



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 1945 of 1995**

**MOHAMED YAKUB & MOHAMED YUSUF T/A YASSER BUTCHERY.....PLAINTIFF/APPLICANT**

**VERSUS**

**MRS BADUR NASA SAIDI NASHEAN.....DEFENDANT**

**RULING NO 1**

The plaintiff applicants have come to this court by way of an application dated 8<sup>th</sup> day of May 2008 and filed on the same date. It is byway of a notice of motion brought under order L rule 1 CPR and section 3A of the CPA . Three reliefs are sought namely:-

- (1) *That the honourable court be pleased to set aside the orders made on 19<sup>th</sup> February 2007.*
- (2) *That the plaintiffs suit be reinstated and heard on merit.*
- (3) *That costs of the application be in the cause.*

The grounds in support are set out in the body of the application, supporting affidavit annexure and case law. The court, has perused the same and the court finds that the major ones are as follows:-

- That the suit herein was filed in the year 1995 and along the lines, the same was dismissed for want of prosecution where upon the plaintiff applicants went to the court of appeal which reinstated the suit and ordered that it be heard on its merits.
- That upon the suit being so reinstated, hearing dates were taken but applicants were not informed of those hearing dates. By then the firm of Ramesh Manek was the one which was handling the matter. It is deponed that the counsel then seized of the matter in the firm of Ramesh Manek and Co-advocates left the firm without a proper handling over of the file to another counsel.
- Later on another counsel namely M/s Kelvin Mogeni of the same firm came across the file and took over the matter by which time the defendants had put in an application dated 20<sup>th</sup> day of March 2006 and filed on the 23<sup>rd</sup> day of March 2006 seeking the dismissal of the plaintiffs suit for want of

prosecution, and or having the same struck out and the release of a sum of Kshs 200,000/= deposited in court, by the defendants and costs of the dismissed suit and the application.

- The counsel then who had come on record namely Kelvin Omogeni, filed grounds of opposition and a replying affidavit, in opposition to that application which procedural step was not brought to the attention of the applicants but the said application was argued inter parties and a ruling given allowing the application.
- Later on new counsel came on record, regularized their position, and then presented the application subject of this ruling.
- It is the stand of the applicants that they have all along been ready and willing to prosecute their case. They blame their counsels then on record for not informing them of the progress of the matter.
- That the deponent who was the link between the counsels and he co-plaintiff has been having a medical complication which sometimes necessitates him to seek medication out of the jurisdiction of the court.
- That they did not instruct m/s Kelvin Omogeni & Co. advocates on how to proceed in the matter, not even the filing of the grounds of opposition and the replying affidavit in opposition to the application for dismissal of the suit for want of prosecution.
- Contend they could not continue hiring advocates to defend them if they had no interest in the matter.
- Contend they have been prejudiced by the action of their counsels and stand to suffer injustice if the matter is not opened for them to be heard.
- They now have a new counsel on record and are now ready and willing to prosecute the suit speedily and the court should indulge them.

The applicants counsel also filed written skeleton arguments dated 10<sup>th</sup> December 2008 and filed on the same date. The salient features of the same are.

- Reiterated the content of the supporting affidavit already set out herein and added that they still maintain that their instructed counsel on record never informed them of the goings on in the matter and that they never instructed Kelvin Omogeni to act for them without instructions. This is confirmed by the fact that even in the said replying affidavit counsel did not mention that he had authority from his clients to depone to the matters deponed to therein.
- They have also demonstrated that one of the plaintiffs has been a victim of poor health demonstrated by annexure My1, My 2.
- There is no demonstration by the defendants of any hardship that they stand to suffer should the matter be reopened for the applicants to be heard on their merits.

- Contend that the court has jurisdiction to entertain the matter herein fortified by the fact that the Respondents have admitted that there are no provisions for setting aside of orders for dismissal under order XVI rule 5 hence their coming to the seat of justice through the provisions of section 3A of the CPA.
- This is a proper case where by this court, can exercise its jurisdiction under section 3A of the CPA to set aside he dismissal order, have the matter reopened for the applicants to be heard in view of the fact that the proceedings here have not closed as the defendants counter claim is still pending hearing on the record.

