REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1180 OF 2000

HOTWAX HOTELS LIMITED……PLAINTIFF/APPLICANT

VERSUS

NAIROBI CITY COUNCIL …… DEFENDANT/RESPONDENT

RULING

The plaintiff's application by Chamber Summons, dated 24th April, 2004 and filed on 12th May,2 004 was made on the basis of section 3A of the Civil Procedure Act (Cap. 21). The prayer made was that the Court do set aside its order of 27th November, 2003 dismissing the suit, and reinstate the same.

On 27th November, 2003 the defendant's application dated 26th May, 2003 had come up before the Honourable Mr. Justice Lenaola, and the defendant was represented while the plaintiff was not. The application sought the dismissal of the suit for non-prosecution, the plaintiff having not taken any steps at all since August, 2000. The learned judge dismissed the suit.

What grounds support the plaintiff's instant application for reinstatement of the suit? Firstly, that the suit was dismissed owing to a groundless perception that there was a misunderstanding between advocate and client. (I have to note that such a misunderstanding is not reflected in the Court record). Secondly, that there were mistakes leading to inaction by the plaintiff's advocates, but these should not be visited upon the party. Thirdly, that the party will suffer immensely if the suit is not reinstated. And fourthly, that the plaintiff is ready to pay reasonable throw-away costs to the defendant, to have the suit reinstated.

A supporting affidavit was sworn by *Rogers Irungu*, a director of the plaintiff company. He depones that his first advocates in this matter were M/s Ng'ang'a Thiongo & Co. Advocates, and they had tried unsuccessfully to obtain a settlement in the matter. Then, sometime in 2001 the plaintiff was introduced by one *Michael Muratha* to the firm of Koome Mbogo & Co. Advocates; and *Mr. Ashford Koome Mbogo* of that firm has informed the deponent (and he believes the information) that the said advocate "personally tried to negotiate a settlement with the defendant's advocates", though this initiative was unsuccessful. The deponent avers that, on 19th March, 2003 he had secured the surrender of the file on the instant matter by *Mr. Ashford Koome Mbogo* to enable him to make some other arrangements for a settlement; and that thereafter the advocate filed Chamber Summons application dated 21st July, 2003 for the purpose of withdrawing from the conduct of the matter on behalf of the plaintiff. The deponent avers that he only learned in April, 2004 that the said file had been secured from *Mr. Koome* and was now in the hands of *Mr. Michael Muratha.* The deponent also states that he believes the information he has received from *Mr. Koome*, that the hearing notice for 27th November, 2003 had been served upon the advocate's clerk who failed to enter the same in the diary, and this clerk had had his employment

terminated in December, 2003. It is deposed that the dismissal of the suit had been occasioned by events about which the plaintiff had been unaware. The deponent states that the plaintiff has invested much money in the subject-matter of the suit, and in legal charges and fees, and thus it is only fair that the matter is heard on the merits.

To the plaintiff's application and supporting depositions, the defendant filed grounds of opposition on 25th June, 2004. One of these grounds is that the application lacks merit; and this ground is disputed by the applicant. The second ground was that:

> **"No purpose would be served in reinstating the suit because the claim is barred by section 3(1) of the Public Authorities Limitation Act".**

Mr. Mesa for the plaintiff remarks that this question was raised in both the plaint and the statement of defence; and he urges that the *time during which negotiations continued* should be construed in favour of the plaintiff, for the purpose of ensuring that the full trial may take place.

The last ground of opposition is that –

> **"the application is misconceived, and otherwise an abuse of the process of the Court"**.

Mr. Mesa disputes this contention, and asserts that the applicant is properly exercising its rights by seeking justice through the Court process.

Mr. Kirimi for the defendant contended that if *Mr. Muratha* was an agent of the plaintiff and he failed to keep his principal properly informed, and as a result the suit was not prosecuted as it should have been, then the plaintiff cannot escape from the consequences of his failings.

Counsel noted that the defendant had filed the application to have the suit dismissed on 28th May, 2003 and the same was served upon the plaintiff's counsel on 4th June, 2003. This application was scheduled for hearing on 24th July, 2003; but when it came up for hearing, the plaintiff's counsel on record filed an application seeking to withdraw from the conduct of the case. In the words of counsel for the defendant, "That application was meant to scuttle the matter, when our application was coming up that day". This led to a consent order recorded by *Rimita, J* – that the application be stood over generally, and the plaintiff's counsel was allowed two months to fix the application for hearing; but as he failed to do so, the defendant fixed its application for hearing on 27th November, 2003. The application was not opposed; and, counsel submitted, it was clear to the Court that the plaintiff's counsel was reluctant to prosecute the application.

