REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 384 OF 2001

PYRETHRUM BOARD OF KENYA.....PLAINTIFF

VERSUS

SAMUEL K. KIHIU.....1ST DEFENDANT

STANLEY K. CHEPKWONY.....2ND DEFENDANT

GEORGE OLE SAYAGIE.....3RD DEFENDANT

JUSTUS M. MONDA.....4TH DEFENDANT

RULING

1. The Pyrethrum Board of Kenya *(the Plaintiff/Applicant)* in this suit is a State Corporation within the meaning under Section 2 of the State Corporation's Act *(Cap. 446, Laws of Kenya).*

2. By a Plaint dated and filed on 8th November 2001, it sought -

(a) a declaration that the Defendant jointly and severally are infringing the Corporation's Trade Mark No. 50824 – Pyrethrum Growers Association of Kenya (PGA) and the Device in class 16 (Schedule in respect of Letterheads lables and as a result damages should be awarded to the Plaintiff).

(b) an injunction restraining the Defendants whether by themselves, agents and/or servants for infringing the Plaintiffs Trade Mark.

c. ***Costs of the suit.***

d. ***Any other relief the court may deem fit to grant.***

3. An application for injunctive orders dated 15th July 2002 and filed on 16th July 2002 was not prosecuted. The Corporation took no action on the case, opening avenue for the Defendants to file and prosecute the application for dismissal of suit dated 27th October 2009, filed on 3rd November 2009. That application was heard and granted by this court on 27th February 2011. It is that order of dismissal of suit which the Board seeks to have reversed and vacated and the suit be reinstated.

4. By a Notice of Motion dated and filed on 11th April 2013 and brought under Sections 1A, 1B and 3A of the Civil Procedure Act, *(Cap. 21, Laws of Kenya)* and Order 51 Rule 1 of the Civil Procedure Rules, the Plaintiff *(Applicant)* sought, *inter alia,* the following orders-

(1) – (2) *spent*

3. ***that this court be pleased to set aside its orders of 17.02.2011 dismissing the suit for want of prosecution and all the consequential orders thereof and be pleased to reinstate the suit for hearing on its merits.***

4. ***that the costs of the application be in the cause.***

5. The Application is supported by the Affidavit of Dr. Isaac J. W. Mulagoli the Managing Director of the Plaintiff sworn on 11th April 2013 and is premised on the grounds **firstly** that, it is not clear whether the application for dismissal of the suit for want of prosecution was served upon the firm of M/s Nancy Njoroge & Company Advocates which was previously on record for the Plaintiff as the same was not annexed to the affidavit of service. If they were, then the said firm failed, refused or neglected to attend court when the matter came up for hearing of the application for dismissal or taxation of the costs. As a result both applications were heard and granted ex-parte. **Secondly** the Plaintiff only learnt that the suit had been dismissed upon being served with a proclamation by M/s Airways Auctioneers. It has always been ready and willing to prosecute this matter and now stands a great risk if its properties are auctioned on account of failure by its advocates to do their professional duties. The Plaintiff stated that it was ready to abide by such directions as to the prosecution of the suit as the court may direct.

6. The application was however opposed by Defendants who relied on the Replying Affidavit of Samuel K. Kihiu sworn on 15th April 2013. The Defendant confirmed having filed the application dated 27/07/2009 by which it sought to have the Plaintiff's suit dismissed for want of prosecution with costs. Neither the Plaintiff nor his counsel attended court for hearing of the application, which was then heard and allowed *ex-parte*. Counsel for the Defendant thereafter filed Party and Party Bill of Costs which was allowed as drawn after the Plaintiff's counsel failed to attend court for the hearing of the same despite having been served and notified of the hearing date. It was the Defendant's case that the Plaintiff has lost interest in prosecuting this matter and the only remedy available to it is in the form of damages against its former Counsel, if the said firm acted negligently in representing the Plaintiff. He therefore urged the court to dismiss the application with costs.

7. The Application was canvassed by way of oral submissions. Counsel for the Applicant submitted that the base facts of the Application were that the Applicant had engaged the firm of M/s Nancy Njoroge & Company Advocates to act for it up to the time when the suit was dismissed for want of prosecution. This firm was served with the application for dismissal and Notice of Taxation but failed to appear in court for the hearing of the same. Counsel stated that the Applicant wishes to prosecute this case, but has been let down by their Advocates on record. He stated that the court has discretion to set aside the dismissal order and relied on the case of **MAINA Vs. MURIUKI [1984] KLR 407.** Counsel also cited the holding of the Court of Appeal at Nairobi in **GEORGE ROINE TITUS & ANOTHER Vs. JOHN P. NANGURAI Civil Application No. Nai 249 of 1998 (U/R)** for the proposition that the mistakes of an advocate should not be visited upon the litigant.

