



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 636 of 2004**

**BURNABY PROPERTIES LIMITED.....PLAINTIFF**

**VERSUS**

**SUNTRA STOCKS LIMITED.....DEFENDANT**

**R U L I N G**

1. On 23<sup>rd</sup> January 2012, this suit was dismissed for want of prosecution as no cause had been shown as to why the same should not be dismissed. Before then, the suit had last been in court on 18<sup>th</sup> September, 2007 when the Plaintiff was granted leave to amend its Plaint, file and serve the same to the opposing party. The Defendant was also granted leave to amend its Defence and serve the same to the Plaintiff within 21 days from the date of service of the amended Plaint. On 21<sup>st</sup> September, 2007 the Plaintiff filed its Amended Plaint. The Defendant subsequently filed its Amended Defence on 6<sup>th</sup> November, 2007.
2. On 15<sup>th</sup> March 2012 the Plaintiff filed the present motion dated 14<sup>th</sup> March, 2012 under Sections 1A, 3A, 80 and 100 of the Civil Procedure Act as well as Order 51 Rule 1 of the Civil Procedure Rules seeking to set aside the order dismissing the suit for want of prosecution and for the suit to be reinstated for hearing and determination on merit. The grounds in support of the application were outlined on the face of the motion. In support of the motion were affidavits of Joseph Louis Onguto, Advocate for the Plaintiff and his court clerk Simon Mbinda sworn on 14<sup>th</sup> March, 2012, respectively. The main ground was that the Plaintiff and its Advocates were never served with the Notice to Show Cause for the dismissal of the suit. It was also averred that between the years 2008 and 2010 the Plaintiff attempted to list the case for hearing no less than six (6) times but on all occasions, no date was available. Further, it was contended that in the year 2009 the court file went missing prompting the Plaintiff's Advocates to seek to apply for the reconstruction of the Court file. It was also contended that the Plaintiff's Advocate's Court Clerk, Mr. Simon Mbinda was unable to fix the case for a hearing date in the year 2011 for the reasons that the Court diary for that year was full and that the Court registry staff advised that priority for hearing dates was for matters filed prior to 2002.
3. Mr. Simon Mbinda also deponed that it was in February, 2012 when he was attempting to fix the suit for trial that he discovered that the suit had been dismissed for want of prosecution. For the foregoing reasons, the Plaintiff contended that it had not been indolent and that it was still interested in prosecuting the suit and the orders for dismissal should therefore be vacated and set aside.
4. In opposition to the Application, the Defendant filed a Replying Affidavit sworn by Fredrick Ngatia, Advocate for the Defendant, sworn on 23<sup>rd</sup> April, 2012. In it, it was contended that the suit was filed on 23<sup>rd</sup> November, 2004 with the pleadings closing on or about March 2005. That since 9<sup>th</sup> November 2006, the Plaintiff has not taken any steps to prosecute the suit. It is further contended that it was misleading for the Plaintiff's Advocate to state that he had attempted to list the case for hearing no less than six (6)

times but unable to secure a court hearing. Mr. Ngatia swore that the Plaintiff's firm did not attend the Court Registry for fixing of the case for the hearing despite them having sent invitations to his firm. It was contended for the Defendant that the assertion that the Plaintiff's advocate was unable to secure a hearing date for 3 years was fallacious, and the only explanation for the inordinate delay was the fact that the Plaintiff had lost interest in prosecuting the matter. That arising from the inordinate delay, the Defendant was greatly prejudiced given that material witnesses have since left its employment and it would therefore be difficult to locate such witnesses and procure their attendance in Court. That in view thereof to set aside the dismissal orders would prejudice the Defendant. Miss Nyaga learned Counsel for the Defendant referred to the cases of **SHEIKH -Vs- GUPTA (1969) EA 141, CHARTERHOUSE LTD -Vs- NATIONAL MEDIA HCCC NO. 1258/04 (UR) AND ALLEN -Vs- SIR MCALPINE (1968) 1 ALL ER 561** in support of the Defendants position. Counsel urged that the application be dismissed.

5. I have read the Application and the Affidavits on record. I have also considered the oral submissions of the learned counsels and the authorities cited by the Defendant. I think the principles applicable in an application to set aside dismissal orders are that the court should consider the length of the delay, if the delay is inordinate whether the delay has been explained. Further, the court has to consider if the delay has caused any prejudice to the Defendant.

6. The first issue that was raised by the Plaintiff was that of notice. It is not in contest that no notice of dismissal was served on the parties by the court. Indeed upon perusal of the Court record, all the four copies of the Notice to Show Cause why the suit should not be dismissed dated 23<sup>rd</sup> December, 2011 were lying in the file. On the face of the Notice, there is a comment probably by the court process server that the Notice was not served on the parties as there was no physical address given by the Deputy Registrar. The comment was dated and signed on 20<sup>th</sup> January, 2012. The Court is thus satisfied that the Parties had not been duly served with the Notice to Show Cause why the suit should not be dismissed. This would explain why no party appeared during the hearing of the same on 23<sup>rd</sup> January 2012, thus prompting the court to dismiss the suit ex parte.