The Respondents have moved to oppose the application on the basis of a replying affidavit deponed by one Said Nashean on the 26<sup>th</sup> day of June 2008. The salient features of the same are that the court, has no jurisdiction to entertain the application because the rules providing for the dismissal of a suit for want of prosecution do not provide for setting aside of the dismissal order.

- That the plaintiff applicants are notorious in their indolence and lack of interest in this matter demonstrated by the fact that after the suit had been dismissed once for want of prosecution, and was reinstated by the court of appeal, the plaintiffs took no steps to prosecute the same hence the 2<sup>nd</sup> dismissal order subject of this application.
- They contend such repeated indolence is un acceptable.
- That in any event, the plaintiffs suit has been overtaken by events and the applicants move to revive the same is simply meant to use the court, as play ground to continue their harassment and oppression of the defendants.
- By reason of what has been asserted above, they contend that the application is misconceived and the same should be dismissed with costs to the Respondents.

In addition to the replying affidavit the defendants filed written skeleton arguments dated 19<sup>th</sup> January 2009. The salient features of the same demonstrate a reiteration of the content of the replying affidavit but stressed the following:-

- The suit was filed in 1995 and remains unheard 14 years later. Contend that the plaintiffs lost interest in the suit after they lost their quest for an injunction.
- The plaintiffs last listed the suit for hearing on the 2<sup>nd</sup> and 3<sup>rd</sup> October 2003.
- It was not until 5 years later that the defendants applied for the dismissal of the suit which dismissal order was made on the 19/2/2007.
- The applicants presented the current application one year and 3 months after the dismissal order after

they had filed a notice of appeal against the dismissal order.

- The court is persuaded to hold that the suit is the property of the plaintiffs who were duly bound to follow their advocates to ensure that the same is listed for hearing and reject the applicants' assertions that their advocates did not fix the matter for hearing and then inform them.
- That explanation given by the plaintiff of ill health does not hold because there is no demonstration that he was sick throughout the three years that the suit remained unprosecuted.
- That it is silent as to what the second plaintiff was doing during that period of time.
- The court, is urged to find that this court, was right in dismissing the suit for want of prosecution as the circumstances warranting the dismissal fell within the guiding principles set out in the CASE OF NILANI VERSUS PATEL & OTHERS (1969) EA 340.
- Lastly that this court, has no jurisdiction to entertain the application and grant the relief sought because the provisions relied upon by the applicant to access the relief are not available because:-
  - (i) Order L rule 1 is simply a procedural provision providing for mode of presentation of application.
  - (ii) Order XVI procedures are not available.
  - (iii) Section 3A of the CPA is not available to them as well.
  - (iv) The only avenue they could have used to access the relief they are seeking is an appeal whose notice they filed but later changed their minds.
  - (v) The court, is invited to find that the order sought to be set aside cannot be set aside because the order was not *ex parte* but *inter partes*.
  - (vi) The applicants cannot seek review because they have already filed an appeal.

On case law, the court, was referred to the case of RAWAL VERSUS THE MOMBASA HARDWARE (1968) EA 392 where the court was referred to page 393 Pr C-D where it was observed thus:-

*“ and the learned judge decided that although O.16r 6 provided a remedy he was never the less satisfied that there remained an inherent power to set aside the dismissal if the requirements of justice so demanded the exercise of that power as for instance if limitation rendered the prescribed remedy futile – (PrG-H). The defendant if the case is restored is not being deprived of any defence that he can actually call an after acquired defence --- (Pg 394 Pr C-E).*

*It is I think, important to consider carefully the obvious intention that nothing in the Act should prevent a court, from exercising its inherent powers in such manner as would be necessary to prevent injustice. What it is sought to do in this case is to say that a provision in the rules should prevent the courts from taking action which may result in preventing injustice and it is sought to say that this position arises by reason of the Rules made under the same Act in which S.97 appears.---- surely if one were satisfied that the effect of Rules construed in a particular way would be to result in*