8. Mr. Kipkoech, for the Defendants urged that this court should exercise its discretion in fair and just terms to all the parties. It was his submissions that the suit was filed in the year 2001, over 12 years ago and has not been prosecuted to date. The Defendants have listed this matter down for hearing on their own motion twice and even filed their list of documents before the Plaintiff. They have afforded the Plaintiff a chance to be heard, yet the Plaintiff has shown no interest in being heard.

9. Counsel further submitted that cases do not belong to Advocates but to the litigants. There is no evidence that was preferred of attempt by the Plaintiff to follow up on the matter from its Counsel and as such it would not be fair to allow the case to fall on its Counsel. The delay of 700 days from the date when the suit was dismissed to when the application for reinstatement was made was inordinate. He relied on the case of **ABRAHAM KAMUYU M'IKIRIMA & 1002 OTHERS Vs. DIRECTORS KIEGOI TEA FACTORY CO. LIMITED [2009] eKLR** where the court found a delay of 5 years in prosecuting the matter to be inordinate. It was also submitted that the Applicant had come to court with unclean hands, that public interest demands that matters be expeditiously disposed without undue regard to

technicalities. On the authorities cited, Counsel submitted that they are on extension of time and have no bearing on the matters at hand.

10. I have considered the application, the affidavits sworn in support and against it, the rival submissions of Counsel and authorities cited. The issue for determination is whether the Applicant has provided sufficient grounds upon which this court should exercise its discretion to set aside its orders dismissing the suit for want of prosecution and all consequential orders and thereafter reinstate the same for hearing on its merits.

11. In the instant case, the Defendant filed a notice of motion on 27/07/2009 wherein it sought to have the suit dismissed for want of prosecution with costs on the grounds that two years had lapsed since the matter was last in court and the Applicant had not taken any further steps to prosecute it. The application and hearing notice were served upon M/s Nancy Njoroge & Company Advocates, the firm on record for the Plaintiff, on 16/12/2010 and 5/02/2011 who acknowledged receipt by appending its signature thereon (see annexures "SK4" and "SK5a" attached to the replying affidavit), although the latter was received under protest as the notice was too short. However, no response to the application was filed and neither the Applicant nor its counsel attended court for the hearing. Consequently, the same was heard ex-parte on 17/02/2011 and allowed with costs.

12. Thereafter, the Defendant's Counsel took out his Party & Party Bill of Costs and set the same down for hearing for 13th February 2013. The Applicant acknowledges at paragraph 6 of its supporting affidavit that its Counsel was served with the said Bill of Costs and Notice of Taxation on 12/02/2012. However, no objection was filed and again neither the Plaintiff nor its Counsel attended court for the hearing. The application was therefore allowed as prayed and costs were taxed at Kshs. 289,592/=.

13. The Applicant now seeks to set aside the order of dismissal made on 17/02/2011 and all the consequential orders, in particular, the order made on 13/02/2013, taxing the Defendants' Bill of Costs at Kshs. 289.592/= and that the suit be reinstated and determined on its merits.

14. The court has unfettered discretion to reinstate a suit that has been dismissed for want of prosecution either on the court's own motion or on the application of a party. This discretion is not absolute and must be exercised judiciously on the basis of facts and legal principles which were stated by the Court of Appeal in the case of **SHAH Vs. MBOGO [1967] EA 116, was cited with approval in MAINA Vs. MURIUKI [1984] KLR 407, as follows-**

> *"Applying the principles that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."*

15. The Applicant herein states at paragraphs 5 and 6 of the supporting affidavit that its former lawyers failed to inform it of the developments of the case and steps taken to safeguard its interests. It maintained that it was not aware that the application for dismissal of the suit had been filed or that the Defendants had been awarded costs which were subsequently taxed without its participation. It only learnt of this upon being served with a proclamation notice on 10/04/2013 by M/s Airways Auctioneers who were seeking to attach its properties in satisfaction of the decree on costs.

