



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION
CIVIL SUIT NO. 64 OF 2006

VIJAY KUMAR DAVALJI KANJI GOHILPLAINTIFF

VERSUS

SURESH MOHANLAL FATANIA..... 1ST DEFENDANT

SHANTILAL KARSANDAS VARIA.....2ND DEFENDANT

TREO APARTMENTS LTD.....3RD DEFENDANT

SUNIL KUMAR POPATLAL DAVDA.....4TH DEFENDANT

AMEGY DIPAK BHATTESIA.....5TH DEFENDANT

CHUNILAL SHANTILAL KHIMASIA.....6TH DEFENDANT

JAYANTILAL JETHA HARJI PARMAR.....7TH DEFENDANT

JAYANTILAL K HARIA.....8TH DEFENDANT

MAHENDRA K PATHAK.....9TH DEFENDANT

RULING

On 15TH June 2010, **Njagi, J** dismissed this suit under the then Order 16 Rule 2(1) of the Civil Procedure Rules on the ground that no cause had been shown why the suit should not be dismissed. That provision provided:

In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

The defendants have now moved this Court by way of a Motion on Notice dated 20th June 2011 expressed to be brought under Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law by which they seek the following orders:

1. **That the order issued on 25th June 2010 dismissing the instant suit for want of prosecution be reviewed and the suit be ordered dismissed with costs for the dismissed suit to the defendants.**
2. **That the costs of this application be provided for.**

The Motion is based on the following grounds:

- a. **That the defendants or their Advocates on record were never served by the court with a Notice to show cause why the suit should not be dismissed and were thus not aware of the listing of this suit for that purpose on 25/6/10.**
- b. **That the plaintiffs' suit was utterly embarrassing and a real frustration of the defendants investment as well as a financial stress to them and it is only fair and just that the plaintiff's suit be dismissed with costs to the defendants.**
- c. **That as soon as the defendants got to know of the orders made on 25/6/2010 requisite action as will be noted from the court file was taken to pursue the issue of the defendants costs only for the court to order on 10th may 2011 that a formal application be filed.**
- d. **That the defendants stand greatly prejudiced if they are not awarded costs for the dismissed suit.**
- e. **That the defendants on their part were not indolent in having the suit dismissed for want of prosecution as will be noted from the court file.**
- f. **That it's only fair and just that the instant application be allowed.**

The same Motion is supported by an affidavit sworn by **Mahendra Pathak**, the 9th defendant herein on 20th June 2011. According to the deponent, upon perusal of the Court file on or around November 2010 with the aim of filing an application to dismiss the suit, the defendants' advocates discovered that the suit had been dismissed by the Court on the Court's own motion on 25th June 2010 but no order was made with respect to costs of the suit. The defendants' advocates then wrote a letter dated 23rd November 2010 indicating that they were not served with the requisite notice to show cause and hence their failure to appear on the date when the suit was dismissed. According to the deponent the defendants have incurred massive legal costs in defending the suit besides the suit being a frustration to the defendants' investments. The defendants' attempts to persuade the Court to award costs by way of a letter met with an advice that they ought to make a formal application hence this application. In the deponent's view, the defendants have not been indolent since they have in the past applied to dismiss the suit. Whereas they have no objection to the dismissal of the suit, it is their view, however, that the same ought to have been dismissed with costs to the defendants. Which order they would have sought had they been duly served with the said notice.

In opposition to the said application, the plaintiff on 7th November 2011 filed the following grounds of opposition:

1. **That the Defendants'/Applicants' Notice of Motion Application dated 20th June 2011 is grossly misconceived and seriously incompetent and the same should be struck out and/or dismissed with costs on the grounds that it is fatally flawed and incurably defective.**
2. **That Defendants' Notice of Motion is fatally flawed and incurably defective on the grounds that the same has not had attached to it a Certified copy of the Order or decree as is by law, mandatorily required.**
3. **That Defendants' said Application should also be struck out and/or dismissed with costs on the further grounds that the Defendants have inordinately delayed in making the same.**
4. **That the said Application should be further dismissed on additional grounds that it is tantamount to blatant abuse by the Defendants of the due process of this Honourable Court; in that it is made in furtherance of mischief and in obstruction of past and current negotiations for the amicable settlement of a business dispute by all parties who are in fact**

neighbours.