*injustice, then the provisions of sections 97 and S.81 already show that the Acts should not be construed in such a manner.--- (Pr G-H) this rule shall be construed in away which would not take away the jurisdiction of the court, to remedy an injustice should it be satisfied that such an injustice exists.----”*

The case of MESHALLUM WAWERU WANGUKU VERSUS KAMAU KANIA (1982-88) 1 KAR 760 pg 783 line 28 from the bottom where the law lords of the CA made the following observation:-

*“ The court, is not powerless. It has an inherent power in the court to control its process for the ends of justice. Section 3A of the civil procedure Act (Cap 21) preserves the inherent powers when there are no rules. It is within the discretion of the court, to dismiss for want of prosecution and to reinstate the application after receiving a satisfactory explanation (---13 from the bottom). Dismissal and reinstatement have been methods of control even from the days of the application of the Indian Civil Procedure code---”*

The case of NILANI VERSUS PATEL AND OTHERS (1969) EA 340. at page 341 Pr D-4 it is observed “ *It is only too trite to say that as in every civil suit, it is the plaintiff who is in pursuit of a remedy that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the court, towards that end as soon as it is convenient by either applying for its dismissal or setting down the suit for hearing (Pr H)--- It is the client who must seek not his advocate.---(Pr1). It is quite apparent from the judgments of the court of appeal to put it freely that it frowns on delays of this kind – situation like these are deplored.---- (Pg 342 Pr B-C) there is some special circumstances such as excessive delay. The principle on which we go is clear. When the delay is prolonged and in excusable and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away leaving the plaintiff to his remedy against his own solicitor.---- (Pg 343 Pr H -1)---It means that if no application is made within 12 months of the court adjournment, the fact that a case has been adjourned generally gives a plaintiff a right if he chooses to do nothing. He is given complete chance under the law to remain static for an indefinite period, and be even allowed to keep the suit pending until the end of time, and there is nothing a defendant can do about it. I do not think any judicial rule making authority could have intended such an absurd situation to exists, when it has always and still is the practice of the courts to brook no delay in bringing a case to trial. No rule making authority would wish to create such an unreasonable situation of permitting actions to hang over the head of any defendant for an indefinite period without giving him the right to move the court to have the action dismissed for want of prosecution---*”

On the courts assessment of the facts herein, it is clear that here are certain aspects of this case which are not in dispute or forms common ground namely:-

- (i) That there have been two dismissal s for want of prosecution of the suit herein since the filing of the suit in 1995. The first dismissal having come three years after the filing of the suit on 22/6/1998. This

dismissal prompted the applicants to move to the court of appeal for reprieve which reprieve they were given but instead of the suit proceeding to trial, there was another lapse of three years prompting the second dismissal order.

- (ii) It is on record that the plaintiff applicant have put forward an explanation for the second dismissal namely sickness and mistake of counsel and have pleaded with this court to reopen the matter for them saying that they are now serious and are desirous of moving the matter forward for trial.
- (iii) It is common ground that the defence is opposed to having the matter reopened for the plaintiffs to be heard. The strong reasons put forward for them are that:-
  - (a) There is no jurisdiction to grant the relief.
  - (b) Even if there were jurisdiction to grant the same, there are no merits for granting the same.
- (iv) The issue of jurisdiction arises because it is common ground that provisions under which the suit was dismissed for want of prosecution do not allow room for an application for setting aside. Room only exists for appeal or review, reliefs that the applicant is not seeking herein.
- (v) On the merits, side, the defendants allege that the plaintiffs do not merit the indulgence of the court because of the reasons given.

This court has given due consideration of the said rival arguments and considered the same in the light of principles of case law cited and the court moves to make the following findings on the same:-

- (a) On jurisdiction, it is indeed correct as submitted by the applicants counsel and by the respondents counsel that reliance is being made on the basis of there being in existence the inherent jurisdiction of the court. The applicant asserts this is available to them and the court, can invoke the same and grant them a remedy. Where as the defence asserts that it is not available.

