REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 30 OF 1999

SELINA OCHIENG ONEGE.....PLAINTIFF/ APPLICANT

-VERSUS-

HANS JURGEN ZAHLTEN .....DEFENDANT/ RESPONDENT

RULING

On **13th May, 2010** the defendant, who appeared in Court in person, on which occasion the plaintiff did not turn up and was unrepresented, asked the Court to grant his prayers set out in his Notice of Motion application of **7th May, 2010**. That application had sought the dismissal, with costs, of the plaintiff's suit (filed on **29th January, 1999**) for want of prosecution.

This Court, taking into account the fact that due service of hearing notice had been effected (affidavit of service dated **11th May, 2010**), and that the plaintiff had not filed any response, ruled as follows:

"In principle, all litigation must come to an end, so that parties are clear as to their outstanding obligations in law. It is clear that the plaintiff, in the instant matter, opened up a course of litigation which she had no interest in bringing to a close: and that amounts to an abuse of the process of justice.

"Accordingly, I hereby allow the defendant's application of *7th May, 2010*, and dismiss the plaintiff's suit herein, with costs to the defendant. The plaintiff/respondent shall also pay the defendant/applicant's costs in this application".

That ruling is the reason for the plaintiff's Chamber Summons application of ***20th May, 2010*** which now comes up for determination. The applicant comes with one substantive prayer:

"THAT the Order for dismissal of suit herein of *13th May, 2010* be set aside and the suit herein be reinstated for full hearing".

The supporting grounds are thus set out:

(i) delay in setting down the suit for hearing was not deliberate, "as proceeding were to be typed";

(ii) "the hearing of this case can be set down immediately";

(iii) "the defendant would not suffer any prejudice that cannot be compensated by costs";

(iv) "the plaintiff's default was due to the action of her legal representatives who failed to inform her of the [progress] of the case";

(v) "the applicant was not served with the application dated *7th May, 2010".*

The plaintiff swore an affidavit on **20th May, 2010** averring that she was the wife of the defendant; that the delay in prosecuting the suit was not intentional; that the firm of Advocates which had acted for her, suffered internal changes when the responsible Advocate from the firm of M/s Deche, Nandwa & Bryant, Advocates, namely **Mr. Nandwa**, left for the USA, and subsequently the succeeding Advocate with the conduct of the matter, **Mr. Bryant**, also relocated to Nairobi; that the succeeding Advocate, **Mr. Omolo** had omitted the procedural step of filing a "notice of appointment", which fact became known only in **April, 2010**; that none of the advocates then having conduct of the matter, informed her of the defendant's intention to seek the dismissal of the suit; that the proceedings in question are very important to her because"it is about a declaration of [her] marital status to thedefendant", about the status of her son, about the security of her matrimonial home where she stays with her son, and about jointly-owned properties. The deponent swore a supplementary affidavit on **30th June, 2010** averring, *inter alia*, that service of the defendant's application had not been effected upon her but had been effected upon a certain firm of Advocates, M/s Bowyer Mahihu & Co., Advocates "which ceased to act in this matter more than ten years ago".

Learned counsel, **Ms. G.A. Okumu** who presented the plaintiff's application, brought under Order IXB (rule 8) of the Civil Procedure Rules and ss. 1B (1) (a) and 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya), submitted that the plaintiff had not been served with the defendant's application dated **7th May, 2010** and similarly, her Advocates on record had not been served; the Advocates who were purportedly served, had not acknowledged service.

Ms. Okumu urged the Court "to exercise its discretion and reinstate the suit, to avoid injustice and hardship to theplaintiff"**.** Counsel urged that "the overriding objective of the Court is thatjustice be done to both parties". And that the Court do "exercise its discretion and allow the [instant] application …."

Learned counsel, M/s Mogaka Omwenga & Mabeya, for the Defendant, submitted that the plaintiff's application was incompetent for being brought under "wrong provisions of the law": "what the plaintiff should have sought was to apply to have the order of dismissal set aside, and the application of the defendant to dismiss … for want of prosecution … heard *inter partes*".