- 5. That the defendants' Application is totally devoid of merit and the only and/or best option for the Court is to exercise its discretion to dismiss the same or to strike it out with costs to the Plaintiff.**
- 6. That the document attached to the Defendant's Notice of Motion and titled "Affidavit in Support" is misconceived and incompetent and the same, is fatally and incurably defective on the grounds that the deponent has failed to depose specifically as to the authority given to him by the 3rd defendant Corporation to swear the purported Affidavit and accordingly the same should be expunged in toto from the record and hence the Defendants Application should be struck out and/or dismissed with costs.**
- 7. That this Honourable Court having dismissed the whole suit suo moto, is now functus officio and now lacks capacity or jurisdiction to entertain the Application or to grant orders as sought by the Defendants.**
- 8. That none of the parties stand to suffer any prejudice as due process is observed by this Honourable court.**
- 9. That the Application is not representative of all the Defendants as the same only reflects the exclusive, partisan and misguided views of the 3rd and 9th Defendants.**

He further filed a replying affidavit sworn by himself on 4th November 2011. According to him, the parties herein are neighbours in the same plot with a common interest in the same property which was his desire to formalise through this suit. According to him there have been negotiations between the parties with a view to settling the issues herein which negotiations will result in saving substantial judicial time and is in the interest of all parties. In his view the present application is therefore in bad faith, mischievous and designed or calculated to be an abject abuse by the defendants of the due process of the court. According to the advice receive from his legal advisers not all the defendants are lawfully or effectively represented in this application hence the same lacks merits apart from the fact that the same does not comply with the procedure and practice in the Courts of law. According to him the applicants have inordinately delayed in making the present application hence the same violates the express provisions of the law. It is deposed that the previous application for dismissal was dismissed on the ground of the on-going negotiations which ought to be encouraged pursuant to Constitutional provisions. In his view the orders sought herein will not only result in unnecessary opening up of a closed chapter but will also result in a very serious miscarriage of justice hence the application ought to be dismissed.

The general rule as to costs is provided for in **section 27** of the **Civil Procedure Act** which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

This provision has been the subject of several judicial pronouncements. In the case of Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006 the Court of Appeal expressed itself thus:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court’s view the learned Judge’s order was wrong and for the foregoing reasons, the plaintiff’s appeal succeeds as to the award of interest and costs on the principal sum awarded”.

In this case the Court in dismissing the suit did not expressly deal with the issue of costs. From the record, one cannot say with certainty that the Court’s intention was to deprive the defendants who were the successful parties in so far as the order dismissing the suit was concerned of the costs of the suit. Had the Court expressly made an order that there was no order as to costs, that would have been an exercise of judicial discretion which would ordinarily not be subject to review though it may be challenged on appeal. Looking at the record as it is one can only conclude that the failure by the Court to deal with the issue of costs must have been due to inadvertence on the part of the Court and in light of the provisions of Order 45 rule 1 of the Civil Procedure Rules as read with Section 80 of the Civil Procedure Act that would amount, in my view, to an error apparent on the face of the record. An error apparent on the face of the record, it has been held, cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. However that there is a distinction between a mere error and an error apparent on the face of the record and that where an error on a substantial point of law stares one in the face, and could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. However, an error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record neither can a view which is adopted by the Court in the original record, if a possible one, be an error apparent on the face of the record even though another view is also possible: mere error or wrong or an erroneous view of evidence or of law is certainly no ground for a review although it may be a ground for appeal. See also **Muyodi vs. Industrial And Commercial Development Corporation and Another [2006] 1 EA 243** and **Nyamogo & Nyamogo Advocates vs. Moses Kipkolum Kogo Civil Appeal No. 322 of 2000 [2001] 1 EA 173.**

The law is that it is incumbent upon judges at the stage of the hearing of an application for review to inquire fully into the correctness of the facts and that it would suffice if the court is satisfied that the facts brought up after the event are such as to merit a review of the judgement.

Section 27 of the Civil Procedure Act mandates the Court to expressly address its mind to the issue of costs and where the Court decides not to follow the general rule, the Court is required to give its reasons for not so doing. Where a Court of law fails to address its mind to a legal requirement that may constitute a ground for review as opposed to where the Court addresses its mind to the same and makes a decision thereon.

The plaintiff has, however, contended that the defendants are guilty of laches. The order dismissing the

suit was made on 5th June 2010. The present application was made on 20th June 2011 which is slightly over a year. On the face of it, that delay would be inordinate unless there is an explanation. However, it is contended by the defendants that they were unaware of the Notice. I have perused the record and I am unable to find evidence that the defendants were served with the notice. Accordingly, the reason given for delay is, in my view satisfactory. The plaintiff has further contended that since there were on-going negotiations, the Court ought not to penalise the plaintiff in costs. Whereas under Article 159(2)(c) of the Constitution, the Court is enjoined to promote alternative dispute resolution mechanisms, I am unable to find any concrete evidence of the same in these circumstances. The fact that the defendants had previously applied to have the suit dismissed lends credence to the fact that the defendants were keen to have the suit dismissed and negates the plaintiff's contention that there were such negotiations.

Accordingly I am satisfied that this is a proper case in which the Court ought to review the order made on 6th June 2010. As was held in in **Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418** the Courts jurisdiction in such cases is meant to give effect to its intention at the time the decision was made. Since there is no contrary intention manifested by the Court in dismissing the suit and as costs follow the event, I hereby award the costs of this suit to the defendants.

Dated at Nairobi this 28th day of January 2013

G V ODUNGA

JUDGE

Delivered in the presence of Ms Mutisya for the Defendants/Applicants