



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 611 OF 2009

CMC MOTORS GROUP LIMITED.....PLAINTIFF

VERSUS

DIMKEN (K) LIMITED..... 1ST DEFENDANT

DICK GITHAIGA.....2ND DEFENDANT

RULING

1. By its application dated 9th April 2012 brought under Order 17 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules as well as under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, the Plaintiff seeks the setting aside or variation of the Order made by the court on 28th February, 2012 dismissing this suit for want of prosecution. The Plaintiff also prays that the costs of this application be in the cause. The grounds in support of the application are stated on the face of the application. The main ground is that the Plaintiff's suit was dismissed by this court for want of prosecution without the issuance of a Notice to Show Cause in writing as required by Order 17 Rule 2. The Motion is supported by the Affidavit of Kefa Ombati, Advocate, sworn on 9th April 2012 and the annexures thereto.
2. It is contended that the Plaintiff's Advocate did not receive any notice in writing from the court to Show Cause why the suit should not be dismissed for want of prosecution, that had there been service of such a notice, the Plaintiff's advocate would have been able to sufficiently Show Cause why the suit should not have been dismissed. It is also contended that the Plaintiff's Advocate was not aware that the suit was fixed for notice to show cause on 28th February 2012 and therefore failed to attend court whereby the suit was dismissed for want of prosecution ex-parte. That consequently, the Plaintiff's Advocate only became aware of the dismissal of the suit for want of prosecution when they were served with a notice of taxation and the Defendants' bill of costs filed in **Nairobi Milimani HCMCA No. 154 of 2012 CMC Motors Group Ltd-v- Dimken Limited & Dick Githaiga.**
3. The Applicant has further contended that had it received a Notice to Show Cause why the suit should not be dismissed, matters that had contributed to the delay in the prosecution of the suit would have been brought to the attention of the Court. Such matters include the fact that there was a petition filed in the High Court at Milimani Commercial Courts by Equity Bank of Kenya Limited seeking for the winding up of the 1st Defendant herein in HCWUC **No. 3 of 2010 In the matter of Dimken (K) Limited.** It was argued that the Plaintiff was waiting for the hearing and determination of the winding up petition to determine how to proceed with the hearing of this suit.

- It is further contended that upon perusal of the court file of the aforementioned winding up cause, the Plaintiff's advocate could not determine the outcome of the same as the court file did not have a copy of the ruling or judgement made by the court.
4. The Applicant additionally contends that the Defendant's advocate filed an application dated 25th May 2010 seeking to strike out the entire suit, that when the same came up for hearing on 21st July 2010, the Court was informed that the parties were negotiating an out of court settlement. That the said Application is still pending before the court and the Plaintiff's Advocate could essentially not fix the case for hearing given the pending application. The Plaintiff concluded that it is keen and desirous of prosecuting its case against the defendants and it is in the interest of justice that the Plaintiff is given the chance and opportunity to do so.
 5. The Application was opposed by the Defendants through a Replying Affidavit sworn by Dick Maina Githaiga the 2nd Defendant and Director of the 1st Defendant. It was contended that the reasons advanced by the Applicant are not sufficient to warrant a reversal of the Court's decision to dismiss the suit for want of prosecution, that with regard to the issue of the winding up cause of the 1st Defendant where the Plaintiff was awaiting the determination and conclusion of **HCWUC No. 3 of 2010 In the matter of Dimken (K) Limited**, the Plaintiff should have made the court aware of the existence of such a cause and seek directions on how to proceed with this case. The Defendants admitted that there was an application dated 25th May 2010 seeking to strike out the suit but contended that the same had been adjourned at the instance of the Plaintiff. The Defendants further contended that though the parties attempted to negotiate an out of court settlement, when the matter came up for mention on 13th October 2010 to confirm whether the matter had been settled by way of consent by the parties, the Plaintiff failed to appear prompting the Court to have the matter stood over generally. Since then, the Plaintiff took no action prompting the Court to require the Plaintiff to show cause why the matter should not be dismissed for want of prosecution. Additionally, it was argued for the Defendants that when the matter came up for notice to show cause, the Plaintiff's advocate did not while the Defendant's Advocates attended and supported the motion of the court to dismiss the matter for want of prosecution. Finally, the Defendant contended that there was no provision under Order 17 Rule 2 for the setting aside an order of dismissal. The Defendants prayed that the application be dismissed with costs.
 6. I have read the Application, supporting and replying affidavits of the respective parties. I have also considered the submissions of the learned counsels. The matter before me is simple, should the Court reverse its decision dismissing the suit for want of prosecution? It is the Plaintiff's case that its Advocate did not receive any notice from the court to show cause why the suit should be dismissed for want of prosecution as mandated by Order 17 Rule 2 (1) of the Civil Procedure Rules. The said provision states as follows:-

“In any suit in which no application has been made or step has been made or step taken by either party for 1 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.” (Emphasis supplied).

