



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 319 OF 2006

NATIONAL BANK OF KENYA LIMITED PLAINTIFF/APPLICANT
VERSUS
ARBINDKUM MAVJO LADHA 1ST DEFENDANT/RESPONDENT
KASOBI RAMJI PATEL 2ND DEFENDANT/RESPONDENT
GOPAL RAMJI LADHA 3RD DEFENDANT/RESPONDENT
MAVJI RAMJI LADHA 4TH DEFENDANT/RESPONDENT
RLCO STEEL FABRICATORS LIMITED.....5TH DEFENDANT/RESPONDENT

RULING

The applicant's application dated 4th April, 2011 seeks the following orders:

- “1.THAT this Honourable Court do certify this application as urgent and service be dispensed with in the first instance.**
- 2. THAT there be a stay of prosecution of the Defendant's Bill of Costs filed on 14th March 2011 pending the hearing and determination of this application.**
- 3. THAT this Honourable Court be pleased to set aside the order made on the 11th November 2010 and reinstate the suit.”**

The application was supported by an affidavit sworn by **G. Kariuki Njamwitha**, an advocate practicing in the law firm of Ndungu, Njoroge and Kwach Advocates who have the conduct of this matter on behalf of the plaintiff. He stated that on 29th July, 2010 the defendant's counsel filed an application seeking to have this suit dismissed for want of prosecution at the Chief magistrate's Court. The application was served on the plaintiff's advocates on the same day. The application was however not accompanied by a supporting affidavit.

When the application was brought to the attention of Mr. Kariuki he telephoned Mr. Mwangi advocate of Macharia-Mwangi and Njeru Advocates for the defendants and alerted him of the irregularity of the application. He also requested for service of the full application to enable him respond to the same. Nothing else was served and on 24th August, 2010 Mr. Kariuki proceeded to the registry to find out if the full application had been filed.

Upon perusal of the court file Mr. Kariuki found that there was no application placed on record on 29th July, 2011 and he was requested by the registry staff to check with the Chief Magistrate's Court. On the same day counsel proceeded to the Chief Magistrate's Court and was informed by the Executive

Officer that the application could have been stamped at that registry by error since it was supposed to be a High Court matter.

Mr. Kariuki decided to call Mr. Mwangi advocate to inform him of his predicament in regard to the application. Mr. Mwangi informed him that he will follow up on the issue to ensure that a proper application and a hearing notice were served. The initial application that had been served showed that the application would be heard on 26th August, 2010. On the said date the plaintiff's advocate went to the High Court and the subordinate court registry and confirmed that the matter was not listed in either of the registries.

But before that, on 17th August, 2010 the plaintiff's advocate had been served with a notice indicating that the application would be heard on 21st October, 2010. Mr. Kariuki stated that the said hearing date was inadvertently not diarized and so he failed to attend court with the result that the application came up for hearing before Njagi, J. who struck out the suit for want of prosecution.

What followed thereafter was receipt of a taxation notice to the effect that the defendants' bill of costs was scheduled to be taxed on 5th April, 2011.

Mr. Kariuki further deposed that he was surprised by the turn of events because he had been in constant telephone and written communication with the defendants' advocates as regards the legal status of the 3rd defendant who was said to have passed away. They were also settling the issues and documents in preparation for the hearing of the suit.

Mr. Kariuki further stated that the application that was filed in court was given a hearing date for 21st October, 2010 and not 26th August, 2010 as initially stated. That implies that the application canvassed in court was not the same as the one that was served. Further, counsel deposed that the suit involves a substantial claim, **Kshs.189,979,855.85** and the plaintiff is keen to have the matter heard and determined on its merits. For the aforesaid reasons, he urged the court to allow the application.

A replying affidavit was filed by **Boniface Masinde**, an advocate practicing in the firm of Macharia, Mwangi & Njeru Advocates. He stated that the plaintiff's Advocates were aware of the defendants' application for dismissal of the suit for want of prosecution and were also aware that the application was coming up for hearing on 21st October, 2010. The only reason given by the plaintiff's counsel for failure to attend court was that he did not diarize the matter.

