



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 559 OF 2005

KENYA SUGAR BOARD PLAINTIFF

VERSUS

NDUNG’U GATHINJI DEFENDANT

RULING

1. I have before me the plaintiff’s notice of motion dated 23rd February 2012. The plaintiff prays that the order of court of 20th December 2011 dismissing the suit be set aside. The motion is expressed to be brought under section 3A of the Civil Procedure Act and order “L” rule 1 and 2 of the Civil Procedure Rules. The Civil Procedure Rules 2010 have no order titled “L” but I will entertain the assumption it refers to order 50. Even then, it is not clear how order 50 would support the present motion. I will revisit that matter later.
2. On 20th December 2011, the suit was listed down for hearing. Neither the plaintiff nor its counsel attended court. The defendant, represented by Mr. Nzamba Kitonga, applied to have the matter dismissed. The defendant was not admitting to any part of the plaintiff’s claim. The defendant however had a counterclaim. After satisfying itself that the date had been taken by the plaintiff, the court dismissed the plaintiff’s suit under order 12 rule 3 of the Civil Procedure Rules.
3. The plaintiff should thus have moved this court under order 12 rule 7 for reinstatement of its suit. But that may be a matter falling under the general rubric of form and technical rules. I am prepared to disregard it in view of the overriding objective to do justice set out at sections 1A and 1B of the Civil Procedure Act. But as I said at the beginning, it points to the tardy manner and poor preparation of the motion by the plaintiff. It has been oft repeated that procedural rules are handmaidens of justice. They do not exist in a void and parties must endeavour to follow them to expedite justice.
4. The grounds put forth in the motion are that the plaintiff has been keen to prosecute the suit; and that failure to attend court on 20th December 2011 was that of its counsel. In the annexed affidavit of Nduru Gichamba it is deponed that the plaintiff’s counsel failed to note the hearing date on the diary. The lawyers for the plaintiff only became aware of the dismissal “after a legal audit was conducted internally” due to the “blatant laxity that had been exhibited by [their] court clerks”. The plaintiff thus says the error to appear in court was not deliberate and should be reinstated to the seat of justice.
5. The defendant contests the motion. There is filed a replying affidavit of Nzamba Kitonga sworn on 1st March 2012. The crux of it is that the applicant does not disclose which lawyer failed to diarize the matter or the clerk who carried out the “internal audit” or when the dismissal order became apparent. The

defendant also drew the courts attention to HCCC No 558 of 2005 between the same parties which was dismissed by this court in nearly similar circumstances on 8th April 2011.

6. Order 12 rule 7 of the Civil Procedure Rules grants the court discretion to set aside the order of dismissal and to reinstate the suit for hearing. The suit was dismissed on 20th December 2011. The plaintiff only presented this motion to court on 23rd February 2012. That is over 2 months later. The plaintiff has not disclosed when it carried what it terms as an internal audit or when it discovered the suit was dismissed. I find a delay of 2 months dilatory and inexcusable in the circumstances. The parameters for exercise of discretion in a matter of this nature were well settled in Shah Vs Mbogo [1967] E A 116. The discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a party who has deliberately sought to obstruct or delay the course of justice. These principles were restated in Maina Vs Mugiria [1983] KLR 78. In a synopsis, this court has wide and unfettered discretion. But the discretion must be exercised in a fair and judicious manner.

7. The hearing date of 20th December 2011 was taken by the plaintiff *ex parte*. It issued hearing notices to the defendant. The plaintiff has not disclosed who failed to diarize the matter or even when it discovered in its internal audit about the order of dismissal. The plaintiff has put the court deliberately in a blind spot. The plaintiff has not even exhibited any letter or evidence to show it had invited its witnesses to appear in court at the hearing. The suit dates back to the year 2005. Seven years later, the record shows it has *never* proceeded to hearing on the merits.

8. The overriding objective of the court set out at articles 159 of the constitution and sections 1A and 1B of the Civil Procedure Rules enjoin counsel and the parties to assist the court to expedite justice. When counsel then take a casual posture as in this case, their errors and omissions are a clear breach of that objective. True, sins of counsel should not be visited on the plaintiff. But I would venture to say that the plaintiff is not without a remedy. If authority for that proposition is required, it is to be found in Mugo Vs Njogu [2010] e KLR where the court stated;

“With the overriding objective in place, it is no longer acceptable in my view for the court to automatically excuse the mistakes and lapses of counsel. Counsel have a role and duty to assist the court in realizing the overriding objective and incompetency or lapses of counsel derogate from the objective”.

I am also alive to the inherent power of the court to dismiss a suit laid down in Mukisa Biscuit Manufacturing Company Vs West End Distributors [1969] E A 696. I thus find that there is a paucity of evidence or reasons to persuade me to exercise my discretion in favour of the plaintiff. As there is no sufficient cause, I find the plaintiff’s motion lacks merit.

9. In the result, I order that the plaintiff’s notice of motion dated 23rd February 2012 be and is hereby dismissed with costs to the defendant.

It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of April 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Gichamba for the Plaintiff.

No appearance for the Defendant.