7. A close scrutiny of this rule shows that the Court has discretion when it comes to dismissing a suit for want of prosecution. The rule stated that the court **“may give notice in writing”** requiring the parties to show cause why the suit should not be dismissed. The question that arises is whether in this case there was a notice to show cause that was issued in writing to the Plaintiff before the suit was dismissed. It is the submission of the Plaintiff that none was given. I have scrutinized the documents on record and I agree with the Plaintiff's assertions. There is nothing on record to show that a Notice to show cause was ever issued by the Court. Ordinarily, once a notice to show cause is issued by the Court, the same should be served upon the parties. In the present case however, none seems to have been issued in writing or at all. At the time this Court gave the Order dismissing the Plaintiff's suit for want of prosecution, the issue of whether a Notice to Show Cause was issued or served to both parties was not delved into. In the case of Nairobi **HCCC No. 1266 of 1999 Associated Warehouse Company Ltd & Others -vs-Trust Bank Limited** Azangalala J, as he then was, held that:-

“The Plaintiff’s state that they did not receive the Notice to show cause why their suit should not be dismissed. Their Advocates were also not served with the Notice.....the dismissal order was therefore made without the knowledge of the Plaintiffs or their agents. There is no affidavit of service. The ex-parte dismissal of the suit is irregular. Rule 2 (1) of order 16 presupposes service before dismissal”

It should be noted that Order 16 Rule 2(1) referred to above is now Order 17 Rule 2(1) of the current Civil Procedure Rules. I am persuaded by the sentiments of Azangalala, J in the above case. It is clear that the process of our judicial system requires that all parties before the Court should be given an opportunity to remedy their defaults before any adverse orders are made against them hence the proviso in Order 17 Rule 2 (1). In this case, the Plaintiff was not given the opportunity to show cause why its case should not be dismissed. The issuance and service of a Notice to Show Cause to the Plaintiff is of paramount importance for justice to be seen to have been done. This is so because once a suit is dismissed, the Plaintiff is forever barred from agitating its case.

8. Counsel for the Defendants however submitted that the application before me is bad law in that Order 17 Rule 2 has no provision for setting aside the dismissal of a suit. That the proper recourse for setting aside the order for the dismissal of the suit lies in appeal or review of the Court’s decision and not in the present application. I agree with this assertion. It would seem that the rule has made no provision for the setting aside of an order of dismissal of a suit. That notwithstanding however, the Courts have always minded to sustain claims rather than throwing them out on minor procedural defaults. I am therefore prepared to hold that the Court has inherent powers to set aside an order made for the dismissal of a suit for want of prosecution. As Azangalala J held in **ASSOCIATED WAREHOUSE COMPANY LIMITED (supra):-**

“The Notice to show cause why this suit should not be dismissed for want of prosecution was issued pursuant to the provisions of Order 16 rule 2 (1). I do not detect exclusion of the court’s jurisdiction to set aside an order of dismissal made under this rule.”

9. I take note of Paragraph 10 of the Applicant’s supporting affidavit where the Plaintiff makes an attempt to Show Cause why there was a delay in prosecuting its matter. There were two main reasons advanced. Firstly, that the Plaintiff was awaiting the outcome of **HCWUC No. 3 of 2010 In the matter of Dimken (K) Limited** a winding up cause against the 1st Defendant by Equity Bank Kenya Limited and secondly the Defendant’s application dated 25th May 2010 for striking out the suit. I am doubtful whether these were plausible reasons. The Plaintiff had every opportunity to bring these issues to the attention of the Court and even seek directions on how to proceed given the winding up cause against the 1st Defendant as well as the aforesaid application to strike out the suit. None of the said causes prevented the Plaintiff from prosecuting its suit. A Plaintiff should exhibit prudence in prosecuting a suit it has lodged in court. Public policy demands that the business of the courts should be conducted with expedition. I find that in the instant case, the reasons advanced by the Plaintiff for the delay in prosecuting its case may not be satisfactory. I have considered the general conduct of the Plaintiff in this case. It’s my opinion that vigilance and spirited efforts should have been exhibited in prosecuting its case.
10. Be that as it may, the Defendants did not demonstrate how the Plaintiff’s delay in prosecuting the case had occasioned prejudice on their part. Further, there was also their application to strike out the suit that was still pending. The Plaintiff’s legal advisors may have rightly or wrongly thought that the suit could not be proceeded with while the said application was still pending. For this reason, and that fact that the suit was dismissed without due notice being given to the Plaintiff, I am inclined to sustain the suit. An award of costs, in my view, will adequately compensate the Defendants for any inconvenience that they may have suffered. They will certainly suffer no prejudice by allowing the suit to proceed to hearing.
11. I will in the circumstances allow the Plaintiff’s application. The order of 28th February, 2012 by which the Plaintiff’s suit was dismissed for want of prosecution is hereby set aside, and the suit reinstated for hearing. The Defendants shall have the costs of this application and thrown away

costs of the suit. This suit should now be fixed for hearing on priority basis.

DATED and DELIVERED at Nairobi this **11th** day of **February**, 2013

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A. MABEYA

JUDGE