Counsel further stated that the plaintiff's advocate had not filed any replying affidavit to the application which means that no material was placed before the court to show cause why the suit could not be dismissed for want of prosecution. He denied that the defendants filed two applications for dismissal of the suit for want of prosecution. There was only one application dated 9th July which was inadvertently filed in the lower court on 29th July, 2010 and later filed regularly in this court on 2nd August, 2010.

Mr. Masinde further stated that he had consulted Mr. Mwangi advocate who was previously handling the matter on behalf of the defendants in respect of some of the allegations made by the plaintiff's advocate and Mr. Mwangi informed him that the defendants' application was not intended to be supported by an affidavit and it was therefore appropriately filed and served. Counsel urged the court to dismiss the plaintiff's application.

On 3rd November, 2011 Mr. Thuku for the plaintiff and Mr. Masinde for the defendant made brief submissions. The plaintiff's advocate cited various authorities in his effort to persuade the court to grant the orders sought. I will highlight a few of them in the course of this ruling.

There is no dispute that the defendants' application dated 9th July, 2010, though bearing the proper heading as well as the case number was wrongly filed in the Chief Magistrate's registry. The application was served upon the plaintiff's advocates on the same day and was scheduled to be heard on 26th August,

2010. However, on the said date the application was not listed.

On 17th August, 2010 plaintiff's advocates were served with a hearing notice indicating that the defendants' application would be heard on 21st October, 2010. The application clearly indicated that it was based on the ground that no action had been taken by the plaintiff to prosecute the suit. There was no indication that any affidavit had been sworn in support of the application. The plaintiff's advocates did not file a replying affidavit to the said application. According to Mr. Kariuki the only reason that caused him to fail to attend court on the hearing date was his inadvertent omission to diarize the matter. All the other reasons that he advanced for his failure to attend court are insufficient. The plaintiff's advocates cannot blame the defendants' advocate for having proceeded with the hearing of the application on 21st October, 2010 when it came up before Njagi, J.

That notwithstanding, this court has wide discretion in considering an application of this nature. In **NJOROGE v PRESTIGE AIR SERVICES LIMITED [1991] KLR 447**, it was held that there are no limits to the judge's exercise of such discretion except that if he does vary the order that is sought to be set aside he does so on terms that are just, the main concern of the court being to do justice to the parties. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but it is not designed to assist a person who deliberately seeks to obstruct or delay the course of justice. See **PATEL v EAST AFRICA CARGO HANDLING SERVICES LIMITED [1974] EA 74** at page 76.

This suit was filed on 16th June, 2006 and between that date and 2nd October, 2008 both parties filed various interlocutory applications including amended pleadings. But between 2nd October, 2008 and 29th July, 2010 no action was taken by either of the parties towards disposal of the suit. Other than the application made by the defendants for dismissal of the suit for want of prosecution the matter was completely dormant over the said period of time.

The plaintiff's claim is for a substantial amount of money. The 1st and 2nd defendants had also filed a counter claim against the plaintiff. The plaintiff's advocate's failure to attend court on 21st October, 2010 was occasioned by a genuine error on his part in having failed to diarize the matter. A mistake of that nature can occur and I do not think that the plaintiff ought to be unduly penalized for its advocate's mistake. Considering the nature of this matter I am inclined to exercise my discretion in favour of the plaintiff. The defendants have been inconvenienced but it has not been demonstrated that they have been prejudiced. The inconvenience can be redressed by an appropriate order for costs.

I hereby set aside the orders made on 11th November, 2010 and reinstate the suit to hearing. The plaintiff shall bear the defendants' thrown away costs of the suit as well as the costs of this application which I assess at Kshs.10,000/=. The costs to be taxed if not agreed upon. I further direct that such costs be paid before the suit is set down for hearing.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2011.

D. MUSINGA

JUDGE

In the presence of:

Muriithi – Court Clerk

Miss Ogata for Mr. Thuku for the Plaintiff

Mr. Mwangi for Mr. Masinde for the Respondent