16. It was the submission of Counsel for the Applicant that failure to attend court or respond to the applications was a mistake of Counsel previously on record for the Applicant and should not be visited upon it. Whereas the Applicant may have been prejudiced on the conduct and failures of its previous Counsel which conduct may well amount to negligence, it is my view that it is not, on its own, sufficient ground upon which the dismissal order may be set aside. The Applicant must also show cause why the suit ought not to have been dismissed for want of prosecution. It must demonstrate a willingness to have its matter disposed of expeditiously and that it is not abusing the court process by obstructing justice through delays. I am guided by the holding in the case of **NILANI VERSUS PATEL AND OTHERS [1969] EA 340.** at page 341 paragraph D-4 it is observed

"It is only too trite to say that as in every civil suit, it is the plaintiff who is in pursuit of a remedy that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the court, towards that end as soon as it is convenient by either applying for its dismissal or setting down the suit for hearing (Para. H)--- It is the client who must seek not his advocate.---(Para. 1). It is quite apparent from the judgments of the court of appeal to put it freely that it frowns on delays of this kind – situation like these are deplored.---- (Pg 342 Para. B-C) there is some special circumstances such as excessive delay. The principle on which we go is clear. When the delay is prolonged and in-excusable and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away leaving the plaintiff to his remedy against his own solicitor.---- (Pg 343 Para. H -1)---It means that if no application is made within 12 months of the court adjournment, the fact that a case has been adjourned generally gives a plaintiff a right if he chooses to do nothing. He is given complete chance under the law to remain static for an indefinite period, and be even allowed to keep the suit pending until the end of time, and there is nothing a defendant can do about it. I do not think any judicial-rule making authority could have intended such an absurd situation to exist, when it has always and still is the practice of the courts to brook no delay in bringing a case to trial. No rule making authority would wish to create such an unreasonable situation of permitting actions to hang over the head of any defendant for an indefinite period without giving him the right to move the court to have the action dismissed for want of prosecution---".

17. Having perused the proceedings in this case, I find that the Applicant has failed in this regard. This is an old matter that was filed in the year 2001. Since then the Applicant has only filed one application *(on 16th July 2002)* wherein it sought an injunction restraining the Defendants from using the trademark Pyrethrum Growers Association of Kenya (P.G.A) which application was not certified as urgent and the court directed the same do proceed in the normal manner. The Applicant seems to have then abandoned the application. Thereafter the suit was set down for hearing only 3 times the last two being at the behest of the Defendants. The last attempt to list the matter for hearing was on 15/02/2007 when a hearing date for 17/10/2007 was taken by a Mr. Dan for Kiplenge Advocates. Although there is no record of the matter having come to court for hearing on the said date, no step has been taken since by the Applicant.

18. It is clear from the above that the Applicant has been indolent and demonstrated lack of interest in prosecuting this matter. The period of 2 years from the time when the suit was last set down for hearing to the date when the application for dismissal of the same is quite inordinate, yet the Applicant has offered no explanation for the delay.

19. In addition, I do note that the there was a period of over 3 years from the time the application for dismissal was made to when Defendants' Bill of Costs was allowed. Although the Applicant has blamed the previous Counsel for failing to notify it of the pending applications for dismissal, it did not take any steps during this time to have the matter set down for hearing or otherwise have the matter determined, which steps would have obviously disclosed the existing applications and enabled it reply to them accordingly. The Applicant had a duty and was duty bound to follow up on its advocate to ensure that the suit is listed down for hearing as well as to find out the status of its case. I therefore reject the submission that previous Counsel was solely to blame for the the fact that the Applicant had no knowledge of the status of the matter and in particular the existence of the said applications whereas he has demonstrated no steps taken to follow up on its matter during the three years when the same were determined.

20. Consequently, I find that the Applicant herein has been guilty of laches and is therefore undeserving of this court's discretion. Even if the court were to set aside the dismissal order and reinstate the suit, I am not persuaded that the Applicant is keen on prosecuting the same expeditiously, having already demonstrated laxity in doing so for the past 12 years. Its actions in seeking to set aside the dismissal order, 2 years after the same was made, were prompted by the threat of attachment of its property and not the desire to have the suit determined on its merit. In addition, the Defendants stand to

suffer prejudice by having a suit hanging over their heads, which they have attempted to have determined by setting the same down for hearing on their own motion.

21. In making these orders I am fully aware that the Aplicant is a State agency, and that public money in the form of taxes will be defrayed to pay the Defendants. That would be a proper application of such funds to offset public liabilities.

22. For the above reasons I find, and hold that the Applicant's application dated 11th April 2013 lacks merit and dismiss the same with costs.

Dated, signed and delivered at Nakuru this 9th day of April, 2014

M. J. ANYARA EMUKULE

JUDGE