REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 482 OF 2000

CENEAST AIRLINES LIMITED……..…… PLAINTIFF

VERSUS

HABIB BANK A.G. ZURICH……..…….……..…….. DEFENDANT

RULING

This suit was commenced by a Plaint in or about March, 2000. The record shows that the matter came up severally for hearing but did not proceed for various reasons until it was partly heard by Koome J (as he then was) on 17th June, 2009. On 2nd February, 2010, the Defendants Advocates listed the same for mention on 18th February, 2010 when the same was fixed by consent for hearing on 5th and 6th May, 2010.

On 5th May, 2010, the matter came up before Koome J when Mr. Muraya holding brief for Mr. Wambugu for the Plaintiff informed the court that the Counsel handling the matter was indisposed and sought for an adjournment. For reasons that Mr. Wambugu was indisposed, the court adjourned the matter to 6th and 7th July, 2010 for further hearing. The record will show that on 6th July, 2010 Mr. Kariuki held brief for Mr. Wambugu and informed the court that Mr. Wambugu had left hospital the previous day and was unable to attend court and conduct the trial. Counsel therefore applied for an adjournment. The same was refused and the court ordered that the matter do proceed for trial at 10.30 a.m. that morning. At 11.00 a.m. when the parties appeared, Mr. Kariuki now held brief for Mr. Wambugu for the Plaintiff and informed the court that since the Plaintiff's Advocates had informed their client that they would be seeking an adjournment, the Plaintiff did not attend court that morning for further cross examination. Accordingly, since the Plaintiff did not attend to offer evidence in support of its case, the court dismissed the suit under the provisions of Order IXB Rule 4 of our former Civil Procedure Rules.

On 23rd July, 2010, the Plaintiff returned to court with an application under Order 1XB Rule 8 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeking the setting aside of the order of 6th July, 2010 that dismissed the suit. The Plaintiff contended that Mr. Wambugu underwent surgery on 2nd July, 2010 which had not been anticipated, that that position had been communicated to the Defendants Advocates, that the matter was part heard and the Plaintiff was about to complete prosecuting the suit, that the Defendant does not stand to suffer any prejudice that cannot be compensated with damages if the suit is reinstated. The Plaintiff produced medical records and a letter dated 3/5/10 to support its position. Mr. Wambugu learned Counsel for the Plaintiff cited the cases of **HCCC No. 916 of 2001 Abdikadir, Sala –vs- Adurdubow (UR) HCCC 5766 of 1990 J Kathuri –vs- Gideon Mungai Karanja & Another (UR) HCCC No. 30 of 1995 Kihugu Ndirangu –vs- Reuben Kinyanjui Ndirangu (UR), HCCC No. 1038 of 2001 Kinos Ndung'u –vs- M.M. Kariuki (UR)** and **HCCC No. 1066 of 2001 Excelation Ltd –vs- Commercial transported Ltd (UR)** in support of the proposition that

the court has a wide discretion under the rule to reinstate a dismissed suit in order to do justice, that a Plaintiff should not be punished for the mistakes of an Advocate. Counsel urged that the application be allowed.

The Defendant opposed the application and filed a Replying Affidavit sworn by Andrew Githanji Mungai on 10th March, 2011. The Defendant contended that the application was an abuse of the court process in that it was an attack on the rulings delivered by Koome J on the 6th July, 2010 one declining to adjourn the matter and the second dismissing the suit. Mr. Amoko counsel for the Defendant cited the case of **C.A No. 181 of 1994 Njagi Kanyanguti& others –vs- David Njagi Njogu C.A No. 181 of 1994(UR)** on the proposition that in exercising the discretion under Order 1XB Rule 4, there must be material on record to support such exercise and that the court must consider the conduct of the applicant both before and after the making of the order sought to be set aside. Mr. Amoko submitted that there was no material placed before the court to warrant interference with the exercise of the courts discretion in the making of the order of 6th July, 2010.

Mr. Wambugu distinguished the Njagi Kanyunguti case on the ground that the court was considering an appeal yet before me is an application to set aside an order made by this court.

I have carefully considered the Affidavits on record, the authorities cited and the submissions of counsel. I have also perused the entire record.

I do agree with the principles enunciated in the cases cited by the Plaintiff in this matter. The courts discretion is perfectly clear when considering an application under Order 1XB Rule 8 presently Order 12 Rule 3 of the Civil Procedure Rules. Indeed in the case of **Abdikadirsalah –vs- Adurdubow (supra)** Nyamu J (as he then was) held at page 2 thereof that:-

"Although the reasons for non-attendance by the learned Counsel are not entirely satisfactory I have a wide discretion under the applicable rule to do justice. It will be the interest of justice to allow the application so that the matter can be heard and determined on merit."

I do also heavily subscribe to the view that no litigant should be made to suffer for the mistakes of his Advocate. The only loss an Advocate loses when a litigant losses a case may probably be fees whilst a client may so immensely suffer as a result of the negligence or mistake of his counsel. In my view therefore, the doctrine that a litigant should not be punished for the mistakes of his advocate should and indeed holds a special position in the practice of law.

