



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANICOMMERCIAL COURTS**

Civil Case 175 of 2005

MEA LIMITEDPLAINTIFF
VERSUS
NELION SOAP INDUSTRIES LIMITED.....DEFENDANT

RULING

1. On 31st August 2009, this court issued a notice to the parties to show cause why this suit should not be dismissed under **Order 16 rule 2(1)** of the Civil Procedure Rules. The Notice came up for hearing on 30th October 2009. None of the parties appeared to show cause and the suit was dismissed. The Plaintiff filed a notice of motion on 14th January 2010, seeking for an order to set aside the dismissal order made on 30th October 2009. This application is premised on the grounds stated on the body thereto and the supporting affidavit sworn by Mr. Paul Njuguna Chuchu the Advocate for the Plaintiff.

2. It is contended that on the 30th October 2009, the day the notice to show cause came up for hearing, counsel for the plaintiff had requested his clerk to procure the services of an advocate to hold his brief and proceed to show cause. Due to inadvertent miscommunication the suit was dismissed for want of prosecution. According to counsel for the Plaintiff, the suit involves colossal sums of money; the parties opted for an out of court settlement as per the annexed letters exchanged with counsel for the Defendant. The Plaintiff also took steps to fix matter for hearing as can be seen in the letters exchanged between the counsel for the Plaintiff and Defendant. Counsel for the plaintiff submitted that it will be oppressive on the part of his client if the suit is dismissed due to a mistake by counsel which should not be visited on an innocent client.

3. This application was opposed by the Defendant; Mr. Were relied on the grounds of opposition. Firstly, the application was challenged for failing to disclose the name of the clerk who was sent to court and the advocate who purportedly held brief in a different matter. The letters annexed to the affidavit show that negotiations failed in 2007 and no efforts are shown that the Plaintiffs took steps to fix the matter for hearing. They did not file their list of documents thus the suit was properly dismissed for want of prosecution. The Plaintiff was invited to show cause why the suit should not be dismissed and no cause was shown, thus the order dismissing the suit should be upheld.

4. I have considered the rival submissions; this application invokes this court's discretion to allow the Plaintiffs an opportunity to prosecute their case. The overarching objective of judicial discretion is to give a Judge flexibility to provide definitions according to the specifics of a particular case, to ensure ends of justice are met and to prevent the abuse of the court process. See the persuasive decision in the case of; Shah vs. Mbogo & another EALR [1967] EA page 116 Harris J held that:

“The principles governing the exercise of the court's discretion to set aside a judgment obtained *ex parte*. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion

or otherwise, to obstruct or delay the course of justice.”

5. The record of this matter shows the suit was fixed for hearing on three occasions on 23rd November 2005, it was fixed for hearing on 22nd March 2006, but the matter was taken out by a Judge on the grounds that the parties had not complied with the mandatory requirements for discovery under Order 10 rule 11A. The matter was fixed again on 26th September 2006, it was taken out due shortage of Judges. The last time it was fixed for hearing 21st February 2007 when it was taken out by the Judge on the grounds that the parties had yet again not complied with the mandatory requirements of discovery. Thus the Court took the initiative to issue the notice to show Cause why the suit should not be dismissed.

6. Up until this moment, the Plaintiff has not done discovery. The file clearly shows the Plaintiff has taken no action on the matter since October 2007, and even when the matter came on a notice to show cause, although the Plaintiff claims that there was miscommunication by the clerk who was sent, there is no affidavit which had been filed in response to the Notice to Show Cause why the suit should not be dismissed. The reasons advanced by the counsel for the Plaintiff are not plausible. No justifiable reasons have been shown why no steps have been taken to prosecute this matter and why the suit should be reinstated.

7. This application lacks merit and it is hereby dismissed with costs to the Respondent.

RULING READ AND SIGNED ON 7TH MAY, 2010 AT NAIROBI

M. K. KOOME
JUDGE