



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 41 OF 2003

LAWE INVESTMENTS LTD.....

.....**1ST PLAINTIFF/APPLICANT**

EMILY OMONDI (suing as the Administrator of the Estate of the late

ABIGAEL AREMO.....

.....**2ND PLAINTIFF/APPLICANT**

VERSUS

NATIONAL BANK OF KENYA LTD.....

.....**1ST DEFENDANT/RESPONDENT**

GEORGE MULUAN IKOTH.....

.....**2ND DEFENDANT/RESPONDENT**

JOSEPH GIKONYO t/a

GARAM INVESTMENTS.....

.....**3RD DEFENDANT/RESPONDENT**

STEPHEN KUNGU KAGIRI.....

.....**4TH DEFENDANT/RESPONDENT**

R U L I N G

This application is brought by a notice of motion dated 17th May, 2010. The applicant thereby moves the court under Sections 80, 1A, 1B, 3A, and 63(e) of the Civil Procedure Act; Order XLIV Rules 1 and 6 of the Civil Procedure Rules; and all enabling provisions of the law, for the grant of the following orders –

- 1) **That this Honourable court be pleased to vacate, review and/or set aside its orders made on 16th April, 2010 dismissing the Plaintiffs’ suit for want of prosecution.**
- 2) **That the Plaintiffs’ suit be reinstated for hearing.**
- 3) **That the cost of this application be in the cause.**

The application is supported by the annexed affidavit of EMILY AKINYI OMONDI and is based on the grounds that the non prosecution and/or delay in the prosecution of the suit was not deliberate but inadvertent. It was brought about by the Plaintiffs’ inability to raise the 2nd Defendant’s costs which at the time of the ruling dismissing the suit on 16th April, 2010, stood at Kshs 90,000/-. The Plaintiffs’ have since paid and settled those costs.

In opposing the application, the 1st and 4th Defendants filed grounds of opposition stating, inter alia, that the entire suit had been overtaken by subsequent events and that there is no longer any basis or purpose for its revival; that the application is exceedingly frivolous, has no merit, and is an abuse of the court process.

At the oral canvassing of the application, Mr Muriuki appeared for the Plaintiff/Applicant; Mr G Kamau for the Defendant/Respondent and Ms Wangia for the 1st Defendant. After considering the pleadings, the submissions by all counsels and the authorities cited, I note that this application is made under Sections 80, 1A, 1B and 3A of the Civil Procedure Act, and also Order XLIV Rule 1 of the Civil Procedure Rules. Sub rule (1) of the said rule states that –

“Any person considering himself aggrieved ... and who from the discovery of new and important matter ... which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

In this case, neither have the Applicants advanced any evidence of the discovery of any new and important matter which was not within their knowledge, nor is it alleged that there is any mistake or error apparent on the face of the record. That leaves only one other condition upon which a review can be undertaken, which is whether there is any other sufficient reason to obtain a review of the court order. In this regard the Applicants have invoked the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act. Section 1A sets out the overriding objective of the Act and the rules made thereunder, which is **“to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”** In that context, it is notable that the proceedings in this case were stayed pending the payment of costs by the Applicant. If these costs had been timeously paid, the hearing of this case would, possibly, have been concluded a long time ago. After feigning inability to pay for a long time, the Applicants had not paid those costs by the time when the ruling sought to be reviewed was delivered on 16th April, 2010. But soon after the suit was dismissed on that date, the Applicants miraculously managed to raise and pay the outstanding costs.

Every case should be considered and determined on its own merits and circumstances. In this matter, the unpaid costs were the only ones that constituted a barrier between the Applicant and further proceedings. Now that the barrier has been removed by the payment of those costs, although belatedly, I find this to be a sufficient reason for reviewing my order dismissing the case. I also find it to be in the greater interests of justice as spelt out in Section 1A (supra) that the Applicants should be given a chance to proceed with and prosecute the case, having satisfied the only condition imposed by the court. However, the court will not countenance any repeat performance by the Applicants in the future.

For these reasons, I accordingly review the order made herein on 16th April, 2010 and make the following orders –

- (i) The order made in this matter on 16th April, 2010, dismissing this suit is hereby reviewed, vacated and set aside.**
- (ii) The Plaintiffs’ suit be and is hereby reinstated for hearing.**
- (iii) Within 45 days from today, the Plaintiffs’ to prepare the suit for hearing and take a date at the Registry.**
- (iv) The Applicants to pay the costs occasioned by this application before the hearing date.**

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 12th day of November 2010.

L. NJAGI
JUDGE