However, I do not agree with Mr. Wambugu that the Principles set out in the cases of **Njagi Kanyunguti (supra)** are not applicable on the ground that the court was dealing with an Appeal. It is true that the Court of Appeal in that case was dealing with an appeal but what is important is that in so dealing with that appeal, the court considered the principles applicable in an application to set aside either a judgment or order of dismissal of a suit made under Order IXB Rule 4 of the Civil Procedure Rules. Accordingly, I hold that the principles applicable when considering an application under Order IXB Rule 4 (currently Order 12 Rule 3) of the Civil Procedure Rules are those set out in the **Njagi Kanyunguti –vs- David Njagi Njogu** case. In that case the court held that:-

"In an application brought either under O.IX B rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court's discretion is wide, provided it is exercised judicially (see, Pithon Waweru Maina v. Thuku Mugiria, (Civil Appeal No. 27 of 1982) (unreported), Patel –vs- E.A Cargo Handling Services Ltd 1974 EA 75). The court is, also, enjoined to consider all the circumstances of the case, both before and after the judgment being challenged, before coming to a decision whether or not to vacate the judgment.

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However, it is trite law that this or any other court will only exercise its judicial discretion in favour of

setting aside a judgment in order to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, and will not assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. (See, Shah –vs- Mbogo & Another, 1967 EA 116 at P.123). The appellants' conduct and that of their advocate when viewed objectively clearly shows that they were bent on delaying the course of justice."

In the application before court, therefore, the court is called upon to consider the conduct of the Plaintiff before and after the making of the order of 6th July, 2010. Although it is clear that the suit was part heard before it was dismissed on 6th July, 2010, the matter had proceeded to hearing on 17th June, 2009 only after the Defendant had objected to an application for adjournment by the Plaintiff and after the Court had ordered that the matter does proceed to hearing at 10.30 a.m. Otherwise, the Plaintiff was not willing, to proceed with the trial on the 17th June, 2009.

On 6th July, 2010, the court found as a fact that the Plaintiff had not attended court in the person of PW1 for further cross-examination and that no good reasons had been given for that failure. In my view, that discretion of the court to refuse adjournment could only be challenged by way of an appeal. None was filed.

Whilst the court's discretion is perfectly free, I do not think good and plausible reasons have been advanced to allow this court exercise its discretion in favour of the Applicant. Whilst the court appreciates and agrees with the ratio decidendi of the cases relied on by the plaintiff, the court does not think that those cases apply to the present application. The advocate has not expressly condescended on the facts that constitute his mistake that might have led to the dismissal of the suit which the court should not visit upon the Plaintiff. None of these, if any, were set out either in the application or the Affidavit. In any event, as earlier on observed, the Plaintiff chose not to swear any Affidavit wherein it could have set out such matters if they ever existed.

As regards the conduct subsequent to the dismissal of the suit, I am inclined to believe that the same does not help the application. These are as follows:-

1) Although the suit was dismissed on 6th July, 2010, the Plaintiff took more than a fortnight to file the present application. To me, two (2) weeks was too inordinate a delay to file a genuine application to re-instate a dismissed suit. The Plaintiff could have done better to reflect its genuineness to prosecute the suit bona fide and not just to delay the trial of the same.

2) The Plaintiff itself has not filed any Affidavit to explain its position. The court has only heard from its advocate but not the directors or any other officer of the Plaintiff. To my mind, this exudes a don't care attitude. Why should an advocate pursue the interests of an unwilling litigant?

3) One of the reasons for the court refusing the adjournment and dismissing the suit on 6th July, 2010, was that on the 17th June, 2009, the trial was conducted by Mr. King'ara Advocate from the firm of Gichuki King'ara & Company Advocates. Mr. Wambugu Advocate who also comes from that firm of Advocates and who was indisposed on the 5th May and 6th July, 2010 respectively only took over the conduct of the matter after Mr. King'ara had conducted the evidence in chief and part of cross examination. The Plaintiff did not find it prudent to explain by way of Affidavit in the present application why Mr. King'ara Advocate could not attend court on 6th July, 2010 and conduct the trial now that the illness of Mr. Wambugu was well known since May, 2010.

In any event, PW1 was not in court on the 6th July, 2010 to show any willingness on the part of the Plaintiff to proceed with the trial.

My take of it is that Section 1A which enjoins the court to effect the overriding objective of the Civil Procedure Act militates against the applicant. This is a 2000 case. Having perused the record, it was clear to the court that the Plaintiff was not very keen to prosecute the suit, there must be an end to litigation. In

my view, the grounds advanced are not satisfactory to enable this court interfere with the order of 6th July, 2010.

Accordingly, the Plaintiff's application dated 22nd July, 2010 is without merit and is dismissed with costs.

DATED and delivered in Nairobi this 19th day of April, 2010.

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A MABEYA
JUDGE