7. Be that as it may, the court has to consider whether if the notice had been served the Plaintiff would have shown cause. Firstly, the period in question is 2007 and January, 2012, approximately five (5) years. To my mind that is inordinate delay. Has the delay been explained? This suit was filed on 23<sup>rd</sup> November, 2004, which is more than 8 years ago. The pleadings closed on 6<sup>th</sup> November, 2007. It would seem that no activity took place between 2008 and 2010 but the Plaintiff claims that there were varied attempts to have the matter fixed for hearing to no avail. There was also the assertion that the Court file had disappeared in 2009 and the Plaintiff had sought to have the same reconstructed. Counsel for the Defendant contended that no step had been taken since November, 2006 and that the reason why no dates were taken was because the Plaintiff failed to attend court on the fixing date despite having sent invitations. Two issues arise from this contention. I have perused the record and have noted that contrary to Mr. Ngatia's contention that no step had been taken since 9<sup>th</sup> November, 2006, there were steps taken on 14<sup>th</sup> June, 2007, when the application for amendment was filed, 18<sup>th</sup> September, 2007 when the said application was heard and allowed, 21<sup>st</sup> September, 2007 when the amended Plaint was filed and 6<sup>th</sup> November, 2006 when the Amended Defence was filed. Accordingly, the factual statement that no step had been taken since November, 2006 was misleading.

8. On the issue of non-attendance on the fixing dates, Mr. Onguto did not assist the court. However, the record would show that on 23<sup>rd</sup> March, 2009 when the matter came up for fixing, someone by the name Vaita from the firm of J.L Onguto Advocates for the Plaintiff attended court but no date was given. However, that entry has been cancelled and no reason has been given. Further, the Defendants counsel has admitted having received several invitations by the Plaintiff's Advocates. Indeed, the Plaintiff produced six (6) copies of such invitations for the period April, 2008 and February, 2012. All of them appear to have been received by the Defendant's Advocates and the court. They were not disputed. That being the case, if the representative of the Defendant's Advocates appeared at any such date, why didn't he/she take a date for the suit? Didn't Order 16 Rule 2 of our previous Civil Procedure Rules require both the Plaintiff and the Defendant to take steps to list a suit for trial? I am persuaded to

believe the Plaintiff's explanation that on the invited dates, either the file was missing or there were no dates available. Indeed the Plaintiff's Advocates seems to have complained to the Deputy Registrar on 11<sup>th</sup> November, 2011 and 2<sup>nd</sup> December, 2011 of the missing court file. Although the court received those two letters, they seem to have not been responded to. All these, in my humble view, cannot be said to be conduct of an indolent litigator. Had the court responded to the request to reconstruct the court file probably then, we could have judged the Plaintiffs attitude, conduct and position differently. Now it may not be so.

9. Further, it is not lost to the court that in the past there were instances when there was an acute shortage of judges in the Commercial Division of this court that to get a date for hearing was an uphill task for litigants.

10. The Defendant has contended that as of yet, the matter is still not ready for hearing as there are no documents, witness statements nor list of agreed issues filed. The Plaintiff, in response to this, submitted that there are some cases that have been heard without necessarily invoking Order 11 of the Civil Procedure Rules. On my part, I am not aware of such instance and I think it is an ill informed response. If other litigants have been insensitive and unresponsive to the requirements of the law, that does not allow the present plaintiff to act as such.

11. The Defendant contended that it shall be greatly prejudiced if the order for dismissal is vacated as it would be difficult to access its witnesses as most of them have since left its employment. In the case of IVITA –VS-KYUMBU (1984) KLR 441 it was held that the Court should consider the issue of prejudice as well as the excuse for the delay. I agree with the sentiments of Hon. Odunga J in the case cited by Miss Nyaga of CHARTERHOUSE BANK LIMITED AND ANOTHER -Vs- NATION MEDIA GROUP AND ANOTHER HCCC 1238 OF 2004 [2012] eKLR on the issue of prejudice. However, I note that in that case, there was delay of seven (7) years which was not explained. In the instant case, I have examined the reasons advanced by the Plaintiff for the delay and I am satisfied that they are genuine. The allegation that the material witnesses have left the employment of the Defendant fell from the lips of Counsel and not the Defendant itself. The Counsel did not disclose how he knew of that fact. How can the court take that fact as true yet it was not stated by a person who can give direct evidence of the fact? I am afraid I cannot properly rely on it. In this regard, I am inclined to sustain the suit rather than terminate it at this stage. I am convinced that if the Notice to show Cause had been properly issued to the Plaintiff and the Plaintiff attended court on the date of dismissal and given the present explanation, the suit may not have been dismissed.

12. The upshot is that the application is merited and I allow the same on the condition that the Plaintiff shall forthwith take steps to complete pre-trials within 90 days and thereafter list the suit for trial. The costs of the application is awarded to the Defendant in any event.

13. DATED and DELIVERED at Nairobi this 12<sup>th</sup> day of February, 2012

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**A. MABEYA**

**JUDGE**