REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 1591 OF 2000

ANNE SANAIPAEI MASSEY :::::::::::::::::::::::::::::::::: PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LIMITED :::::::::::::::: DEFENDANT

R U L I N G

INTRODUCTION

1. The **Notice of Motion** before the court is dated **10th December 2012** and filed in court on **24th May 2013**. The application brought by the Plaintiff is filed under Section 1A, 1B and 3A of the Civil Procedure Rules and Order LI Rule 1 and Civil Procedure Rules. The application seeks the main surviving order that the court be pleased to set aside its order of 11th June 2012 dismissing the suit and that the same be reinstated. The application is supported by affidavit of **Miller Wanyala Bwire** dated **10th December 2012**.
2. The history of the application is that the Plaintiff/Applicant ("**the Applicant**") filed this suit on 4th September 2000 together with an application for injunction. In an attempt at expediting the conclusion of this matter, on 21st February 2011, this Court directed parties to exchange documents and fix an early hearing date. The Defendant/Respondent ("the Respondent") filed its List of Documents on 8th November 2001 whereas the Applicant filed her List of Documents on 16th November 2001.
3. On 18th October 2002, the Respondent filed an Application for dismissal of the suit for want of prosecution. On 19th November 2002, when the Application came up for hearing, this Court directed the Applicant to fix the matter for hearing within three (3) months, and in default the suit would stand dismissed.

The suit was fixed for hearing on 22nd July 2003 when the same was adjourned at the Respondent's instance to enable it locate its original documents. The matter was subsequently fixed for hearing on 20th July 2004, when it was adjourned at the Applicant's instance, on 23rd February 2005 when it was adjourned again at the instance of the Applicant to enable her make a proposal for settlement, on 2nd February 2006, when again it was adjourned at the instance of the Applicant to enable her make an application to amend her Plaint, and on 11th December 2006 when it was also adjourned at the instance of the Applicant to allow the Applicant amend the Plaint. All these hearing dates were fixed at the instance of the Respondent.

4. After amendment of the pleadings, the suit was scheduled again for hearing on 12th May 2010 but

was adjourned for failure by the Applicant to file a Bundle of Documents and List of Issues. The Respondent filed its List of Agreed Issues on 6th October 2010 whereas the Respondent filed its List on 8th October 2010. The matter was subsequently fixed for hearing on 26th January 2012. As the hearing was awaited, a Notice to Show Cause why the suit should not be dismissed for want of prosecution issued. On 26th January 2012, this Court directed that a hearing date be fixed at the registry on a priority basis and in the event no action was taken within forty five (45) days, the matter would stand dismissed. On 29th March 2012, at the instance of the Respondent, the suit was fixed for mention for pre-trial directions on 10th May 2012. On 10th May 2012, this Court directed parties to comply with Order 11 of the Civil Procedure Rules within 30 days and fixed the matter for mention on 11th June 2012 and directed that in default, the suit would stand dismissed.

5. The Respondent complied with the Orders aforesaid by filing its Bundle of Documents on 4th June 2012 and its Witness Statements on 8th June 2012. On 11th June 2012, this Court noted that the Applicant had failed to comply with the Order of 10th May 2012 and ordered the suit to be dismissed with costs and directed that the Respondent fix the Counterclaim for hearing. The Applicant's Counsel was absent on the said date.

The Applicant's Application herein seeks to set aside the orders issued by this Court on 11th June 2012 dismissing the suit, and to have the suit reinstated.

6. The application is opposed by the Respondent who filed Grounds of Opposition dated 29th May 2013 together with the Replying affidavit of Karen Mate sworn on 4th June 2013 and field on the same date.
7. The Applicant's application is brought pursuant to the inherent powers of this court set out in Sections 1A, 1B and 3A of the Civil Procedure Act. The Applicant blames the failure to file the Applicant's bundle of documents on inadvertence of counsel when taking over from the previous counsel, which mistake ought not to be visited on the Applicant.
8. In response, the Respondent contends that the application is defective and bad in law as it is field by an advocate not property on record, and secondly that the application lacks merit.
9. Parties with the leave of court filed written submissions to the application. The affidavit sets out and explains why the Plaintiff's advocates failed to file list of documents on 11th June 2012. The Plaintiff had transitioned Counsel from Messrs Adipo & Company advocates to Messrs Ochieng', Onyango, Kibet & Ohaga advocates.

In the course of the transition the date and deadline for filing the documents were not correctly noted by incoming Counsel with the regrettable result that Counsel did not comply with the order of the Court. Failure to comply with the order of court was therefore completely inadvertent, not ascribable at all to the Plaintiff. It was mistake of counsel.

Whilst the application is dated 10th December 2012 it was filed on 24th May 2013 because the Plaintiff's advocates could not access the Court file.

10. The Respondent submitted that the Application is defective because this suit was filed by the firm of Adipo & Company Advocates on behalf of the Applicant. The Advocates on record purported to come on record by a Notice of Appointment of Advocates dated 10th December 2012 and filed on 24th May 2013.