Counsel contended that there was a lack of *bona fides* on the part of the plaintiff as shown *inter alia*, by the fact that the alleged non-diarizing of the hearing date of 27th November, 2003 was not a proper account, as no deposition had been made by the clerk in question, to that effect.

Mr. Kirimi contended that the application was brought in bad faith and was lacking in merits. He submitted that as the plaintiff's counsel had taken no action to set down the suit for hearing, the suit was properly dismissed, and it had not been shown that the judge's discretion was exercised other than properly; and the mode of exercise of the discretion did serve the right cause of avoiding a miscarriage of justice.

Learned counsel, *Mr. Kirimi* went further to make submissions on principles for setting aside discretionary orders of the Court. He relied on the Court of Appeal case, ***Mbogo & Another v. Shah*** [1968] E.A 93. The following passage in the judgment of *Sir Clement de Lestang*, V-P. was relied upon (p.94):

> **"[The trial judge] refused it …. on the ground, as I understand his judgment, that while the Court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error it would not assist a person who has deliberately sought to**

obstruct or delay the course of justice which, in his view, the company had done in the present case. Order IX r. 10 gives the High Court an unfettered discretion to set aside or vary an ex parte judgment (*Evans v. Bartlam* [1937] 2 ALL E.R. 646) and it was in the exercise of his discretion that the learned judge refused the application. I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion".

Along the same lines, *Sir Charles Newbold, P* thus remarked (p.46):

"One must not forget that justice looks both ways and very often a judge has to draw a line between two rather conflicting cases, each of which has some justice on its side. Now that is what the judge did in this case. As the Vice-President has said, it may be another judge would not have decided the matter in the same way; but this judge, in the exercise of his discretion, without taking into account any factor which I think was an improper factor to take into account, and without failing to take into account any matter which he should have taken into account, arrived at this decision. It is now sought to set aside this decision which was made under the exercise of a discretion.

"We come now to the second matter which arises on this appeal, and this is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

As will be noticed, the forgoing quite clear-minded passages relate to the Court of Appeal, when called upon to upset the discretionary orders of a High Court Judge. Their Lordships speak in one voice, which should, I believe, be taken to represent the law and the principle regarding the amount of deference to be accorded a discretionary order made by a High Court Judge. I think it is right to hold that, that same level of deference may apply, perhaps with stronger force, where one High Court judge is called upon to set aside a discretionary order made by another High Court Judge.

While, therefore, I remain open to cogent argument on both sides, regarding the destiny of the orders dismissing the plaintiff's suit, made by Mr. Justice Lenaola on 27th November, 2003 I must be constantly guided by the principle that the discretionary orders made by a judge ought not to be substituted merely because such a measure comports with my own temperament.

Although the orders made by the learned judge were not prefaced with a record of submissions, there is no doubt that the dismissal of the suit was effected under Order XVI, rule 5(a) for the reason that "the plaintiff has not set down the suit for hearing since the close of pleadings in August, 2000 and more than three months have elapsed".

Hardly any cogent account has been given before me which would excuse the failure by the plaintiff to prosecute this suit of 2000. Although the plaintiff indicates its preparedress to pay "reasonable throw-away costs" to the defendant, in return for being allowed more time to prosecute the suit, I think such a scheme is unlikely to outweigh the prejudice that must fall upon the defendant, occasioned by suit held as a threat for so long and yet not prosecuted. It would also be most improper to commit the Court's time-resources for the purpose of a case that won't be prosecuted to disposal. I must, in these circumstances, uphold the orders made by Mr. Justice Lenaola on 27th November, 2003.

I therefore dismiss the plaintiff's Chamber Summons application dated 24th April, 2004 with costs to the defendant.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 28th day of January, 2005.

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk – Mwangi

For the plaintiff/applicant : Mr. Mesa, instructed by M/s

Koome Mbogo & Co. Advocates

For the Defendant/respondent : Mr. Kirimi, instructed

by M/s Muciimi Mbaka & Co. Advocates.