



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 312 OF 2008**

**DEPOSIT PROTECTION FUND BOARD**

**(SUING ON BEHALF OF EURO BANK LTD.**

**IN LIQUIDATION ::::::::::::::::::::::::::::::::::: PLAINTIFF/APPLICANT**

**VERSUS**

**FIRDOSH E. JAMAL ::::::::::::::::::::::::::::::::::: DEFENDANT/RESPONDENT**

**R U L I N G**

1. The **Notice of Motion** application before the court is dated **15th October 2013**. The application seeks the following orders:-
  1. *That the Honourable court be please to set aside the dismissal order made by this Honourable Court (Ogola, J) on 8th February 2012 dismissing the Plaintiff's suit for want of prosecution.*
  2. *That this Honourable Court do reinstate the Plaintiff's suit for hearing on its merits.*
  3. *That the costs of this application be provided for.*
2. The application is premised on the following grounds namely:-
  1. *That the suit was dismissed by this Honourable Court (Ogola, J) on 8th February 2012, pursuant to a Notice to Show Cause process under Order 17 Rule 2 of the Civil Procedure Rules, 2010 but the Defendant's counsel were never served with the Notice as required.*
  2. *Had Notice to Show Cause process been brought to the attention of the Plaintiff's counsel, the Plaintiff would have established sufficient cause why the suit should not be dismissed, as demonstrated in the annexed affidavit.*
  3. *The law donates to the court an unfettered discretion to set aside such dismissal orders, subject only to such terms as are just, and in this regard:-*
    - a. *The Applicant has a more than arguable claim against the Defendant, which it is anxious to have decided on merits, and with good prospects of success.*
    - b. *The Plaintiff stands to be substantially harmed unless the orders sought herein are granted.*
    - c. *For reasons set out in the annexed affidavit, the Defendant will not be unduly prejudiced if the orders ought herein are granted.*

- d. *There has, admittedly, been some delay in making the application for reinstatement, but for reasons set out in the annexed affidavit, the delay is not such as would disable the Applicant from relief or one that cannot be remedied by way of an appropriate order for costs.*
  - e. *The overriding objectives of this court as well as the wider interests of justice would best be served if this application is granted as prayed.*
3. The application is supported by the affidavit of **DANIEL NGACA GACUGIA** dated **15th October 2013** with its annexures.
  4. The application is opposed vide the Replying Affidavit of the Defendant dated **19th December 2012**. The Defendant also filed **Notice of Preliminary Objection** in court on **17th January 2014** where he objects to the application on the following grounds:-
    1. *That the application is incompetent, bad in law and abuse of the process of the court.*
    2. *That the court is and has been functus officio since 8th February 2012.*
    3. *That the purported orders sought are a nullity and an abuse of the court process.*
    4. *That the alleged debt accrued 6 years before the Plaintiff was filed on 11th June 2008 and the claim is therefore barred by Section 4 subsection 1 of the Limitations of Actions Act Cap 22 Laws of Kenya.*
    5. *That the Application and Plaintiff are fatally and incurably defective and the same ought to be struck out.*
  5. The brief history of the application is as follows. By a **Plaint** filed in court on **11th June 2008** the Plaintiff claims Kshs.43,381,878/= plus interests and costs owed to it by the Defendant who is alleged to have borrowed Kshs.4,000,000/= from EURO BANK LIMITED (*in liquidation*) and refused or failed to repay the same. It is alleged that at that time the Defendant was a Director in the said bank which subsequently went under. These allegations have been denied through a defence filed in court on 12th August 2008. There appears to have been little or no activity since the pleadings closed in the matter. This caused the court, pursuant to the Notice to Show Cause under Order 17 Rule 2 of the Civil Procedure Rules 2010, to dismiss the matter for want of prosecution on 8th February 2012.
  6. On the 8th February 2012 when the said Notice to Show Cause was to be heard, there was no attendance from either the Plaintiff or the Defendant or their advocates, and the court proceeded to dismiss the suit. It is that dismissal which is now being challenged through this application.
  7. I have considered the application and the opposition to it, including the grounds raised in the Preliminary Objection filed in court on 17th January 2014. In their submissions, the parties have digressed into the merits of the suit and paid scanty effort to the application at hand and why it should or should not be allowed. In my view, there is only one issue which if this court determines, will dispose off the current application. The issue is

***Whether or not the Notice to show Cause was served upon the parties, and especially, upon the Plaintiff.***

8. To answer that question I have looked at the court record. The following is evident:-
  - i. *There is no record of a Notice to Show Cause.*
  - ii. *There is no evidence that if it existed, it was served either upon the Defendant or upon the Plaintiff.*
  - iii. *The order dismissing the suit was worded as follows:-*

***“The suit within is herewith dismissed pursuant to the Notice to Show Cause under Order 17 Rule 2 of the Civil Procedure Rules 2010. I make no order as to costs.”***

9. From the above record, it is clear that the court itself was not sure that a Notice to Show Cause was actually on record. If the court was sure, the court would have recorded the date of that Notice to Show Cause. The court merely referred to it vaguely as a Notice to Show Cause without stating its date. It is possible there was no Notice to Show Cause on court file, leave alone a served Notice to Show Cause.
10. The cardinal ground upon which justice is based is that a court cannot condemn a party without giving the party a chance to be heard. There is no proof that a Notice to Show Cause was ever served upon the Plaintiff. There is no proof that it was ever served upon the Defendant. The said Notice to Show Cause cannot be the basis upon which a suit can be dismissed, regardless of the merits of the suit. Without going into the merits of the suit, the fact that the said Notice to Show Cause was never proved to have been served upon the Plaintiff is itself enough reason to allow the application. It is also noted that even the Defendant was not in court. The Defendant has not stated that it was served with the said Notice to Show Cause. If the Defendant was served, how comes the Defendant did not attend the court. The Defendant also has a duty in making sure that a suit progresses as fast as is possible. That means that in the present circumstances both parties are guilty. However, I believe that neither the Plaintiff nor the Defendant was served with the non-existent, non-dated, and non-apparent Notice to Show Cause. What transpired in court on 8th February 2012 was a visitation of injustice on the Plaintiff by this court. Accordingly, this court must lead in restoring the rights of the Plaintiff without any further persuasion.
11. The Plaintiff's Notice of Motion dated 15th October 2013 is allowed. Parties shall bear their own costs.

**DATED, READ AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Rono holding brief for Munyolo for Plaintiff/Applicant

M/s Gathera for Defendant/Respondent

Teresia – Court Clerk