

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1280 of 2001

NATIONAL BANK OF KENYA LIMITED PLAINTIFF
VERSUS

FRANCIS ERIC WASUNA 1ST DEFENANT
DICKENS OYUA T/A

DIFCO GENRAL SUPPLEIRS 2ND DEFENANT

RULING

1. The court issued a notice to show cause why this suit should not be dismissed for want of prosecution pursuant to the provisions of order XVI Rule 2(1) of the Civil Procedure Rules. The matter came up for hearing of the notice on 23rd April 2010. None of the parties appeared to show cause and the suit was dismissed for want of prosecution. The plaintiff/applicant filed a notice of motion under section 1A, 1B and 3A of the Civil Procedure Rules seeking for the review of the order dismissing the suit on the grounds that the plaintiff's firm was not served with the notice to show cause. Moreover, the firm of Khan and Katiku Advocates who were then on record for the plaintiff, dissolved their firm and joined Musyoka Wambua & Katiku Advocates in February 2009.

2. Thereafter several attempts were made to file a notice of change of advocates and to fix the matter for hearing but the court file was not available. They annexed several correspondences written to court to enquire the whereabouts of the file but those correspondences went unanswered.

The plaintiff has a huge claim against the defendants and it is in the interest of justice that the suit be heard and determined on merits.

3. This application was opposed by the defendants; reliance was placed on the grounds of opposition which raised a technical point of law. Firstly, the firm of Musyoka Wambua and Katiku was faulted for coming on record without first obtaining the leave of the court since judgment had been entered in the matter. Secondly, there is no discovery of new matters to warrant a review. The firm of advocates that was on record, Khan and Katiku were served with the notice to show cause. The plaintiff has also been indolent for failing to take steps from July 2006 to fix the matter for hearing. Thus counsel urged the court to dismiss this suit.

4. This application invokes the inherent jurisdiction of this court. The overarching objective of those provisions is to ensure the just determination of the proceedings for ends of justice. The plaintiff's contend that several correspondences were written to court in which they were

seeking for fix the matter for hearing. They annexed those correspondences which bear the court stamp and also the stamp of the advocate for the defendant. Another issue is the notice to show cause was not served upon the advocates for the plaintiff. The copy in the court file does not indicate that service was effected, not even to the firm of Khan and Katiku Advocates.

5. Going by the material the plaintiff has annexed to the affidavit, it shows had they been served with the notice to show cause, that material would have been sufficient to persuade the court not to dismiss the suit. For that reason I will exercise this courts discretion and set aside the order made on 23rd April 2010. The suit is reinstated and the parties are directed to take a hearing date on priority basis. The defendants will have the costs of this application.

RULING READ AND SIGNED ON 30TH JULY 2010 AT NAIROBI

M.K. KOOME
JUDGE