

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Civil Case 1584 of 2000

GIRO COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

SUPERFOSS LIMITED1ST DEFENDANT

PANKAJ MOHANLAL LAKHANI.....2ND DEFENDANT

DILIP MOHANLAL LAKHANI.....3RD DEFENDANT

R U L I N G

On 5th November, 2003 the Plaintiff's suit herein was dismissed by Mutungi, J. for want of prosecution under Order 16 Rule 2(1) of the Civil Procedure Rules. The Plaintiff has now come to court by notice of motion dated 10th November, 2003 seeking a review and setting aside of the said order in order to reinstate the suit. When dismissing the suit Mutungi, J. stated, *inter alia*:-

- “1. Upon hearing the counsel for the plaintiff this court is not satisfied with the reasons given for the want of prosecution.***
- 2. The last time the matter was in this court was 13th October, 2000 – that is three (3) clear years.***
- 3.”***

The application is brought under Order 44, Rule 1 of the Civil Procedure Rules. Section 3A of the Civil Procedure Act is also quoted. Rule 1 aforesaid donates to court jurisdiction to review an order or decree for discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's 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 mistakes or error apparent on the face of the record, or for any other sufficient reason. It is stated on the face of the application that the Plaintiff has sufficient cause as to why the suit should not have been dismissed for want of prosecution. A supporting affidavit sworn by KIRAGU KIMANI, learned counsel for the Plaintiff which is annexed to the application elaborates. The main plea contained in that affidavit is that the Plaintiff had not been served with a notice to show cause why its suit should not be dismissed for want of prosecution. This very plea had been made before Mutungi, J. on the 5th November, 2003. Being dissatisfied with the decision of Mutungi, J. one would think that an appeal would have been the appropriate way for the Plaintiff to go rather than the present application.

Mutungi, J. is no longer attached to this division and is not available to hear the application. That is why I heard the application. But I note that the application had been placed before him on 26th February, 2004 when the Defendants raised objection to it upon the ground, *inter alia*, that by the application the Plaintiff is asking the court to sit in appeal on its own judgment since the issues raised in the application had been raised on 5th November, 2003. Mutungi, J. overruled that preliminary objection, stating, in effect, that the suit having been disposed of on technicalities that plea could not be properly made. That observation by Mutungi, J. is an indication that he was prepared to look at the matter afresh. Though my first inclination was that an appeal should have been preferred instead of the present application I have

been encouraged by the above observation of Mutungi, J., and I will look at the matter afresh.

The application is opposed by the Defendants upon the grounds of opposition dated 5th December, 2003. Those grounds are that the application is misconceived, bad in law and an abuse of the process of the court; that it lacks merit; that it is frivolous, vexatious and scandalous; and that it is incurably defective and untenable in law. I have considered the submissions of the learned counsels appearing. On 5th November, 2003 only the learned counsel for the Plaintiff appeared before Mutungi, J. There was no appearance for the Defendants. The Plaintiff's counsel stated to Mutungi, J. that no notice to show cause why the suit should not be dismissed for want of prosecution had been served upon the Plaintiff or its counsel. The same plea has been repeated before me. It has not been argued for the Defendants that any notice to show cause as above for 5th November, 2003 had been served upon them. Indeed, the lack of appearance for the Defendants on the said date is an indication that the Defendants themselves had not been served with any notice to show cause. The Plaintiff's learned counsel made a passionate plea before Mutungi, J. for an opportunity to file an affidavit to show cause why the suit should not be dismissed. He was denied that opportunity. He has made the same plea before me. All the Plaintiff wants is an opportunity to show cause why the suit should not be dismissed for want of prosecution. As already noted, Mutungi, J. was prepared to look at the matter afresh. Since he could not hear the application the task falls upon me to look at the matter afresh without in any way purporting to sit in appeal from the order of Mutungi, J. If the Defendants had been served with a notice to show cause for 3rd November, 2005, they are beneficiaries of the order made on that day notwithstanding that they did not bother to attend court. But indications are that they, just like the Plaintiff, had not been served with such notice to show cause.

I have anxiously considered this application. I think the justice of the matter demands that the Plaintiff be accorded a proper opportunity to show cause why its suit should not be dismissed for want of prosecution. I will, therefore, set aside the order of 5th November, 2003. The Plaintiff's suit is thus reinstated. I further order that the parties do appear before court on theday of, 2005 for purposes of showing cause why the suit should not be dismissed for want of prosecution. The parties are at liberty to file and serve appropriate affidavits before the said date. In the circumstances of this case there will be no order as to costs of this application. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 25TH DAY OF NOVEMBER, 2005.