REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Case 1766 of 2000

ALCON HOLDING LIMITED……..……...….....……..... PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK……...…….DEFENDANT

RULING

Order 12 Rule 3 of the Civil Procedure Rules provides:-

"3.(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court , only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."

A suit means any proceedings commenced in any manner prescribed thereby it includes an application. That being the case, if only a respondent appears on the date fixed for a hearing of an application, the application **shall** be dismissed. The rule is in mandatory terms that if the suit or application is not dismissed, the Court **MUST** give reasons for failure not to have dismissed such a suit or application. That is how serious the law takes the issue of non-attendance on the date of the hearing. The law therefore presupposes that once a matter has been fixed for hearing unless there is very good reason which must be recorded, if the Plaintiff or applicant fails to attend, the suit or application MUST (due to the use of the term "shall") be dismissed – unless there is very good which must be recorded. The Court's discretion is taken away by the term "shall".

On 3rd September, 2010, the Defendant made an application to dismiss the Plaintiff's suit for being a nullity and for being vexatious, scandalous and otherwise an abuse of the process of the court. That application came up for hearing on 28th October, 2011 when, however, the Plaintiffs counsel applied for adjournment to be able to put in additional materials through a Supplementary Affidavit. The application was adjourned to the 14th November, 2011 in the presence of both Counsel for the Plaintiff and Counsel for the Defendant.

On 14th November, 2011 when the application was called out, only the counsel for the Plaintiff/Respondent was present. Counsel for the Defendant being absent, the Plaintiff's Counsel applied

for that application to be dismissed for non-attendance. The Court by virtue of the provisions of Order 12 Rule 3 aforesaid, dismissed the Defendants application dated 3rd September, 2010 with costs to the Plaintiff.

On 15th December, 2011, the Defendant filed a Notice of Motion under Sections 1A and 3A of the Civil Procedure Rules for the following orders:-

1. That this Honourable Court be pleased to set aside the order of Honorable Justice Mabeya made on 14th November, 2011 dismissing the Defendant's Notice of Motion Application dated 28th October, 2010.

2. That the Defendant's application dated 28th October, 2010 be reinstated and fixed for hearing inter partes.

3. That the costs of this application be provided for."

The Defendant set out a total of nine (9) grounds in the body of the motion. Some of the grounds were:-

"(iii) THAT based on the foregoing, the Applicant filed the application dated 28th October, 2010, seeking to dismiss the Plaintiff's suit for being a nullity and/or being vexatious, scandalous and otherwise an abuse of the court process and/or for want of prosecution.

(iv) THAT when the said application came up for hearing on the 28th October, 2011 the Applicant was ready to prosecute the said application but the matter could not proceed at the instance of the Plaintiff/Respondent who sought leave to file a further affidavit.

(v) THAT the court granted leave to the Plaintiff/Respondent to file a further affidavit whereupon the matter was adjourned to 15th November, 2011. The Applicant's Advocate proceeded to indicate in his diary that the matter was fixed for 15th November, 2011.

(vi) THAT the matter appeared on the Cause list for 14th November, 2011, and the advocate for the applicants failed to attend because he did not check the cause list for that day since he expected the matter to come up on 15th November, 2011.

(vii) THAT it appears that it is either the court that made a mistake in listing the matter on 14th November, 2011 or it is the Applicant's Advocate who did not hear correctly the date fixed by the court and consequently entered the wrong date in his diary.

(viii)THAT whatever the case it is trite law that in such circumstances as outlined herein above, it is only fair and just that this court grants the orders sought herein.

The said application was also supported by the Supporting Affidavit of Jotham Okome Arwa of 13th December, 2011 in which he averred that the Applicant's application dated 28th October, 2011 came before me on 27th October, 2011 for hearing when the Plaintiff's advocate applied for leave, which was granted, to file a further affidavit, that the matter was adjourned to 15th November, 2011, that however, the matter was listed for hearing on 14th November, 2011 when the Defendant's Advocate did not look at the cause list, that he had however diarized the same for 15th November, 2011 and he produced a copy of his diary to that effect, that it is either the court which made the mistake in listing the matter on 14/11/11 or the Applicant's advocate who did not hear correctly the date fixed by the court.

Mr. Juma, learned Counsel for the Defendant/Applicant submitted that it may be that Mr. Arwa confused the dates to 15th November, 2011, that if it was Mr. Arwa's mistake, then the same is excusable and the client should not be made to suffer for the same, that the many hearing notices exhibited in the Plaintiff's

Affidavit were evidence of the Plaintiff's intention and interest in listing the matter for hearing, that the failure to attend on the 14th November, 2011 should be executed.

The Plaintiff filed a Replying Affidavit by Davinder Singh Hanspal sworn on 13th January, 2012 wherein he swore that it was the Defendant's several applications that had delayed the hearing of the suit for over a decade now, that the deponent of the Replying Affidavit Mr. Darshan was present in Court on 28th October, 2011 and that it is not true that the court made any mistake to list the matter on 14th November, 2011, that the said 14th November, 2011 was fixed by the court after the respective Advocates had compared their diaries, that the application was incurably defective and an abuse of the court process, that for the ends of justice the court should invoke sections 1A and 3A and fix the matter for trial.