The reservoir for this remedy is found in section 3A of the Civil Procedure Act which the applicant has cited. It reads:- “ *S 3A of the Civil Procedure Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*” The applicability of this provision has now been established by the CA and as dutifully followed by the superior court. There is in place the case of WANJAU VERSUS MURAYA (1983) KLR 276 where Kneller JA as he then was had this to say:- “ *Section 3A of the Civil Procedure Act Cap 21 although saving the inherent powers of the court, to make such orders as may be necessary for the ends of justice or to prevent the abuse of the power of the court, should not be cited where there is appropriate section or order and rule to cover the relief sought.*”

The case of MEDITERRANEAN SHIPPING CO. SA VERSUS INTERNATIONAL AGRICULTURAL ENTERPRISES LTD ETCO (MJA) (1990) KLR 183 a high court decision where it was also held inter alia that:- “ *It is*

now trite law that the inherent jurisdiction of the court should not be invoked where there is a specific statutory provision which would meet the necessities of the case.

(2) Section 3A of the civil procedure Act ought not to be called into the aid of a litigant in all situations not specifically legislated for. It all depends in the circumstance of the case.”

The case of TANGUS VESUS ROITEL (1968) EA 618 where it was also held *inter alia* that the courts inherent jurisdiction should not be invoked where there was a specific statutory provision not meet the case.”

Applying these principles of case law, to the rival arguments herein, it is evidently clear that since there is no provision through which the plaintiff applicants could access the relief of setting aside the order of dismissal for want of prosecution, if the same is available.

Further support has been generated from section 151 of Mulla on the code of Civil Procedure thirteenth edition page 575 which is framed in almost similar words like section 3A of the CPA thus:- “*Nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*”

As in many of the synopsis of the applicability of the sections of the code is in line with the principles of case law cited for the interpretation of the applicability of section 3A of the CPA namely:

(i) Inherent power of the court their nature and object:-

“The code of civil Procedure is not exhaustive. The court, therefore in many cases where the circumstances require it, acted on the assumption of the possession of an inherent power to act *ex debito* institutions and to do that real and substantial justice for administration of which alone it exists. The law cannot make express provisions against all inconveniences so that their dispositions shall express all the cases that may possibly happen and it is therefore the duty of a judge to apply them not only to what appears to be regulated by their express provisions but to all the cases to which a first application of them may be made and which appears to be comprehended either within the express sense of the law or within the consequences that may be gathered from it. This section does not confer any powers but only indicates that there is a power to make such orders as may be necessary for the ends of justice and to prevent an abuse of the court.”

(ii) Not to be exercised when prohibited or excluded by the court or other statutes – “a court has no inherent power to do that which is prohibited by the----”

(iii) Not to be exercised when there are specific provisions in the code – “inherent jurisdiction must be exercised subject to the rule that if the code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked. It is only when there is no clear provision in the civil procedure code that inherent jurisdiction can be invoked. This inherent power would not include a power similar to the power of

*revision,----even as to cases to which that section is not applicable--- A court cannot make use of the special provisions of this section where the applicant has his remedy provided elsewhere in the code and has neglected to avail himself of it.”*

(iv) *To be exercised only for ends of justice –further no order should be made under this section unless it is necessary for the ends of justice or to prevent abuse of the process of the court. The mere fact that there is no other remedy would not attract the application of this section----*”

When the principles on the inherent power of the court, as set out in *mulla* are applied to the rival arguments herein, these fortify the case law decided by this jurisdiction on the subject as set out above and then go further to demonstrate that the power is available if the relief sought is available to the litigant and the court, has jurisdiction to grant the same. Further that the power cannot be invoked for purposes of granting review orders where the relief is not available to the complainant. Further it cannot be invoked if the litigant has a remedy else where which the litigant has neglected to follow.

The Respondent herein has submitted that invocation of this power is not available to the applicant because the orders sought to be set aside are incapable of being set aside as the same were made after inter parties hearing. This being the case the same can only be upset by way of review or appeal, reliefs not applied for.

