



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI
CIVIL SUIT NO 588 OF 2000

MWALUKO MWANGILI.....PLAINTIFF

VERSUS

UNIVERSAL BANK LTD.....DEFENDANT

RULING

By a notice dated 14th September, 2006, the Deputy Registrar called upon the parties herein to appear in court on 13th October, 2006, to show cause why this suit should not be dismissed under Order XVI Rule 2 (1) for non prosecution. The matter came to court on the appointed date and neither the Plaintiff nor the Defendant attended. The presiding judge observed that the Plaintiff was not present to show cause and accordingly dismissed the suit for want of prosecution with no order as to costs.

The application now before the court is brought by a Notice of Motion dated 16th November, 2010, and is made under Sections 1A, 1B and 3A of the Civil Procedure Act, and Order L Rule 1 of the Civil Procedure Rules. The Plaintiff/Applicant thereby applies for orders –

1. **That the Order made on 13th October, 2006, be set aside.**
2. **That the suit herein be reinstated for hearing and determination on its merits.**
3. **That costs of this application be provided for.**

The application is supported by the annexed affidavit of MWALUKO MWANGILI, the Plaintiff/Applicant, and is based on the following grounds –

1. **That the Plaintiff had instructed the firm of Cons Matata & Co. Advocates who filed this suit on his behalf.**
2. **That the said firm has always kept the Plaintiff in the dark regarding the progress of the suit.**
3. **That the firm of Cons Matata was not traced by the Court Process Server to effect service of Notice to Show Cause and consequently the suit was dismissed on 13th October, 2006 for want of prosecution.**
4. **That had the Plaintiff been aware of the Notice to Show Cause he would have appeared before the Judge to show cause.**
5. **That the Plaintiff is desirous of prosecuting the suit diligently once it is reinstated.**
6. **That it was the mistake of counsel then on record which led to the dismissal of the suit for**

want of prosecution.

7. That the defendant would not suffer any prejudice if the orders sought are granted.

When the application came for hearing, Mr Uvyu appeared for the Plaintiff/Applicant but there was no appearance for the Defendant/Respondent. Noting that the firm of Advocates representing the Defendant were duly served with the copy of the Notice of Motion and the supporting affidavit on 22nd November, 2010, and that they had filed neither a replying affidavit nor grounds of opposition, and further that they were not in court on the appointed day, the court proceeded *ex parte*. The court further noted that in the absence of grounds of opposition or a replying affidavit, the application was unopposed and the applicant was entitled to the orders as prayed.

The court was particularly concerned by an endorsement at the back of the Notice to Show Cause which showed that the same had been returned unserved on the Plaintiff's Advocates, Cons Matata & Co. Advocates, as the said firm "**cannot be traced on (sic) the given address.**" The dismissal of the suit therefore proceeded without the Plaintiff's knowledge as his Advocate had not been served with the Notice to Show Cause. It is an elementary principle of law that a person should not be condemned unheard. Since the Plaintiff was not even aware that there was any Notice to Show Cause, the dismissal of the suit was premature and ought to be set aside *ex debito justitiae*. It is also grossly prejudicial to the Plaintiff. Coupled with the fact that the application is not opposed, I find it fair and proper that the Plaintiff should be granted the prayers sought and I accordingly make the following orders –

- 1. That the Order made on 13th October, 2006, be and is hereby set aside.**
- 2. That the suit herein be and is hereby reinstated for hearing and determination on its merits.**
- 3. Costs in the cause.**

It is so ordered.

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

L NJAGI

JUDGE