



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 1510 OF 1997

CORNERMOTOR WORKS LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

INTEXT CONSTRUCTION LIMITED.....DEFENDANT/RESPONDENT

RULING

The Plaintiff in an application dated 26/6/2012 seeks orders as follows:

1. *The order of this court made on 16/7/2010 dismissing the suit be reviewed, varied and/or set aside.*
2. *In the result, the Plaintiff's suit instituted on 20/7/1997 be reinstated and proceeds to hearing in the ordinary way*
3. *The Plaintiff be at liberty to apply for such further and/or other orders or directions as the Court may deem fit to grant.*
4. *Costs of the application.*

The application is premised on grounds that the suit was dismissed for want of prosecution on 16/7/2010 and therefore the Plaintiff was not afforded a chance to be heard. The Plaintiff avers that it was prevented by sufficient causes and factors beyond its control from prosecuting the matter within the prescribed time. The Plaintiff states that neither itself nor its advocates received the Notice to Show Cause why the suit should not be dismissed as provided under Order 17 Rule 2 of the Civil Procedure Rules. The Plaintiff contends that it is still keen, ready, able and willing to expeditiously prosecute the suit and that it will be greatly prejudiced if the suit is not reinstated in view of the fact that the dispute concerns land. The Plaintiff avers that the delay is not inordinate to be considered inexcusable and thus it is in the interest of justice that the order be reviewed and the suit be reinstated.

Arun Sharma, a Director of the Plaintiff swore the affidavit in support of the application on 26/6/2012. He deposed that sometimes in 2005 he developed heart complications and was under intensive medical care in Nairobi. In 2007 he travelled to the United Kingdom to seek further treatment and has been in and out of United Kingdom for the treatment which goes on to date. The deponent stated that being the Managing Director and as a result of the frequent treatments abroad, the Plaintiff was unable to communicate with its advocates appropriately so as to expedite the prosecution of the case. The deponent

stated that the Plaintiff came to learn of the dismissal of the suit after being served with an application for eviction by way of registered post sometime in November 2011. Further that the Plaintiff was not aware that the previous advocates on record had made an application to cease acting. The deponent stated that Affidavit of Service relied upon by the said firm of advocates indicates that the application was served by way of registered post which the Plaintiff never received.

The deponent reiterated that the Plaintiff did not receive a Notice to Show Cause why the suit should not be dismissed. On learning of the dismissal, the Plaintiff appointed the firm of Ibrahim, Isaak & Co. Advocates to act on its behalf and make the appropriate application but that the said firm failed to carry out the instructions timeously prompting the Plaintiff to appoint its current advocates on record. The deponent stated that the dispute herein being predicated on land, it is in the interest of justice that the issues herein be fully canvassed before Court to make a proper determination. The deponent states that he has now recovered enough to prosecute the case to its logical conclusion.

Defendant's Response

Pooran Singh Tak, a Director of the Defendant swore a Replying Affidavit on 26/7/2012 in response to the application. The deponent gave a chronology of events from the date the suit was filed to the date the Defendant served the application for eviction upon the Plaintiff following the dismissal of the suit for want of prosecution. It was his disposition that since the institution of the suit on 20/6/1997, the Plaintiff had not taken any concrete steps to set down the suit for hearing thus indicating that the Plaintiff had no interest in pursuing the matter. The deponent stated that the Plaintiff was granted temporary relief as prayed in its application dated 20/6/1997. However on 28/1/1998 when the matter was scheduled for hearing, neither the Plaintiff nor its advocates attended the hearing and as such the Court dismissed the suit for non-attendance. The suit was however reinstated upon an application by Plaintiff on 29/1/1998 but that despite the reinstatement, neither the Plaintiff nor its advocates took steps to set down the suit for hearing. Thus come 20/3/2000, the Defendant filed an application for the dismissal of the suit for want of prosecution but that it was then that the Plaintiff had appointed the firm of Mohamed Muigai & Co. Advocates to act on its behalf. The deponent stated that the Defendant accommodated the Plaintiff and by mutual consent, the matter would be fixed for hearing within 30 days failing which the suit would stand dismissed with costs.

