



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 733 OF 2009

ESSAR TELECOM (K) LIMITED ::::::::::::::: PLAINTIFF/APPLICANT

AND

AMBER AFRICA LIMITED ::::::::::::::: DEFENDANT/RESPONDENT

R U L I N G

1. The application before the Court is the Notice of Motion dated **15th September 2014** and filed in Court on **16th September 2014**. It is expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act as well as Order 12 Rule 7 of the Civil Procedure Rules. It is also taken out under Article 159 of the Constitution and Section 3 (2) of the Judicature Act.
2. The application is seeking for orders that this Honourable Court do set aside orders of dismissal of the suit and other consequential orders issued by this Court on **11th July 2014** as well as reinstate the suit. It is based on the grounds stated in the application and is supported by the affidavits of **Eunice Otieno-Arwa** and **Arnold Baraka** both dated **15th September, 2014** and the supplementary affidavit of **Eunice Otieno-Arwa** dated **13th October 2014**.
3. The application is opposed. The Defendant filed Grounds of Opposition dated 25th September 2014 and filed in Court on the same day. There is also filed a Replying affidavit sworn by **Wanjiru Waweru** on **9th October 2014** and filed in Court on the same day.
4. The background to the application is that the Plaintiff fixed the matter for hearing on 8th July, 2014. However, on the night of 7th July 2014, Eunice Otieno-Arwa, the Advocate who has the conduct of this matter fell ill. She therefore requested Arnold Baraka to appear in Court on her behalf and take out the matter. However, Mr. Baraka misread the cause list and wrongly assumed that the matter was not listed for hearing. He thereafter proceeded to the registry to find out why the matter was not listed. She avers that Mr. Baraka was informed by the registry that the file could not be traced, upon which he concluded that the matter was not listed due to the missing file.
5. Meanwhile, the matter was called out and the Defendant applied for dismissal of the suit which orders were granted by the Honourable Court on 11th July 2014. Mrs. Arwa contends that the Plaintiff's Advocates were not aware of this eventuality. It is upon being served with the Notice of Taxation dated 19th August, 2014 that the Plaintiff's Advocates became aware of the fact that the matter had been dismissed. As stated by the deponent, they have been waiting for the diary of 2015 to be able to fix the matter for hearing as they had been informed that there were no available hearing dates in 2014.
6. It is therefore the Plaintiff's Advocates' case that their failure to appear in Court was inadvertent

- and an excusable mistake. The deponent pleads that unless the prayers sought herein are granted the Plaintiff will suffer great prejudice and injustice.
7. In his affidavit sworn on 15th September 2014, Mr. Arnold Baraka confirmed the facts as stated above by Mrs. Arwa.
 8. In its grounds of opposition, it is the Defendant's case that the explanation for non attendance by the Advocate who was sent to hold brief is not plausible. It is further the Defendant's case that there has been an inordinate delay on the Plaintiff's part in bringing the current application.
 9. In her Replying affidavit sworn on 9th October 2014, Wanjiru Waweru, a Director of the Defendant, sets out the history of this matter from the time the suit was lodged in Court. The essence of the history is to bring out the fact that there has been inordinate persistent and inexcusable delay on the part of the Plaintiff in prosecuting this suit. It is the deponent's assertion that when considering an application for reinstatement of a suit, the Court is enjoined to look at the past conduct of the Plaintiff in so far as the prosecution of the suit is concerned.
 10. With regard to the file in this matter missing, the Defendant's director avers that the said allegation has not been substantiated and is therefore an afterthought. The deponent is advised by their Advocates that the registry usually keeps a copy of the cause list. Therefore, if indeed the Advocate enquired why the matter was not listed, the registry clerks would have informed him that the matter was indeed listed and the file would have been taken to Court. This is the ideal situation and I agree with the deponent's averments which are plausible. However, the registry is operated by humans who are prone to err and in this case it is only prudent to give the benefit of doubt.
 11. In conclusion, the deponent avers that the Plaintiff has not established any valid grounds for the failure to attend Court on 8th July 2014 to warrant the reinstatement of the suit.
 12. In reply to the conduct of the Plaintiff in this matter, Mrs. Arwa averred in her supplementary affidavit sworn on 13th October 2014, that the delay in prosecuting the suit was as a result of the alleged actions or omissions of the Plaintiff's former Advocates. She avers that the Plaintiff had all along been keen in expediting the matter and that is why they changed their Advocates. I agree that a suit belongs to the Plaintiff and it is upon the litigant to get the case moving. However, the actions or omissions complained of by the Defendant leading to the delay in prosecuting this matter cannot in all fairness be transferred to the current advocates. This is because the said allegations occurred when the current Advocates did not have conduct of this matter.
 13. I have considered the application, the affidavits on record, the written submissions by Counsel as well as the authorities cited.
 14. The principles governing the exercise of the judicial discretion to set aside an *ex parte* Judgment have been restated in several case laws. In **Patel Vs EA Cargo Handling Services [1974] EA 75** the Court observed that there are no limits and restrictions on the Judge's discretion except that, if he does vary the judgment, he does so on such terms as may be just. The said discretion is intended to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought to obstruct or delay the Course of justice. See; **Shah Vs Mbogo [1967] EA 116 at 123B**.
 15. The undisputed facts are that this matter was listed for hearing on 8th July 2014 and was subsequently dismissed for non attendance. The Advocate's mistake was the failure to carefully read the cause list to ascertain if the case was listed for hearing. It is of course baffling how the Advocate failed to see the case which was among the first cases and on the first page of the cause list. He avers that his conclusion that the matter was not listed was due to his failure to notice that the matters scheduled for hearing on that day were covered in two separate segments and he mistakenly focused on the second segment only. The deponent attached the cause list in question to his affidavit.
 16. I have looked at the said cause list and yes, there were two 'segments' for Hearing. The first segment has matters listed from number 1 to 5. The second one is the last matter in that cause list at number 19. Why the Defendant chose to look at the last segment or better still the last case

listed in that cause list to the exclusion of the other cases, this Court cannot tell. It is therefore clear that the Advocate did not peruse the cause list as stated in his affidavit. For if he did so, he would not have missed the matter in the said cause list. However, I think the failure to see the said case by the Advocate is what would fit in the definition of a mistake. A mistake is a mistake. In the case of *Phillip Chemowolo & Another v Augustive Kubede [1982-88] KAR 103 at 1040 Apalo JA* (as he then was) posited as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

In this case, any prejudice caused to the Defendant can be compensated by way of costs.

17. In view of the foregoing, the Plaintiff's Notice of Motion dated **15th September 2014** and filed in Court on even date is allowed. With regard to costs, the order that commends itself to this Court is that the Defendants pay thrown away costs of Kshs.10,000/= to the Plaintiff within 15 days from the date hereof and in default the Defendant to continue with the taxation proceedings.

READ, DELIVERED AND DATED AT NAIROBI

THIS 19TH DAY OF DECEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Mutunga holding brief for Arwa for the Plaintiff/Applicant

M/s Were holding brief for M/s Odaa for the Defendant/Respondent

Teresia – Court Clerk