Counsel urged that there was evidence of service of the defendant's application: and therefore, "the only way to challenge such an affidavit is by calling the process-server to Court for cross-examination". Counsel submitted that the process server's affidavit is to be held to stand, as he had not been called for cross-examination: **Raj Harish Devani v. National Bank of Kenya Ltd**, Nairobi HCCC No. 781 of 2002 [2005] eKLR (**Visram, J.)** [in which it was held that where the process server is not called to be cross-examined, service is deemed to have been effected]. The same principle is stated in **Hellen Arinata Konani** (suing as Legal Representative of **Anthony Mukanzi Makumba (deceased) v. United Insurance Co. Ltd.**, Eldoret HCCC No. 168 OF 2002 (**Gacheche, J**.).

Counsel submitted that the cause of justice, in this matter, did not lie in favour of the plaintiff: for the plaintiff had filed suit in 1999, and obtained an **ex parte** interim injunction which was repeatedly extended, and later, and with the defendant's consent, was confirmed on terms that the plaintiff would diligently prosecute the claim; but the plaintiff then wallowed in the injunctive relief, and failed to prosecute.

Counsel, while conceding that the Court has a discretion in this matter, urged that non-prosecution of a suit for as much as a year, by law justified dismissal. As delay in this case had run on to the lengthy period of six years, counsel urged that "it would be a travesty of justice" to grant the plaintiff indulgence.

The applicant's case, certainly, is set against the regular application of the technical provisions of the law. As already noted, there is an affidavit of service on file, which bears the **prima facie** colour of genuineness. This Court is not in a position to question the depositions in that affidavit, even though the plaintiff now contests the veracity of those averments. Just as learned counsel for the defendant contends, the lawful and regular course was to have the deponent in the return of service cross-examined in Court.

The plaintiff has stated reasons for her failure to prosecute the suit over a long period of time; and it is, I believe, a focused examination of these that will resolve the whole question on the merits. The plaintiff attributes delay to the time taken to have the proceedings typed; but this would not be a valid ground – as the delay is said to have been for as long as six years. The plaintiff has given evidence on the difficulties which she had with the continuity of legal representation available to her; taking this to be a true account, this particular factor would be a basis for Court's discretion in favour of the applicant.

The plaintiff avers that the issues of marriage relations, property-sharing at dissolution of marriage, child support, and family accommodation, which are central in the suit in question, raise litigious matters too important to be disposed of by summary procedures; and she would undertake to prosecute the suit right away, if this Court would allow. The plaintiff avers that the defendant will not suffer any prejudice that cannot be compensated in costs, if the Court reinstated the suit.

The hearing of this matter took place in **October, 2010**, at a time when the broad canvas against which judicial dispute-settlement must take place had been re-defined by the **Constitution of Kenya, 2010** which had been promulgated on **27th August, 2010**. Henceforth, it is the manifest obligation of the Courts to anchor this Constitution, by elaborating its principles, and enmeshing the same into the techniques and procedures of dispute settlement. In this way, the goal of ensuring justice as between parties, is to be realized in the context of the principles set out in the Constitution.

I am, in this particular case, guided by the principle set out in Art. 159(2) (d) of the Constitution:

"In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

…….

> **(d) justice shall be administered without undue regard to procedural technicalities …"**

As already noted, the respondent has raised valid procedural grounds which would mitigate against the instant application; but at the same time the application relates to important matters or justice within the family, which should be accorded a day in Court.

On the merits, I will allow the main application, with specific orders as follows:

(a) The order of *13th May, 2010* dismissing the plaintiff's suit is vacated.

(b) The plaintiff shall invite the defendant for the taking of a hearing date within 21 days of the date hereof.

(c) The Registry shall give a priority date for the hearing of the suit dated *28th January, 1999*.

(d) The parties shall have the liberty to apply.

(e) The plaintiff/applicant shall pay to the defendant/respondent costs thrown away, assessed at

Kenya Shillings Five Thousand (Kshs.5,000/-).

DATED and **DELIVERED** at **MOMBASA**this**4th** day of**February, 2011.**

J. B. OJWANG

JUDGE

Coram: **Ojwang, J.**

Court Clerk: **Ibrahim**

For the Plaintiff/Applicant: **Ms. Okumu**

For the Defendant/Respondent: