



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 356 OF 2005**

**D. CHANDULAL K. VORA & COMPANY LTD .....PLAINTIFF**

**VERSUS**

**KENYA REVENUE AUTHORITY..... DEFENDANT**

**RULING**

1. This is the plaintiff's notice of motion dated 23rd February 2012. It is expressed to be brought under order 45 rule 1 and sections 1A, 1B and 80 of the Civil Procedure Act. The plaintiff prays that the order of court of 10<sup>th</sup> February 2012 dismissing the suit be reviewed or set aside. The principal grounds are set out in the annexed affidavit of Michael Mubea of even date.

2. The plaintiff says that it was not served with the notice to show cause for dismissal. Its counsel Michael Mubea received a text message from his law pupil that the matter was listed for dismissal. He appeared before the court and sought to show cause why the matter should not be dismissed. He explained that the plaintiff had tried to fix the suit for hearing in January and February 2012. He concedes in his affidavit that in the year 2010 and 2011 attempts to fix the suit for hearing were made but no date was taken. The matter had earlier been fixed for hearing on 1<sup>st</sup> October 2009 but was not listed. The plaintiff had filed its list of documents way back on 18<sup>th</sup> January 2007. All those attempts to fix the matter for hearing are captured by annexures **MM2**, **MM3** and **MM4** to the supporting affidavit. In particular, the plaintiff say that as evidenced in annexure marked **MM5**, the defendant had conceded to the plaintiff's claim. The plaintiff thus implores the court, in the wider interests of justice to review its order dismissing the suit.

3. The defendant contests the motion. The defendant avers that the plaintiff took the risk of showing cause on 10<sup>th</sup> February 2012 instead of filing a formal affidavit. The defendant avers that the same arguments presented to court then are now being regurgitated. It was also contended that this is an old suit; the delay to prosecute is inordinate; and that the plaintiff has not been keen to prosecute it. The defendant further contended that there was no evidence to show the court file was missing or misplaced. Regarding the offer to compromise the suit, the defendant stated the plaintiff declined it. Lastly, the defendant submitted that it would be prejudiced as it may not get witnesses or documents in view of the age of the claim.

4. I take the following view of the matter. It may be true that the plaintiff had not been served formally with the notice for dismissal. But his counsel became aware through his law pupil Noreen Omondi. He attended to the notice to show cause. The plaintiff's counsel could have applied to adjourn the notice to show cause. He chose instead to reply to it orally and on the merits. He thus waived his immediate right

to file a formal reply or affidavit to raise the issues he now depones to. The court, upon consideration of the matter and for the reasons on the record, was of the view that no sufficient cause was shown under order 17 rule 3 of the Civil Procedure Rules 2010 and dismissed the suit.

5. I have studied the court record in this matter and the contested positions taken by the parties. This suit was first filed on 29<sup>th</sup> June 2005. That is nearly seven years ago. Defence was filed on 5<sup>th</sup> August 2005. The plaintiff freely concedes that the suit has *never* proceeded for hearing. The plaintiff filed an application to strike out the defence. That application dated 25<sup>th</sup> August 2005 was dismissed on 28<sup>th</sup> September 2006 because the plaintiff failed to attend court. To be fair to the plaintiff, his lawyer sought adjournment on that day which was refused for lacking merit. The lawyer holding the brief had no instructions to proceed. So the application was dismissed.

6. On 13<sup>th</sup> November 2007 the suit was stood over generally. On 12<sup>th</sup> June 2008, the plaintiff's counsel informed the court that the parties were settling the suit. That date had been taken by the plaintiff. The matter was taken out to a mention date. A new date for hearing was taken for 1<sup>st</sup> October 2009. But on 31<sup>st</sup> July 2009, none of the parties attended the call over before the deputy registrar. The matter was thus taken out. So when Mr. Mubea depones at paragraph 9 that "for some reason the matter was not listed in the cause list of 1<sup>st</sup> October 2009" he is not entirely candid.

