. I have also noted from the court records that the defendant attended at the Registry on 12th February 2013; 12th of March 2013 and 22nd of May 2014, for the purposes of fixing a hearing date for the application. During each of those occasions, the application was fixed for hearing. However, the matter was never listed for hearing on any of the 3 scheduled dates.

30. Eventually, on 17th February 2015, the application was fixed for hearing on 19th March 2015.

31. The plaintiff cannot be faulted for the failure by the court to list the application for hearing on the dates which the registry had assigned the matter for hearing.

32. Meanwhile, there can be no doubt that the steps taken by the plaintiff demonstrated its keen desire to prosecute both the suit and the present application. I do not share the defendant's contention, that the delays experienced in this case, speak about the plaintiff's disinterest in the case.

33. For all the foregoing reasons, I have come to the conclusion that the plaintiff was condemned unheard. It is therefore in the interests of justice to set aside the dismissal of the suit, so that both parties may have an equal opportunity to a fair hearing.

34. Accordingly, the orders made on 1st February 2012 is set aside. The suit is thus reinstated.

35. The costs of the application dated 12th February 2013 shall be in the cause, because neither of the parties is blameworthy for the action which the court took on 1st February 2012.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of April 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Njuguna for the Plaintiff

Sudi for Odhiambo for the Defendant.

Collins Odhiambo – Court clerk.