

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 469 of 2000

SALIM ALHAMED ALI.....1ST PLAINTIFF

MOHAMED SALIM ALHAMED2ND PLAINTIFF

VERSUS

EMAG AG.....DEFENDANT

RULING

Chamber Summons dated 11th May 2006 is brought under Section 3A of the Civil Procedure Act and Order 1XB Rule 8 of the Civil Procedure Rules. The plaintiff seeks an order to set aside the dismissal of this suit. In support of the application the advocate for the plaintiff deponed that this case was dismissed for want of prosecution on the 25th of October 2004. Counsel said that he was unaware of that dismissal and only came to know of the same on the 6th of February 2006. That information of the dismissal of the suit was made by the defendant counsel on the 6th of March 2006. Plaintiff counsel was able to establish that dismissal when he perused the court file. He found that a notice had been sent to his firm but he indicated that the physical address shown in the notice was not where his firm was situated. He further stated that the notice failed to indicate postal address and finally concluded on the court file there was no evidence of service of the notice of dismissal. He was of the view that it would be unjust for such dismissal to continue when the same was made without hearing the plaintiff. The plaintiff thereafter indicated that it was not true that the plaintiff had not taken steps in this matter. The plaintiff counsel deponed to negotiations that had been going on and to a hearing of arbitration which would resolve the dispute herein. The plaintiff therefore sought that the dismissal would be set aside. The plaintiff relied on the case *Maina v Mugiria [1983] KLR* and relied in part of the holding as follows:

- a) **Firstly there are no limits or restrictions on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.**
- b) **Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, where by evasion or otherwise, to obstruct or delay the court of justice”**

The application was opposed by the defendant the affidavit in reply was sworn by counsel appearing for the defendant. He stated that on the 24th September 2004 his firm was served with a notice to show cause why the above suit should not be dismissed. He deponed that that notice clearly indicated the physical address of the plaintiff’s advocates. That on the 29th of October 2004 the plaintiff failed to attend court and this court dismissed this suit for want of prosecution. That the plaintiff had filed this suit on 16th of March 2000 and that this suit was last in court in June 2002. That the court had allowed the defendant to put a replying affidavit out of time during the court appearance in June 2002. Defence then stated that the parties tried to settle this matter out of court but that negotiation hit a dead lock in February 2004 after that period the negotiations were abandoned. Thereafter his firm severally requested

the plaintiff to fix this suit for herein but they failed to do so. Annexed to that application were e-mails to that effect. Defence counsel stated that the plaintiff having failed to set the suit down for hearing the same had been properly dismissed by the court for want of prosecution. He stated that the plaintiff had failed to prosecute this suit for the last 6 years. There being no genuine reason why the plaintiff seeks to re instate the suit the court should not entertain the plaintiffs application. By seeking to re-instate the suit the defendant was abusing the court process and that in any case it was not in the interest of justice to re instate. Defence counsel in oral submission stated that this suit was filed in the year 2000 under a certificate of urgency yet up to the date of dismissal the plaintiff had failed to prosecute the suit. For that reason defence counsel stated that the court of equity should not entertain parties who file a suit without prosecuting the same. The defendant relied on the case **Civil Case No. 1927 of 1999 Protein and Fruits Processor Ltd v Credit Bank Ltd and 3 others** and in particular relied on the sentiments of the judge as follows

“I think that is a case where the applicant is merely interested in going round in circles keeping the defendants, “In a state of perpetual anxiety through the yoke of litigation yet it is undesirable that they should be so kept when the rules and principles of justice militate otherwise.”

I have perused copy of the notice similar to the one that was served upon the parties dated 31st of March 2004. The one in the court file is not clear one cannot be able to make out who it was to be served upon. I have also looked at the copy of the notice that was served on the defendant advocate annexed to his affidavit in reply. That notice too is illegible one is unable to know to whom it was addressed for service. There is no evidence on the court file that service was effected upon the plaintiff counsel. In the absence of such service the court is unable to state unequivocally that the plaintiff was served. I do accept the plaintiffs submission that it would unjust to have the dismissal remain when the same was made without service upon the plaintiff. I believe this is a proper case in which the court should invoke its inherent power to set aside the dismissal of the suit. But that as it may be the finding of this court, this court is unhappy about the obvious delay by the plaintiff to prosecute this suit. The court therefore will set a date at the reading of this ruling on which date the plaintiff shall show cause why this suit should not be dismissed for non prosecution from 20th of June 2002 to the date of dismissal. The order of this court are therefore

- 1) That this court does hereby set aside the dismissal of this suit made on the 29th of October 2004.**
- 2) The plaintiff shall be required to show cause why this suit should not be dismissed for want of prosecution on a date to be fixed at the reading of this ruling.**
- 3) The costs of the chamber summons dated 11th May 2006 shall be abide by the finding of this court on the hearing of the Notice to show cause why this suit should not be dismissed for want of prosecution.**

Date and delivered on 16th November 2006.

MARY KASANGO

JUDGE