



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 34 OF 1998

MENGO FARM LIMITED ::::::::::::::: PLAINTIFF/RESPONDENT

VERSUS

EUNAH WAMUYU KARIUKI ::::::::::::::: DEFENDANT/APPLICANT

R U L I N G

I N T R O D U C T I O N

1. On 18th November 2014 this court dismissed the Plaintiff's application dated 27th January 2013 for want of prosecution, and gave the leave to the Applicant to bring up the same application based on same facts in future if need be. The grounds upon which the said application was dismissed are contained in the said Ruling.
2. The current application is a **Notice of Motion** application dated **21st November 2014** by the Plaintiff who now seeks a review of the aforesaid Ruling and a direction that the said dismissed motion dated 27th January 2013 be reinstated and to be heard on merit.
3. The application is premised on the grounds set out therein and is supported by affidavit of **John Wananda** who is the counsel for the Plaintiff.
4. In the supporting affidavit, Mr. Wananda does not give adequate explanation as to why he failed to attend the court on the day the said application was dismissed. Instead, he provides detailed excuses as to why the application which was filed in court on 30th January 2012 was never set for hearing before it was dismissed. His excuses are that there were other applications before the court which needed to be dealt with first before setting up the said application for hearing. I do not find this submission satisfactory. The said application was an application for contempt. It was the most urgent application because it sought to restore the dignity of the court, which was alleged to have suffered disrepute when the alleged contemnor disobeyed the orders of this court. It was not the kind of application which would surrender its place on the queue. In fact this court noted the urgent nature of that application at paragraph 3 of the Ruling delivered on 18th November 2014 in the following terms:-

"I have considered Mr. Kihara's application to dismiss the said application. Mr. Wananda's application dated 27th January 2012 seeks to commit the Defendant herein in civil jail for contempt of orders issued on 6th August 1998 and on 16th November 1999. An application for contempt is normally an urgent application resorted to, to restore the dignity of the court in situations where it is alleged that a party was bringing the dignity of the court into disrepute by

disobeying orders of the court. Such an application is normally an interim application which has nothing to do with the substantive issues in dispute between the parties. It is an application which must be dispensed with as soon as possible to restore the dignity of the court to normalcy as soon as possible. It is not the kind of application which would be allowed to gather dust. The current application was filed almost three years ago. There does not appear to be an interest on the part of the Applicant to prosecute the same. I agree that there is no proper reason given for seeking adjournment on 21st October 2014 and I allow Mr. Kihara's application to have the same dismissed for want of prosecution."

5. The application is opposed by a Replying Affidavit by Charles Njunu Kihara filed in court on 10th March 2015. Both parties in their opposing affidavits appear to me to be dwelling on the merits and demerits of the dismissed application. I do think that the relevant submission at this stage should concern the failure by Mr. Wananda to attend the court on 21st October 2014 when the matter was dismissed for want of prosecution. In his very detailed supporting affidavit Mr. Wananda does not show me how a review of my order is founded. He does not point of any errors on the face of the record. He does not show me any new matters or evidence pursuant to which a review may lie. In fact, Mr. Wananda at paragraph 19 of his affidavit himself creates an error when he states that:-

". . . upon Mr. Kihara's submissions, the court proceeded to dismiss the application on the said grounds of want of prosecution."

6. That statement is a lie. After the said submissions by Mr. Kihara the court adjourned to deliver a Ruling on 7th November 2014. However, the said Ruling was not ready until 18th of November 2014. The false impression created by Mr. Wananda is that this court delivered a Ruling on the heat of the moment, upon the finalization of submissions by Mr. Kihara. The Ruling of this court was delivered 28 days after submissions and upon careful consideration. In fact the Ruling is typed and could not have been on the heat of the moment. Mr. Kihara correctly noted that despite being in court on the material day, Mr. Wananda had no courtesy to even say an apology. However, an apology is not necessary provided the Applicant can show grounds upon which under order 45 this court can issue orders of review.

7. As I have stated earlier, I have seen no error on the face of the record, I have seen no new evidence or material upon which I can review my orders, and no adequate explanation has been given as to why the matter was not prosecuted on the day it was dismissed. It must be noted for record that it is not good enough for a party to merely submit that there have been no previous adjournment on the matter, and so an application for adjournment ought to have been allowed. To the contrary, this court and the justice system now operates on the principle of the Certainty of Hearing Date and Certainty of Judgement/Ruling date. Once a court has given a date for hearing or judgment or Ruling, all parties shall act and operate with the certainty of those dates. It is now a superfluous submission that a matter has never been adjourned before, and should now be adjourned upon application. This kind of submission can only be brought up to show the good faith on the part of the Applicant for adjournment, and not as a ground for adjournment.

8. For reasons foregoing, I find no merit in the Plaintiff's Notice of Motion dated 21st November 2014 and the same is dismissed with costs to the Defendant/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 15TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Wananda for the Plaintiff

Mr. Wilson holding brief for C. N. Kihara for the Defendants

Teresia – Court Clerk