Order 9 Rule 5 of the Civil Procedure Rules, 2010 states that :

"A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of change of advocate is filed in the court in which cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13, be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal."

11. It is the Respondent's contention that the Application before this Court is defective and bad in law as it was drawn and filed by an advocate who is not improperly on record because no notice of change of advocates has been filed and served in accordance to Order 9 Rule 5 of the Civil Procedure Rules. Consequently, the firm of Adipo & Company Advocates ought to be considered to be still on record for the Applicant.

Further, Order 9 Rule 7 of the Civil Procedure Rules, 2010 sets out the circumstances which require filing of a Notice of Appointment. The rules states as follows:

"Where a party, after having sued or defended in person appoints an advocate to act in the cause or matter on his behalf, he shall give a notice of appointment, and the provisions of this Order relating to a notice of change of advocates shall apply to a notice of appointment of an advocate with the necessary modifications."

According to the rule aforesaid, the Advocates on record could only file a Notice of Appointment if the Applicant was acting in person, the firm of Adipo & Company Advocates either having ceased to act upon an application filed before this Court or upon the Applicant filing a Notice of intention to act in person. The Respondent cited the case of **Joshua Nyamache T Omasire v Charles Kinanga Maena [2008] eKLR**, where the court observed that:

"To answer the first issue, Order III rule 1 of the Civil Procedure Rules permits advocates who are duly appointed by a party to file any application or take such action as by law authorized. Under Order III rule 6, a party is at liberty to change his advocate and when he so decides, an appropriate notice of change of advocates must be filed. An advocate who is not duly appointed to act for a party cannot be allowed to purport to file applications or documents on behalf of a party. An application filed by an advocate who is not duly appointed is an affront to the court process and is a nullity. The court can strike it out ex debito justiciae.

When an advocate who is on record in a matter realizes that there is a strange application in the file, filed by an advocate who is not duly appointed by his client, the right thing to do is to ask the court to expunge the strange document out of the record"

In view of the foregoing, the Respondent urged this Court to expunge the Applicant's Application for being bad in law as it was filed by an Advocate who is not properly on record.

12. The Respondent further contends that, even if the explanation rendered by the deponent of the Supporting Affidavit was to be considered and accepted, there is no explanation whatsoever proffered elucidating the indolent attitude exhibited by the Applicant since the filing of this suit, over thirteen (13) years ago in failing to take steps to prosecute the suit. In the event the Applicant had shown sufficient interest in this suit, it would not have taken 13 years to take steps to set down the suit for hearing. Such conduct militates against exercise of the Court's discretion to set aside orders of the court. The foregoing submission is buttressed by the decision of Justice Mutungi in the case of **Eric Oluoch Olele v Kenneth Obae [2014] eKLR** where the court had been moved to reinstate a suit dismissed for want of prosecution involving a land matter. The court stated as follows in declining to reinstate the suit:

"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."

Further, the Respondent submitted, the Applicant is guilty of indolence and laches in this matter, which are twofold:- failure to set down the suit for hearing for twelve (12) years, and failing to present this Application for a period of almost one (1) year. In the circumstances, the Applicant is undeserving of the discretion of this Court.

13. I have considered the submission of the parties. The only issue for this court to determine is whether the court in the exercise of its discretion, can allow the application.
14. A dismissal of a suit by court on matters not merit is a serious issue, and whenever it is shown to the court that valid reasons exit for a reconsideration of that dismissal, a court will most likely listen. It is the duty of this court to dispense justice. Article 159 (2) (d) of the Constitution demands that justice be administered without undue regard to procedural technicalities, while Sections 1A 1B and 3A of the Civil Procedure Act underpin the discretionary jurisdiction of this court to dispense justice. This matter is a very old matter, having been field in the year 2000. It relates to a recovery of land LR No. Nairobi/Block 72/109. This must be a matter at the heart of the Plaintiff. Parties have been in court since the year 2000. It would not be proper to dismiss the suit, and end the matter by way of procedural technicality for mistakes which are not made by the Plaintiff but by her counsel.
15. The Court of Appeal has encountered the issue and concept of *Mistake of Counsel*, and has delivered itself as follows:

'A mistake is mistake. It is not less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. … The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate'.

As per Madan JA (As he was) in Murai vs. Wainaina (No. 4) (1982) KLR

The Court of Appeal in ***Muhuru Bay Fishermen Cooperative Union Society Limited vs. Cooperative Ban of Kenya & Others (2003) eKLR*** reiterating **Murai vs. Wainaina (No. 4 (supra)** , in the face of an application pleading *Mistake of Counsel*, granted discretion to the Applicant, in the interests of justice.

16. In the light of the foregoing paragraphs of this Ruling, the Plaintiff's application herein is allowed in terms of the main prayer, and so the suit herein is herewith reinstated. The costs of this application herewith assessed at Kshs. 25,000/= shall be for the Defendant to be paid before this matter is listed for hearing.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI

THIS 17TH DAY OF APRIL 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Kiche holding brief for Bwire for Plaintiff

M/s. Amayo holding brief for Munyu for Defendant

Teresia – Court Clerk