The deponent stated that in 2005 the Defendant's advocates on record took over the matter from Mrs. Kalpana Rawal following her appointment to the bench and thereafter on 29/11/2005 made an application to dismiss the suit for want of prosecution. Subsequently on 12/6/2006 the firm of Mohamed Muigai Advocates on record for the Plaintiff filed an application to cease acting on the basis that they had not received instructions from the Plaintiff since the year 2000. The Defendant's application for dismissal of the suit for want of prosecution was set down for hearing on 25/3/2010 and following the Direction of the Court, the application together with the hearing notice was sent to the Plaintiff through registered post. The deponent stated that the said application was allowed on 20/7/2010 after which the Defendant filed an application for eviction on 22/11/2011. The deponent contended that there is no merit in the application and it is meant to delay the eviction of the Plaintiff from the suit premises. It was the deponents dispositions that the Plaintiff being a Limited liability company ought to have other Directors or employees that Arun Sharma would delegated his duties to during the period where he was under treatment. He deposed that nevertheless, prior to Arun Sharma's ailment, he would have pursued the matter but did not as evidenced in the chronology of events. The deponent stated that it followed the court processes and thus the Plaintiff was properly served of both the applications. The deponent also stated that the application had not been brought timeously having been filed over two years after the dismissal hence unjustifiable and inexcusable.

Submissions

This application was canvassed by way of written submissions. Nyachoti & Company Advocates filed submissions dated 3/7/2013 wherein counsel reiterated the contents of the application and supporting affidavit. Counsel submitted that Arun Sharma is a key witness for the Plaintiff and his constant absence and unavailability due to hospitalization in the United Kingdom would have been impractical for the

Plaintiff to kick start the prosecution and prosecute the same to its logical conclusion. Counsel referred the Court to the provisions of **Order 48 Rule 2 and Order 5 Rule 3 of the Civil Procedure Rules**, submitting that the mode of service stipulated in the cited provisions was not met. Further that there is no evidence tendered by the Process Server that he was unable to find the principal officers to effect personal service thereby resorting to service by way of registered post. Counsel cited the cases of **John Akasirwa v Alfred Inat Kimuso C.A. No. 16/1999; Filimon Afwandi Yawala v Ronald Indamuli & Another C.A. No. 9/1987; Waweru v Kiromo (1969) EALR** and submitted that the Courts have consistently held that the ideal form of service is personal service and a departure from this ideal must be based on some cogent evidence. Further that a Process Server must make more than one attempt to effect service before concluding that the Defendant could not be found.

Counsel reiterated that the Plaintiff's Director or its principal officers were not personally served with its former advocate's application to cease acting and as a result, the application was heard and determined without the Plaintiff's participation. It was counsel's submission that there is no evidence that the Order allowing the Advocates to cease acting was extracted, served upon the Plaintiff and a Certificate filed evidencing service of the order contrary to the mandatory requirement stipulated under **Order 9 Rule 13 of the Civil Procedure Rules**. Counsel submitted that the net effect of the omission is fatal to any consequent proceedings in the matter and that pursuant to the proviso of Order 9 Rule 3, unless and until firm of advocates serves the order allowing it to cease acting, they shall be considered the advocate for the party to the final conclusion of the matter. In support of this submission, counsel cited the following authorities: **Virjee and Kassam (Joint Receivers and Managers African Banking Corporation Limited) & another v Glory Properties Limited (2002) 2 KLR and Kobo Safaris Limited v About Africa Limited & Others**: Mombasa HCCC No. 681/1995. Counsel submitted that the application to cease acting triggered the chain of events in this matter leading to the ultimate dismissal of the suit thereby occasioning serious miscarriage of justice. Therefore, it was never the intention of the Plaintiff to delay prosecution of the matter as alleged.