Indeed it is on record that the application which gave rise to the orders sought to be upset was contested as grounds of opposition and replying affidavit were filed in opposition of the same. It is also common ground that the said pleadings were considered on their merits before a ruling was made. The applicants have attempted to go round this by alleging that the counsel who filed the papers in opposition to the application for dismissal had no instructions from them to do so in the first instance, and in the second instance that he had not even informed them that he was taking such an action on their behalf. However they have not sourced an affidavit from the said counsel to explain the circumstances under which the said counsel came on record and took over the conduct of the matter without their consent and instruction.

The question that the court, has to ask itself is whether in the wake of the afore described scenario, this court, is entitled to invoke its inherent power or jurisdiction to grant the relief sought. In this courts’ opinion, the best approach the applicant should have taken should have been an appeal against the said decision if it turned out that they had acknowledge the fact that the counsel who filed opposing papers and argued the opposition to the application had authority to act for them.

The second avenue should have been an application for review and setting aside of the said orders on account of the application having been argued without their knowledge by counsel who had no authority from them to act on their behalf and therefore the ingredient of mistake and other sufficient cause for purposes of review is available to them.

For these two reasons it is the courts' opinion that the inherent jurisdiction of the court, is not available to provide a remedy to the applicants because they have sought a wrong remedy namely setting aside, when they should have sought appeal or review and setting aside.

Having faulted the application on a point of technicality, there is no need to go into the merits of the same as this may preempt the outcome of any other relief that the applicants may deem fit to invoke to cure what they are attempting to achieve through this wrong procedure.

For the reasons given in the assessment the court proceeds to make the following final orders:-

- (1) It was correctly submitted on behalf of the plaintiffs applicants that the provisions under which the suit was dismissed for want of prosecution did not provide for a relief of setting a side of such orders hence the invocation of the inherent powers of the court enshrined in section 3A of the CPA.
- (2) There being no rule within the CPR through which the plaintiffs applicants could seek the upsetting of the dismissal order for want of prosecution by way of setting a side, the plaintiffs/applicants were entitled to cite the said provision as an avenue to access the relief sought.
- (3) However for the reasons given in the assessment, since the application for dismissal of suit for want of prosecution was opposed both by pleadings namely grounds of opposition and replying affidavit as well as oral submission, the proper avenue for setting out to upset the resultant order should have been an appeal or a review. With an appeal being ideal if the plaintiff/applicant accepts that the counsel who drafted and filed grounds of opposition, and replying affidavit and argued the opposition to the said application had authority to so act on their behalf. Where as review and setting a side would have been available to the applicants if they were convinced that the said counsel had no authority to act for them in which case the papers filed and arguments made by the said counsel on their behalf would have been a mistake thus satisfying the ingredients of setting aside on account of mistake.

Thirdly, issue of prolonged illness and failure to receive communication from their counsel on the on goings in the matter would have fallen under the setting aside ingredient of any other sufficient causes or reason.

- (4) Although the plaintiffs/applicant tend to assert that the counsel who filed opposing papers and argued the opposition on merit had no authority to so act, they have not sourced any deponement from the said counsel to confirm that position.
- (5) By reason of what has been stated in number 3 above the application dated 8<sup>th</sup> day of May 2008 and filed on the same date had been found to be in competent and the same is accordingly struck.
- (6) By reason of what has been stated in number 5 above there is no need to go into the other merits of the application as this might preempt the outcome of any action that the plaintiffs/applicants might deem fit to take to obtain relief.

- (7) Indeed an application for setting aside may have been most ideal because it is less costly than an appeal but this notwithstanding the obligation to a litigant to follow the correct procedure within the law in order to access ones relief cannot be ousted by the need for expediency or short cuts as doing so would in essence erode and water down the very dignity of the inherent power of the court.
- (8) The respondent ill have costs of the struck out application.

**Dated, Read and delivered at Nairobi this 12<sup>th</sup> day of February 2010.**

**R.N.NAMBUYE**

**JUDGE**