REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 109 OF 1998

J.G. BUILDERS .... APPLICANT

VERSUS

PLAN INTERNATIONAL .... RESPONDENT

R U L I N G

This is an application dated 7/5/2015 seeking *inter alia*;

1. *That the applicant's suit HCCC No 109 of 1998 which was dismissed pursuant to an order made on 11/3/2015 be reinstated for hearing and determination.*
2. *That the order dismissing the suit be set aside and or reviewed and the applicant be given an extension of time within which to set down the suit for hearing.*
3. *The cost of the suits be provided for.*

The application is supported by the affidavit of Justus Githinji and the further affidavit of Victor Adande.

In the supporting affidavit, the applicant states that on 11/3/2015 the court made an order that he should set down the suit for hearing within 30 days failure to which the suit stood dismissed. He had instructed the firm of Victor L. Adande to act on his behalf on the same day the orders were given but the said advocate was not available to attend court as the date was not convenient. Mr. Maina held brief for Mr. Adande. He agreed with the clerk of his advocate that he would visit the advocate’s office for purposes of fixing a hearing date. He went to the office of the said advocate and the clerk informed him that they would invite the defendant's advocate for purposes of fixing a date. All this time he was dealing with the advocate's clerk as the advocate was unwell.

On 11/4/2014 the clerk for Messrs Adande & Co. advocate invited the firm of Igeria & Ngugi Advocates to fix a hearing date. On 17/4/14 when the matter was supposed to be fixed for hearing, the advocates for the defendant came with a decree for signing thus effecting the dismissal of the suit. The applicant states that he honestly believed that the 30 days period was exclusive of weekends and public holidays.

He argues that the mistake of his advocate should not be visited upon him. He claims he was misled by his advocates clerk concerning the fixing of the date and mode of inviting the defendant’s advocate. The court should find that the delay was not inordinate. The breach of court order was not intentional.

In the further affidavit, the counsel for the plaintiff Mr. Andande stated that he was not present in court when the court order that the matter should be fixed within 30 days was made. Mr Maina held his brief. Soon after, he fell ill and was out of his office for several days. He later learnt that his clerk erroneously advised the plaintiff on the issue of computation of time and service.

The applicant states that in computing the time, his clerk omitted the public holidays and weekends and informed the plaintiff that the days would lapse on 27/4/15.The mistake should not be visited on the innocent litigant. There was no intention to delay the matter on the part of the applicant or his advocate.

In the replying affidavit, Mr. Githinji from the firm of Igeria & Ngugi Advocates on record for the defendant stated that he is well versed with the matter. The matter was last in court on 11/3/2015 when the court granted an adjournment as the plaintiff had appointed a new advocate. The matter was adjourned on condition that the new advocate would fix a fresh hearing date within 30 days failure to which the matter would stand adjourned. Despite the applicant being given a chance to fix a fresh date no effort was made to comply with the court order. It is untrue that the applicant served the respondent with an invitation to fix.

The plaintiff did not annex an official letter from his advocate inviting the respondent to fix a hearing date but also a keen look at the courier receipt will clearly show that the same has been officially acknowledged/stamped as received. A look at the courier receipt will show that there is no address indicated where the respondent is located. The courier receipt is an afterthought by the applicant aimed at misdirecting the court. The applicant filed this suit seventeen years ago and is not keen on prosecuting the same. The plaintiff's advocate has not availed documentary proof that that he was unwell. The advocate having received instructions from his client ought to have complied with the court order.

In absence of any prove of incapacity which barred him from complying with the court orders, the mistake should indeed be visited on his client. The applicant has not annexed any evidence of effort made before the expiry of 30 days period. The record indicates that the matter was previously dismissed on 6/2/03 and was reinstated by court on application of the applicant blaming failure of prosecution on his advocate. Should the court grant the application, the applicant should be ordered to pay the respondent’s costs.

By consent of the parties, this application was argued by way of written submissions.

The applicant in his submissions stated that it was unfair for the defendants advocate to blame the plaintiff for the delay in prosecuting the matter. The allegation that the suit has not been prosecuted for the last 17 years is misleading. Parties have previously tried to settle the matter out of court severally hence the delay. The case was active in court for the last 12 years until it was dismissed on 11/3/15.Any form of delay should be in relation to the period between 11/3/15 and the time of this application. The court should only consider whether there was delay in bringing the said application. The advocate was appointed a day before the order was made. The date was inconvenient thus the advocate did not attend court. A few days after the order for 11/3/15 was made the advocate fell ill. The advocate was diagnosed with a chronic ailment as evidenced from annexture marked as JG in the further affidavit.