7. I do note that the letters marked "MM 2" to "MM 4" contain letters inviting the defendant to take hearing dates. The truth of the matter is that no date was subsequently fixed. Accordingly the last concrete action on the file or step was on 27<sup>th</sup> January 2009 when the date of 1<sup>st</sup> October 2009 was taken. A letter to the opposite party to fix a date is not the kind of step contemplated at order 17 of the Civil Procedure Rules 2010. It must be a concrete step to progress the matter to hearing. In Mukisa Biscuit Manufacturing Vs Westend Distributors [1969] E A 696, the court's inherent power to dismiss a suit under such circumstances was well settled.

8. The applicant has chosen to come for review under sections 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act reads as follows;

*Any person who considers himself aggrieved –*

(a) *by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

(b) *by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

Order 45 rule 1(1) is *pari materia* with section 80 and provides;

1. (1) *Any person considering himself aggrieved –*

(a) *by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

(b) *by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important mater or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

From a plain and natural meaning of the words of the law, an application for review is open to a person aggrieved by a decree of this court and who is entitled to an appeal to the Court of Appeal but has not

preferred such appeal or who holds a decree or order from which no appeal is allowed by the Act. It is thus a unique and special power of this court. For an application for review to succeed, it must be brought without delay, it must be on the basis of either new and important evidence not available at the time of trial, or on account of mistake or error on the face of the record, or for other sufficient cause. Those are the parameters set by the authorities. And the authorities abound including Origo & another Vs Mungala [2005] 2 KLR 307, Kisya Investments Ltd Vs Attorney General and another Civil Appeal No 31 of 1995 (unreported), Refrigeration Contractors Ltd Vs Lieta [2005] KLR 506, Kuria Vs Shah [1990] KLR 316 and M'Anthaka M'Mwoga Vs M'Boore [2006] eKLR.

9. I have wracked my mind and scratched my head and I do not see any new evidence in the affidavit of Mr. Mubea on the record. Even with regard to the settlement or proposed compromise of the suit, the parties had told the court way back on 13<sup>th</sup> November 2007 that they were settling. It was not done. I have not seen any error on the face of the record of 10<sup>th</sup> February 2012. In sum, no sufficient cause to warrant a review has been laid before the court.

10. I have stated that this suit dates back to the year 2005. In the decision in Fitz Patrick Vs. Batger & Co Ltd [1967] 2 ALL ER 657 Lord Denning delivered himself thus;

*“It is the duty of the plaintiff’s advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. Just consider the times here. The accident was on 13<sup>th</sup> December 1961. If we allowed this case to be set down now, it would not come up for trial until the end of the year. That would be six years after the accident. It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution”.*

11. Again, with the coming into force of sections 1A and 1B of the Civil Procedure Act as read together with articles 50 and 159 of the constitution, it is incumbent on the court to do substantial justice to the parties. The overriding objective therein enjoins this court to expedite its business and to utilize judicial resources in an efficient manner. The dictates of justice remind me that justice is a two way street. True, the plaintiff would wish to be reinstated to the seat of justice. And there are some authorities in its support. See Francis Githinji Karobia Vs Stephen Kageni Gitau [2006] e KLR. But the wider interests of justice must also look at the defendant. The overriding objective to do justice requires that the defendant, 7 years later, be freed from the inert grip of the plaintiff. When a matter is not prosecuted for all of those 7 years, I agree with the defendant that it would be prejudiced in getting a fair trial.

12. For all of those reasons, I order that the plaintiff’s notice of motion dated 23<sup>rd</sup> February 2012 be and is hereby dismissed. Costs are at the discretion of the court. As the original notice to dismiss the suit was taken out *suo moto* by the court and no costs were then ordered, I order that each party shall bear its own costs.

It is so ordered.

**DATED and DELIVERED at NAIROBI** this 30<sup>th</sup> day of April 2012.

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

Ms Thiaka for Mubea for the Plaintiff.

No appearance for the Defendant.