Taibjee & Bhalla, advocates for the Defendant filed submissions dated 25/6/2013 wherein counsel reiterated the contents of the Defendant's Replying Affidavit. Counsel submitted that this application having been brought under Order 45 Rule 1 of the Civil Procedure Rules, the Plaintiff was essentially seeking for a review of an order of the Court. However, that the Plaintiff had failed to meet the threshold to warrant a review of an order of the Court, to wit, there is no discovery of new and important matter or evidence previously not within the Applicant's knowledge; there is no existence of or error apparent error on the face of the record; there is no sufficient reason; and there has been undue delay in filing the application. Counsel also stated that there was no dispute as to the Plaintiff's Postal Address which the Defendant used to serve its application for dismissal as it is the same address that the Plaintiff's previous advocates used to serve its application to cease acting and it is also the same address given by Arun Sharma the deposing Director of the Plaintiff. Counsel further referred to the Plaintiff's averments of not receiving a Notice to Show Cause why the suit should not be dismissed and submitted that there was no issuance of such notice as the suit was dismissed at the behest of the Defendant in its application dated 26/9/2007.

Counsel sympathized with the Plaintiff's Director having suffered an ailment. He however submitted that there was no evidence to show the said Director was ailing before 2010 and thus the suit having been filed in 1997 would have been heard and possibly determined had the Plaintiff been interested in prosecuting the same. Counsel further submitted that there is no evidence to show that the said Director of the Plaintiff did travel to and from the United Kingdom as alleged. Counsel submitted further that the Plaintiff has brought this application 3 years after the suit was dismissed and it has taken 1 year to prosecute the application, an indication that the Plaintiff is completely complacent and unwilling to expedite the Court process as long as he continues to remain on the disputed property. Counsel reiterated that the Plaintiff's entreaty that it is keen, ready, able and willing to expeditiously prosecute this suit is not supported by any evidence whether of the past or present which would make this Court be inclined to grant the orders sought.

Determination

This suit was instituted 15 years from the date the instant application. The Plaintiff sought and obtained temporary orders of injunction against the Defendant on 20/7/ 1997. Since that time the suit has not taken off. The Plaintiff avers it was prevented by sufficient causes and factors beyond its control from prosecuting the matter within the prescribed time. The first factor is that the Plaintiff's Managing Director suffered heart complications and sort treatment in Nairobi and later the United Kingdom and has been in and out of the country since then. The Defendant on its part sympathizes with the Director's but avers that there is no evidence to show that he has been in and out of the country as alleged. Further that the Director started ailing in 2005 but even before the ailment, the Plaintiff still failed to prosecute the matter. I have perused the Court record and noted that indeed there was no action that took place until the 23/2/2006 when an application filed by the Defendant could not be reached. There is therefore an unexplained delay from the date of institution of the suit in 1997 to 2005 when the Plaintiff's Director fell sick, a total of 8 years.

In respect to the Notice to Show Cause why the suit should not be dismissed, I have perused the provisions of Order 17 Rule 2 of the Civil Procedure Rules. This provision envisages circumstances where the Court *suo motto* exercises its discretionary power to dismiss for want of prosecution. *The purpose is to remove congestion of files in court registries by getting rid of cases which are moribund or where parties have lost interest in the litigation. It is done to enable the Court disencumber itself of records where parties are no longer interested in prosecuting suits due to loss of interest.* G.B.M. Kariuki J. (now Court of Appeal Judge) in the case of **Jairus Lichungu v Nzoia Sugar Company Ltd (2006) eKLR**. The dismissal of this suit for want of prosecution was at the instance of the Defendant and not the Court on its own motion.

The Plaintiff thus denies receipt of service of the application for dismissal for want of prosecution. I have perused the Court record and taken note that counsel for the Defendant made an application to serve the Plaintiff through substituted service since it was unable to trace its Directors to effect personal service. It should be noted that this application was made after the Plaintiff's advocates had obtained orders to cease acting. This Court (Mbogholi – Msagha J.) granted the application and directed the Defendant to effect service by way of registered post. Subsequently in the ruling, the Court found that service had been effected as directed. The Defendant on its part contends that the Plaintiff's last known address (*P.O Box 10 Athi River*) is not in dispute and in any event, the Director, on behalf of the Plaintiff in his affidavit in support of the application deposes to the same postal address. I have perused the Plaintiffs pleadings and taken note that it has since not changed its postal address to date. *The law is well settled that where the service is by registered post, then service is deemed to have been sent to the last known addressed* See **Musa & Sons Ltd & Another -Vs- First National Finance Bank & Another [2002] I KLR 581**

The Plaintiff averred that it did not receive service of its former advocates' application to cease acting and thereby the Plaintiff had no knowledge of its lack of representation all this while until it was served with an application for eviction by way of registered post. Counsel submitted at length that the Plaintiff's former advocates' action to cease acting triggered the chain of events culminating to the dismissal of the suit. It was counsel's submission that service of such an application ought to have been effected personally upon the Plaintiff's principals and that upon obtaining the order, the same be extracted, served upon the Plaintiff and a Certificate filed that the order has been served.