The court should take judicial notice that chronic illnesses do not get away easily. It is during the period that the clerk failed to fix a hearing date. The fact that the invitation to fix was sent by courier makes it hard to prove that such invitation was tendered. The plaintiff's advocates clerk employed an erroneous method in computing time. The plaintiff relied on the following case law;

RICHARD NCHARPI LEIYAGU VS INDEPENDENT ELECTROL BOUNDARIES COMMISSION AND 2 OTHERS [2013] eKLR where the court held that "the right to hearing has always been well protected right in our constitution and is also the cornerstone of the rule of law. That is why even if courts have inherent jurisdiction to dismiss suits,this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"

HARRISON WANJOHI WAMBUGU V FELISTA WAIRIMU CHEGE & ANOTHER [2013] eKLR where the court cited the case of **BELINDA MURAI & OTHERS V AMOI WAINAINA [1978] KLR 2782** where the court describes what constitutes to a mistake. The court stated that a mistake is a mistake regardless of who commits it. The door of justice is not closed because a mistake has been committed by a lawyer who ought t know better. The court should do whatever is necessary to rectify it. The court also

cited the case of ***PHILIP CHEMOWOLO & ANOTHER V AUGUSTINE KUBEDE*** where the court held that unless there is fraud or intention to overreach,there is no error that cannot be put right by payment of costs

GHEHONA V SEVENTH DAY ADVENTIST CHURCH OF EAST AFRICA UNION [2013] eKLR where the court held that the plaintiff had given an explanation as to the delay in prosecuting his matter. Poor judgment made by counsel was the reason for the delay and the blame was squarely on her. It would be unjust for court to punish the plaintiff on the mistake of counsel.

MWANGI KIMENYI V ATTORNEY GENERAL & ANOTHER [2014] eKLR where the court held that the major issue for determination was whether the delay had been explained such that the suit ought to be reinstated for trial.

The defendant in the submissions stated that the plaintiff filled a claim against the defendant in 1998 seeking damages of ksh 2300000 for breach of contract together with interest at the rate of 30% from the date of accrual till payment in full. Five years later,the claim was dismissed for want of prosecution and the plaintiff was ordered to pay costs to the defendant. The suit was latter reinstated by the court after the plaintiff made an application. The plaintiff was directed to prosecute the case with the seriousness it deserved. The matter was finally fixed for hearing on 11/3/15 after efforts by the defendant's advocates. This was 12 years after the suit was reinstated and without any effort to prosecute the suit by the plaintiff. When the matter came up for hearing on 11/3/15 the defendants witnesses were present in court ready to testify. The plaintiff despite being aware of the hearing date informed court that he had appointed new advocate. The adjournment was granted but the plaintiff was ordered to fix the matter for hearing within 30 days. As of 11/4/15,the plaintiff had neither invited the defendant to fix a hearing date nor had he fixed a date exparte. The plaintiff's application is unmerited due to the following;

- the plaintiff has not offered any justifiable excuse as to why he has not prosecuted his claim for 17 years
- The plaintiff and his advocate are not sincere when they say that they made an effort to send an invitation to fix a hearing date addressed to the defendants advocate. He courier receipt neither bears the official address of the defendants advocate which raises a question of where the letter was delivered
- The plaintiff,s advocate explained that the reason for delay was because the advocate was ill and away from the office. Evidence of such illness was not availed
- the plaintiff's has demonstrated lack of interest in prosecuting his case,utter disrespect for court orders

The plaintiff cited the following cases;

ALLEN V SIR ALFRED MCALPINE & SONS LTD (Court of appeal Civil Division;Lord Denning MR Diplock & Salmon stated that where delay in the conduct of an action is prolonged and there is substantial risk by reason of the delay that a fair trial of the issue will no longer be possible or grave injustice will be done to one party,the court may in its discretion dismiss the action straight away without giving the plaintiff opportunity to remedy default against his solicitors negligence. It is of great importance and in the interest of justice that actions should be brought to trial with reasonable expedition not only in the interests of the plaintiff but also of the defendant.

The defendant was face with a suit seeking recovery of approximately ksh 2,300,000 together with interest at 30% from the date of filing suit. The interest has accrued in millions. The delay in prosecuting the case negatively affects the defendants operations as it is faced with increasing liability every year. From the proceedings, the plaintiff has always blamed his advocates for the delay. Despite the courts indulgence, he has refused to take responsibility for his actions. The plaintiff should bear the costs of this application.

The applicant blames his misfortune on his counsel and by extension, the advocate’s clerk. The issue of whether mistake of counsel should be visited upon a client was discussed in the Court of Appeal cases

below;

1. ***TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY VS JEREMIAH KIMIGHO MWAKIO & 3 OTHERS [2015] eKLR*** where the court cited the case of ***KETTEMAN & OTHERS VS HANSEL PROPERTIES LTD [1988] 1 ALL ER 38;*** in which Lord Griffith stated that ;

> *"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings."*

The court thus held that *"to our mind, this is the most proximate way to balance out the competing interests of both parties to the suit. That the conduct complained of in this case was committed by a clerk is immaterial, for it is the law of agency that the principal should be bound by the acts of his agent".* **(see Ahmed v. Highway Carriers [1986] LLR 258 (CAK) and also (Myers v. Elman [1939] 4ALL E.R 484)** As stated by Viscount Maughan in the Myer's case,

