

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 197 of 1998

NATIONAL BANK OF KENYA LTD.....PLAINTIFF

VERSUS

JAMES MUNGAI GACUCU.....1ST DEFENDANT

MRS. M. W. GACUCU.....2ND DEFENDANT

GREGIB LIMITED.....3RD DEFENDANT

R U L I N G

The plaintiff's suit herein was dismissed for want of prosecution on 16th October 2002. On 26th October 2006, the plaintiff made an application under **Order IXB Rule 3 & 8** of the **Civil Procedure Rules** seeking an order of this court to set aside the said order made on 16th October, 2002 dismissing the suit for want of prosecution. The plaintiff further prayed for an order reinstating the suit for hearing. The application is supported by the annexed affidavit of Tom Abuga and a supplementary affidavit sworn by Hudson Chanzu. The grounds in support of the application are on the face of the application. The plaintiff contended that it was not served with the notice of intention to dismiss the suit before the suit was actually dismissed. The plaintiff stated that it was at all material times willing and interested to prosecute the case. The plaintiff pleaded with the court to give it a chance to ventilate its case (*which according to it was a good case*), so as not to prejudice it.

The application is opposed. James Mungai Gacucu, the 1st defendant swore a replying affidavit in opposition to the application. The 1st defendant swore that the plaintiff had not placed sufficient grounds before this court to enable the court set aside the order of the dismissal. The 1st defendant was of the view that the plaintiff had been indolent because it had failed to prosecute the case for a long period of time. He further swore that the plaintiff had been guilty of laches and did not deserve this court's discretion to be exercised in its favour. He further deponed that the plaintiff was notified that the suit would be dismissed but took no action. The 1st defendant deponed that the record of the court clearly showed that the plaintiff was not interested in the prosecution of the case as it took no action even after it became aware that the suit had been dismissed by the court for want of prosecution. The 1st defendant urged the court to find the plaintiff's application without merit and accordingly reject it.

At the hearing of the application, I heard the submission made by Mr. Ashitiva on behalf of the plaintiff. He submitted that it was mandatory for the notice to show cause to be served to the plaintiff before a suit was dismissed for want of prosecution. He referred to **Order XVI Rule 2** of the **Civil Procedure Rules**. He submitted that the plaintiff has all along being interested in the prosecution of the case; The advocates for the plaintiff had visited the Civil Registry on numerous occasions with a view of filing pleadings to enable the suit to be heard. He explained that on several occasions, the plaintiff was unable to trace the court file. Mr. Ashitiva submitted that it took four years (*i.e. 2006*) before the file could be traced. When the file was finally traced, the plaintiff became aware that the suit had been dismissed for want of prosecution. The plaintiff immediately filed the present application to set aside the said order of

dismissal. He submitted that the plaintiff was interested in the prosecution of the case. He pleaded with the court to give the plaintiff an opportunity to ventilate its case on its merit. He urged the court to put into consideration that the money which was lent to the defendants belonged to the public. The plaintiff should therefore be given an opportunity to ventilate its case on merits. He maintained that the defendants would suffer no prejudice because they would be given an opportunity to defend the suit. He conceded that there was no written confirmation from the court that the file went missing at the material period. He submitted that any prejudice that would be suffered by the defendants be compensated by an award of costs.

Mr. Korongo for the defendants opposed the application. He submitted that there were no valid reasons given by the plaintiff to enable this court grant the order sought. He maintained that notice was issued to the plaintiff's advocate through its postal address to show cause why the suit should not be dismissed for want of prosecution. He argued that the plaintiff was not diligent in dealing with the matter. Mr. Korongo submitted that it was not mandatory for a notice to be issued before a court dismissed a suit for want of prosecution. He reiterated the reasons advanced by the plaintiff that its advocate's clerk could not trace the court file despite visiting the civil registry for a period of five years was incredible. He maintained there was no evidence that the plaintiff made any effort to trace the court file during the material period. He explained that the defendants would be prejudiced if the order of dismissal is set aside because it would be liable to pay the sum claimed plus interest. He reiterated that an award of costs would not be adequate compensation to the defendants. He urged the court to dismiss the plaintiff's application with costs.

I have read the pleadings filed by the parties in support of their respective positions in this application. I have also carefully considered the rival submissions made before me on behalf of the plaintiff and on behalf of the defendants. The issue for determination by this court is whether the plaintiff established a case to enable this court grant the application sought for the setting aside of the order of dismissal of the plaintiff's suit for want of prosecution. Mr. Ashitiva submitted that the plaintiff was not given notice before the suit was dismissed for want of prosecution. In his view, it was mandatory for such notice to be issued before the suit was dismissed for want of prosecution. It was his submission that **Order XVI Rule 2** of the **Civil Procedure Rules** mandatorily required for such notice to be issued. On his part, Mr. Korongo for the defendant was of a contrary view. He submitted that there was no such requirement for notice to be issued. He maintained that even though such requirement for notice was not mandatory, in the present case, the plaintiff had been served with the requisite notice before its suit was dismissed for want of prosecution. **Order XVI Rule 2** provides as follows:

“(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.”

It is clear that there is no mandatory requirement for notice to be issued by the court before a suit is dismissed for want of prosecution. In the present suit, the court issued notice to the plaintiff's advocates to show cause why the suit should not be dismissed for want of prosecution. The notice was issued on the 13th September, 2002. The notice was sent through the postal address of the plaintiff's advocate. A copy of the same notice was similarly sent to the defendants. The plaintiff's advocate claimed he did not receive such notice. I have perused the record the court. There is nothing on record to lent credence to the suggestion by the plaintiff's counsel that it did not receive such notice.

The conduct of the plaintiff since 2002 when the suit was dismissed for want of prosecution clearly show that the plaintiff was not interested in the prosecution of the suit. Four years after the suit was dismissed for want of prosecution, the plaintiff took no step to have the suit reinstated to hearing. The plaintiff's contention that it was not able to trace the court file during the said period is not supported by any evidence. If indeed it was true that the plaintiff was unable to trace the court file between 2002 and 2006, what effort did the plaintiff make to have the said file be availed so that it could prosecute its case?

The plaintiff wrote no single letter to the court complaining of its inability to trace the court file. The plaintiff did not make any application to have the file reconstructed if it was of the view that the file could not be traced.

It is clear to this court that the plaintiff has been indolent. The thrust of the plaintiff's argument in support of its application for the setting aside of the order of dismissal is based on the false premise that it became aware that the suit had been dismissed in 2006. The court record show that the plaintiff's advocate became aware of the dismissal as far back as 10th September, 2004 yet he made no effort to file an appropriate application to have the suit reinstated to hearing. Why did it take the plaintiff over two years before it filed the present application? I agree with the defendants that the plaintiff's conduct is such that this court cannot exercise its discretion in its favour. The plaintiff has been indolent and was clearly not interested in the prosecution of this case. I think it would be unjust to the defendants if the order of dismissal was set aside five years after the court dismissed the plaintiff's suit for want of prosecution.

I find no merit with the plaintiff's application. It is hereby dismissed with costs to the defendants.

DATED at **NAIROBI** this **27th** day of **FEBRUARY, 2008**.

L. KIMARU

JUDGE