The Plaintiffs aver that this was not done contrary to the provisions of Order 9 Rule 13 and therefore fatal to any subsequent proceedings. On perusal of the Court record, I have taken note that the firm of **Mohamed Muigia & Mboya Advocates** came into the matter on behalf of the Plaintiff in the year sometime in March 2000 and thereafter made an application to cease acting on 9/3/2006. Though the application was allowed, there is no Certificate on record filed by the said firm evidencing service to the Plaintiff. From both the provisions of **Order 9 Rule 3 of the Civil Procedure Rules** and the authorities referred by counsel, it is evident that the said firm is still considered to be on record.

Order 9 Rule 13 of the Civil Procedure Rules:

(1) *Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party*

) has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last- known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:

Provided that, unless and until the advocate has—

a)	served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and
b)	procured the order to be entered in the appropriate court; and
c)	left at the said court a certificate signed by him that the order has been duly served as aforesaid,

he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal.

(2)	From and after the time when the order has been entered in the appropriate court, any document may be served on the party to whom the order relates by being filed in the appropriate court, unless and until that party either appoints another advocate or else gives such an address for service as is required of a party acting in person, and also complies with this Order relating to notice of appointment of an advocate or notice of intention to act in person.
(3)	Any order made under this rule shall not affect the rights of the advocate and the party as between themselves.

Noting that filing a certificate that the order to cease acting has been duly served is a mandatory requirement, I wish to point out that for the 6 years that the firm of Mohamed Muigai & Company Advocates was on record, and 2 years before that, the Plaintiff had not made any step to set down the suit for hearing. Incidentally, this is also the unexplained time, since the Plaintiff developed the heart condition in 2005. The Courts have consistently held that litigation does not belong to the Advocate but to the client. It is incumbent upon the client to follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. **See Duale Maryan Gurre v Aminal Mohamed Mahamood & another [2014] eKLR and B1-Mach Engineers Ltd- VS- James Kahoro Mwangi (2011) eKLR.** It is my view that the Plaintiff's application on the pretext that it had no idea that all this while it did not have an advocate on record demonstrates laxity on its part. Had the Plaintiff been a diligent litigant, it would be aware of the progress of its case. **Kimaru, J. in Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002** stated as follows:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's 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. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. 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.”

The application herein is made under Section 80 and Order 45 of the Civil Procedure Act and Rules, respectively. This provision gives the court discretion to review its orders where there is discovery of new and important matter or evidence previously not within the Applicant’s knowledge; there is existence of mistake or apparent error on the face of the record; or any other sufficient reason. From the foregoing, I find that there is an error apparent on the fact of the record, in that the Court ought to have regularized and ensured that the provision of **Order 9 Rule 13** have been effected before proceedings to entertain the Defendant’s application for dismissal of the suit. On that basis, I set aside the order of this Court dated 16/7/2010.

It is well over 7 years since the firm of Mohamed Muigai & Co. Advocates ceased to act for the Plaintiff. However, the requirement of the said provision is mandatory in nature, which requires the said firm to effect service and file the certificate. I therefore make the following orders:

1. *The Plaintiff shall serve this order upon the firm of Mohamed Muigai & Company Advocates within 7 days from the date of this ruling. The firm of Mohamed Muigai & Company Advocates shall within 14 days of service comply with the provisions of Order 9 Rule 13 of the Civil Procedure Rules*
2. *In the meantime, both parties shall comply with the provisions of Order 11 of the Civil Procedure Rules and the Plaintiff to set down the suit for hearing within 45 days from the date of this ruling. In default, the suit herein shall stand dismissed.*
3. *Due to laxity on the part of the Plaintiff, it shall bear the costs of this application.*

Dated, signed and delivered this 25th day of March 2014

L. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk

L. GACHERU

JUDGE.