

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANICOMMERCIAL COURTS)

Civil Case 116 of 2005

SAVLA INTERNATIONAL LIMITED PLAINTIFF

VERSUS

ACME CONTAINERS LIMITED DEFENDANT

R U L I N G

1. On 13th November, 2009 the Plaintiff's suit was dismissed under the provisions of **Order XVI Rule 2 (1)** of the **Civil Procedure Rules** for want of prosecution. On 28th April, 2010 the Plaintiff/Applicant filed a Notice of Motion under the provisions of **Section 3A of the Civil Procedure Act** seeking for orders that the order made on 13th November, 2009 be set aside and the suit be reinstated for hearing. This application was supported by the affidavit of Mr. Jaoko Alexander Ogoye, the Advocate for the Plaintiff. It is contended that the Managing Director of the Plaintiff's Company died in July, 2008 in London thereby making it difficult for the Plaintiff's Advocate's to get proper instructions to prosecute the suit. Now a Director has been appointed and he has the authority to prosecute the matter. Counsel annexed a letter signed by the new Director authorizing Mr. Manish Prahulal Shah to act on their behalf in respect of **CIVIL CASE NO. 312 OF 2001 SHAH HIRJI MANEK LIMITED v. RAMESH PREMCHAND SHAH & 3 OTHERS.**

2. It was further submitted that the sum claimed by the Plaintiff is substantial. It is in the interest of the justice to have the suit reinstated. The Court was also urged to find that the mistake by Counsel to represent a client should not be visited on an innocent client and in this regard he relied on the case of **DANIEL MUREITHI KAMONDE v. MARY WANJIKU KAMONDE [2005] eKLR.** A ruling by Waki, J. where he quoted the case of **MAJPOR JOSEPH MWETERI IGWETA v. MUKIRA M'ETHARE & ATTORNEY GENR (UR)** as follows:-

“After all, the Advocates for the Applicants have acted, not mistakenly, but negligently and in a slovenly manner. The issue that therefore arises for consideration by me is: do the Applicants suffer for the negligence of their Advocates? It is a matter of concern for me that the Applicants are not probably even aware of what is happening. If they are aware they do not know of intricacies of the procedure. They have an undoubted right of appeal which they are unable to exercise because of their Advocate's slovenliness. The matter involves land which is very dear hearts of Kenyans. Should the Applicants be deprived of the right of being heard by the highest Court in the land? This factor has weighed on my mind and taking all matters into consideration I am inclined to give one last chance to the Applicants. They will have no redress against their own Advocates as generally no amount of damages (if the Advocates are any good for payment of such damages) can compensate Kenyans for lost land.”

3. This application was opposed by the Respondent. Counsel relied on the replying affidavit sworn by Anil Shah on 10th June, 2010. The matters deposed therein principally challenge the validity of the supporting affidavit sworn by Mr. Jaoko Ogoye on matters relating to the affairs of the Plaintiff's Company. The Respondent further contends that the Plaintiff failed to take action to prosecute the matter and to-date no issues have been framed and documents have not been filed since the matter was in Court the last time in June, 2007. This suit was also dismissed in November, 2009 and the Plaintiffs took their time before filing this application to reinstate this suit.

4. I have considered the rival submissions for the sake of clarity. This matter came on a notice to show cause why the suit should not be dismissed for want of prosecution on 6th November, 2009. The Court found no notice was shown why the suit should not be dismissed and rendered the following ruling:-

“It is evident from the Court record that the Plaintiff has not taken any steps since July, 2007 to prosecute this matter. This suit was filed in March 2005; it is the duty of the Plaintiff to ensure that steps are taken to prosecute the matter. The Court is also concerned about the delay caused by parties who file suits and fail to take action to prosecute them. This is hampering the delivery of justice and clogging the Court system. The Plaintiff has not shown any sufficient cause why it has not taken any steps to prosecute this matter and no cause has been shown why the suit should not be dismissed for want of prosecution. Accordingly, the suit is dismissed with no order as costs since the notice emanated from the Court.”

5. This application invokes the exercise of this Court’s inherent jurisdiction to set aside an order. It is trite that discretion is always exercised based on cogent and plausible facts in order to promote the ends of justice and not to aid a party who wishes to delay a matter or to take undue advantage of the other party or to abuse the Court process. In this case, I need not repeat that the Plaintiff took six months before filing the present application which in my view is inordinate delay for an application to set aside an order.

6. The affidavit in support of the application was sworn by the Advocate for the Plaintiff. I am in agreement with counsel for the respondent that Mr. Jaoko has deposed to matters appertaining to the Plaintiff which are contentious matters. As if that is not enough, the documents that the Advocate relies on, which ostensibly gave authority to Mr. Manish Prahublal Shah is in respect of a totally different matter and not this suit, the parties are different and the case number is different.

Accordingly, I find the application by the Plaintiff lacks merit and it is hereby dismissed with costs to the Defendant.

RULING READ AND SIGNED ON 17TH SEPTEMBER, 2010.

M. K. KOOME

JUDGE