"...*the jurisdiction may be exercised where the solicitor is merely negligent, it would seem to follow that he cannot shelter himself behind a clerk for whose actions within the scope of his authority he is liable.... My conclusion is that Elman (the solicitor) cannot dissociate himself from the acts and defaults of Osborn (the clerk) and in what follows, I shall generally omit any reference to him and shall treat his acts as being those of his principal.****"***

The court concluded by finding that *"Hence, the mistakes of Mr. Mouko's clerk became the mistakes of Mr. Mouko....."*

2. In the case of ***THREE WAYS SHIPPING SERVICES (GROUP) LTD V MITCHELL COTTS FREIGHTERS (K) LTD [2005] EKLR*** the court held as follow;

> *"The question of advocate's mistake being visited on the client has been raised from time to time. Rt. Hon. Lord Denning M.R. in* ***"The Due Process of Law" London Butterworths at p. 93 said:-***
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> *"Whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him; as for instances when a solicitor does not issue a writ in time or serve it in time or does not renew it properly. We have seen, I regret to say, several such cases lately. Not a few are legally aided. In all of them the solicitors have, I believe, been quick to compensate the suffering client; or at least their insurers have. So the wrong done by the delay has been remedied as much as can be. I hope this will always be done."*

3) In the case of ***SAVINGS AND LOANS LIMITED -VS- SUSAN WANJIRU MURITU NAIROBI (MILIMANI) HCCS NO. 397 OF 2002*** **Kimaru, J** expressed himself as follows:-

> "*Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant.*

In the present case, the applicant alleges that the clerk from the firm of Victor L Adande misled him in

calculating the time of 30 days granted by the court within which he was to fix a hearing date. The applicant did not demonstrate that he made any reasonable effort to ensure that a hearing date was fixed within time especially after learning that his advocate was indisposed.

It is worth noting that the clerk who allegedly misled the applicant in calculating the dates did not swear an affidavit explaining what happened. The defendant submits that the delay in prosecuting the matter will greatly prejudiced them as the interest of 30% claimed by the plaintiff has accumulated over the years to a large amount.

The court in the case of ***TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY VS JEREMIAH KIMIGHO MWAKIO & 3 OTHERS [2015] EKLR*** emphasized on the need to balance out the competing interests of both parties to the suit. Considering the concerns raised by the defendant, the court should not only focus on the prejudice occasioned to the plaintiff if the suit is not reinstated but also to the inconvenience likely to be suffered by the defendant in the event the suit is reinstated.

This case was filed in court on 20/3/1998. The record shows that a number of applications were dealt with but the plaintiff has not demonstrated that he was keen in having the suit heard. The plaintiff had 2 advocates representing him at different times who he later fired. He appeared in person for quite sometime and only acquired the 3rd advocate early this year.

The suit of the applicant was dismissed on 6/2/2003 and was later reinstated through an application where he blamed his advocate for failure to prosecute the suit. After this event, it would be expected that the applicant would be pro-active in having his suit heard and determined which is not the case here.

The order granting the applicant 30 days within which to fix the date for hearing was made on 11/3/2015 when he sought for adjournment on grounds that his counsel Mr. Andande had just come on record. The court reluctantly granted the adjournment bearing in mind that the case had delayed for too long and that the delay was causing a lot of inconvenience to the defendant. For this reason he was given 30 days within which to fix the suit for hearing failure to which the suit stood dismissed.

The 30 days were to expire on the 10/4/2015. By that date the suit had not been fixed for hearing. The next action in the file was the filing of this application. The applicant after realizing that he was misled by his advocates' clerk as he claims, did not move the court immediately. His application was filed on 7/5/2015 which was about a month after expiry of the 30 days.

There was no affidavit by the clerk to confirm the plaintiff’s allegation that he was misled. The applicant claimed that his advocate was unwell for quite sometimes. It is noted that no treatment notes or medical report in respect of the counsel was annexed to the application. It is much later after the respondent had raised the issue that the applicant swore a further affidavit and annexed a biopsy result dated 29/3/2015. The results confirm that the counsel was unwell though it is not known for how long.

Notwithstanding the illness of the counsel, the applicant had a duty to use due diligence to ensure that the advocate’s office fixed a hearing date within the time limit he was given by the court. The office of the advocate was still running and his diary was available. As it was held in the case of ***SAVINGS & LOAN LTD (supra),*** a case belongs to a litigant and not to the advocate. He has a duty to pursue the prosecution of his case and to constantly check with his advocate the progress of the case. The applicant in this case knew the history of his case which has been in court for 17 years and had been dismissed earlier and reinstated. The applicant has been indolent in the prosecution case as shown by the court record. He has been holding the defendant at ransom waiting for the hearing and determination of a case that has never taken off. The applicant bears the bulk of the blame as opposed to his advocate who was unwell. I found the applicant dishonest in his allegation that he was misled by his advocate’s clerk on the computation of time. If the applicant was in doubt, he would have taken the initiative to inquire from the court registry.

I am convinced that the applicant has lost interest in his case and that reinstating it may not serve any useful purpose.

This application has no merit and it is dismissed with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF OCTOBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Andande for Plaintiff/Applicant