REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 92 OF 2007

MECHANICAL ENGINEERING PLANT LTD.....1ST PLAINTIFF

ERNEST MUNGAI KAMAU.....2ND PLAINTIFF

FLORENCE NJERI KAMAU.....3RD PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LTD.....DEFENDANT

RULING

On 7th May, 2010, this court dismissed the Plaintiff's suit under **Order XVI Rule 2 (1)** of the **Civil Procedure Rules** for want of prosecution. By this application, the Plaintiffs/Applicants seek orders that this Honourable court be pleased to set aside the dismissal of the suit and all consequential orders premised thereon, and also to grant the Plaintiffs unconditional leave to prosecute the suit. The Applicants further pray that the costs of the application be provided for.

The application is brought by way of a Notice of Motion under **Order IXB Rule 8** of the **Civil Procedure Rules; Sections 1A, 1B** and **3A** of the **Civil Procedure Act;** and all other enabling provisions of the law. It is supported by the annexed affidavit of ERNEST KAMAU MUNGAI, the 2nd Plaintiff herein, and is based on the grounds that –

a) There is an appeal in the Court of Appeal still pending against the ruling made by Justice Azangalala on 12th March, 2008.

b) The Plaintiffs herein were not aware of the notice to show cause and neither were they informed by their advocates on record.

c) The Defendant herein was very much aware of the pending appeal in the Court of Appeal.

The application is opposed through the replying affidavit sworn by JANE CHEGE, the Account Manager of the Applicants' account with the Respondent Bank, sworn and filed on 9th November, 2010. The

deponent avers in the said affidavit that she is advised by their Advocates on record, which advice she believes to be true, that the lodging of an appeal in the **"the Appellant Court"** (sic) from the ruling of the Honourable Justice Azangalala on an interlocutory application did not at all bar the Plaintiffs from proceeding with the trial of the main suit before this court. She is further advised by her Advocates, which she verily believes to be true, that the Defendant was never under any obligation to inform this court of the pending appeal as there was already a Notice of Appeal on the court record and the existence of any pending appeal without orders for stay of proceedings was not a barrier to the Plaintiffs advancing their substantive suit, which they failed to do. She also deposes, *inter alia*, that setting aside the dismissal order of 7th May, 2010, would be a betrayal of "**justice of the Defendant"** (sic) which would suffer very great prejudice by the Plaintiffs continued abuse of the court process to frustrate its exercising its statutory power of sale. Finally, the deponent prayed that the application herein be struck out forthwith with costs to the Defendant as litigation must come to an end.

At the oral canvassing of the application, Mr Onindo for the Plaintiffs/Applicants relied entirely on his supporting affidavit which he rightly said was very detailed and to which he did not wish to add anything. However, he asked for an order that status quo be maintained.

In response, Mr Ombati for the Defendant opposed the application as an abuse of the process of the court. He submitted that the prayer for maintenance of status quo was a back door attempt to obtain orders which the court had earlier declined to grant, and that to grant such an order would be a travesty of justice. He argued that the Plaintiffs' excuse for not taking steps to prosecute the suit was that there was an appeal pending. However, that appeal did not stay further proceedings in this court. Mr Ombati then referred to **Rule 5(2) (b)** of the Court of Appeal rules which clearly states that the lodging of a Notice of Appeal does not automatically operate as a stay. He also referred to **Order XVI Rule 2(1)** of the **Civil Procedure Rules** and submitted that the onus was on a party to diligently prosecute its case but, in this case the Plaintiffs had gone to sleep and become grossly indolent. He finally submitted that the Plaintiffs' prayer for costs was an abuse of court process.

After considering the pleadings and the submissions of the Advocates for the respective parties, I note that notice to the parties under **Order XVI Rule 2(1)** is, indeed, discretionally. Although in theory the court has the power to dismiss a suit without notice to the parties, it has always been the practice that Notices to Show Cause are invariably sent out to the affected parties, and that is a sound practice which ought to be observed and strictly adhered to. The Applicants' main reason for not taking action in this matter was that after the decision of the High Court not to grant them an interlocutory injunction, they filed an appeal and have been pursuing that appeal. As correctly pointed out by Mr Ombati, **Rule 5(2) (b)** of the **Court of Appeal Rules** is clear that the mere filling of the Notice of Appeal does not constitute a stay of proceedings. It was incumbent for the Applicants to specifically obtain a stay of proceedings, but they did not do so.

While it is true, as stated by the Respondents, that the Applicants could have proceeded with the action notwithstanding the existence of the appeal, I note that when the suit was dismissed on 7th May, 2010, Mr Ombati for the Defendant was present in court. Without apprising the court not only of the existence of the appeal, but also updating the Court on the status of that appeal, he instead supported the dismissal of the suit. It is improper for the Defendant to state in its replying affidavit that it was never under any obligation to inform this court of the pending appeal as there was already a Notice of Appeal on the court records. As an Advocate, Mr Ombati was an officer of the court and one of his duties was to assist the court to administer justice by disclosing fully the existence and status of the appeal. Unfortunately, this he did not do. If this court had been aware that the appeal in the Court of Appeal was still pending, it would not have dismissed that suit.

In the event that this suit is not reinstated; and in the further event that the appeal succeeds, the Applicant would thereafter have nothing to prosecute in the High Court. He would then have spent his time and money in the Court of Appeal in futility, and his success in that court will have been in vain. In order to ensure that the Applicants success, if any, in the Court of Appeal is not rendered nugatory, I am satisfied that this is a fit and proper case for reinstating the suit as prayed.

For the above reasons, I hereby invoke the court's inherent power under **Section 3A** of the **Civil Procedure Act** and grant prayers 2 and 3 of the application by Notice of Motion dated 18th October, 2010, as prayed. However, this Court will not countenance any further laxity on the part of the Plaintiffs to prosecute the case. They are accordingly forewarned.
The Plaintiffs will also meet the costs of this application in any event.
Orders accordingly.

Dated and **Delivered** at **Nairobi** this 16th day of December 2010.

L NJAGI

JUDGE