Mr. Athuok, learned Counsel for the Plaintiff submitted that the Defendant is in the habit of making mistakes that is why it had indicated that the application that was to be reinstated is dated 28th October, 2011 which the Plaintiff is unaware of, that due to this recurrent mistakes the application before court should not be entertained. It should be dismissed.

I have considered the Affidavits on record, and the submissions of counsel. Order 12 Rule 7 provides that:-

"7. Where under this order Judgment has been entered or the suit has been dismissed, the court, on application may set aside or vary the Judgment or order upon such terms as may be just."

Under this rule, which the applicant has brought the application dated 13th December, 2011, the court's discretion is perfectly clear. But as is usual, when the court has to exercise its discretion, it has to do so judiciously.

In this matter, the court is being asked to exercise its discretion and set aside its order of 14th November, 2011 and reinstate an application dated 28th October, 2010. I have perused the entire record, I have not seen any application dated 28th October, 2010. Indeed the plaintiff had indicated in its Replying Affidavit as well as its Counsel's submissions that there was no such application dated 28th October, 2010, referred to in the application. The Defendant never applied either formally or informally, which is allowed by law, to amend its application and indicate the correct application that was dismissed on 14th November, 2011. To my mind, therefore, there being no application dated 28th October, 2010, that was dismissed on 14th November, 2011, or any other day, I consider as futile to exercise my discretion to reinstate a non-existent application. Accordingly, on that ground alone, I would dismiss the Defendant's application dated 13th December, 2011.

Even if the Defendant had gotten it right and stated that it is the application dated 3rd September, 2010 that the Defendant wanted reinstated, the matters the court will address to in exercising its discretion are the merits of the application sought to be reinstated, the reasons for non attendance, the delay in making the application and the overall effect of the order sought.

On the merits of the application, I have perused the record and I have noted that on 31st March, 2010, Hon. P.M. Mwilu J had dismissed the Defendant's application brought under Order XXXIX Rule 4 of our former Civil Procedure Rules. In that application one of the issues and grounds the court considered is to be found at page 4 of the ruling as follows:-

"Counsel also took issue with the Plaint which was filed without summons to enter appearance and prayed that the suit be dismissed on that account."

At page 5 of the ruling, the court observed and held:-

"The issue taken at the hearing about the summons to enter appearance must be considered in light of

the participation of the Defendant in the process of the suit. They have actively participated even though they have never entered a defence. And indeed they have never made an application to dismiss the suit as being improper. They were served with the Plaint in 2000 and to date, they have not sought to deal with the Plaint. ……

I shall not dismiss the suit. I shall endeavour to render substantive justice."

That ruling was no appealed against. One of the grounds in the motion of 3/9/10 for its dismissal read:-

"b.That since the year 2000, when the Plaintiff brought this suit against the Defendant, they have never taken out nor served on the Defendant summons to enter appearance as mandatorily required by law."

That ground in my view was res-judicata. Having being fully argued before Hon. Mwilu J and a determination made, it would not have been open for me to re-look at it there having been no appeal or review against the decision of Mwilu J. Therefore, the merit and success of the motion of 3rd September, 2010 may be doubtful.

As regards the reasons for non-attendance, the Defendant is not coming outright to state that its counsel was either negligent or mistaken. It has held to the fact that either the court was wrong in listing the matter on 14th November, 2011 or that probably its counsel was mistaken. With utmost respect, there cannot be two (2) ways about it. Mr. Arwai who swore the Affidavit should have perused the record and confirmed that the court had on 28th October, 2011 correctly fixed the matter for hearing on 14th November, 2011 before proceeding to swear the Supporting Affidavit. For him to swear that either the court was wrong in listing the matter on 14th November, 2011 or he was mistaken for having diarized the matter on 15th November, 2011 is an attempt to escape responsibility. The dismissal was on 14th November, 2011, he swore the Affidavit on 13th December, 2011. His attempt to escape responsibility is not being candid with the court and the court will be slow in accepting the alleged explanation put forward. Had he perused the record soon after 14th November, 2011, he would have confirmed that the court had not made any mistake in listing the matter on 14th November, 2011. Then he would have properly sworn his Affidavit in Support. Leaving it on probability, I think is not proper. It does not amount to being candid with the court especially when what is sought is a discretionary remedy.

In any event, there has been no explanation as to the delay in filing the application from the said 15th November, 2011, when the Defendant should have discovered that its application had been dismissed to the 15th December, 2011 when the present application was filed. In my view, 30 days was inordinate delay. If there was genuineness in the making of the application, the same would have been filed soon after discovery that the application dated 3rd September, 2010 had been dismissed. In my view therefore, the application has been brought to delay the disposal of this suit.

Finally, if I reinstate the application dated 3rd September, 2010, which order has not been sought, I will be delaying the hearing and disposal of this suit. That will be contrary to the spirit and intention of Section 1A of the Civil Procedure Act which requires expeditious prosecution and disposal of suits.

In the premises, the Defendant's Notice of Motion dated 13th December, 2011 is hereby dismissed with costs.

Dated and delivered at Nairobi this 10th day of February, 2012

A.MABEYA

JUDGE