



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**Civil suit 361 of 1997**

**DIANI MARINE LTD ..... PLAINTIFF**

**V E R S U S**

**JACARANDA HOTEL MOMBASA T/A**

**INDIAN OCEAN BEACH CLUB ..... DEFENDANT**

**Coram: Before Hon. Justice J. Mwera**

**Kingi for Applicant**

**Muthama for Respondent**

**Court clerk – Kazungu**

**RULING**

By the Notice of Motion dated 5th September 2005 the plaintiff company prays that this court's order of 13th May 2005 dismissing its suit under O16 r. 6 Civil Procedure Rules be reviewed under O44 rr. 1, 2, 3(2) Civil Procedure Rules and Section 3a Civil Procedure Act.

Mr. Kingi told the court that to proceed to dismiss a suit under O16 r. 6 Civil Procedure Rules the court acts on its own motion and no notices are served on the parties.

Only that 3 years have elapsed and no party to that suit has taken any step. That in this cause the defendant wrote to the registry on 19th July 2004 inquiring about the file which had been missing for some 2 years. That the defendant was greatly prejudiced with injunction orders against it which had been in place for more than six years. Mr. Kingi considered this the last step taken, urging the court to accept that a letter was as good as any document in the file constituting a step in a matter. He cited the case of NJOROGI & OTHERS VS SAVINGS & LOAN (K) LTD & OTHERS [1990] KLR 78. His emphasis was that had Justice Khaminwa who made the order under review, seen that letter of 19th July 2004 she could not have dismissed the suit. That therefore there was an error on the face of the record. Further that O5 r.1(7) Civil Procedure Rules did not apply because it concerns extension of summons which was not the case here. And that that too was an error on the face of the record.

The court was also told that there was sufficient reason to review the order in issue and reinstate the suit because the file actually went missing for a long time and nothing could thus go on it.

In opposition Mrs. Osolika strongly opposed the application on the grounds that the applicant having failed to take any step in the cause since 14th December 2001 did not deserve the orders sought. That O16 r 6 Civil Procedure Rules did not oblige issuing a notice to parties before ordering dismissal of a suit and that since the plaintiff / applicant got the injunction orders it refused / stopped paying rents. She added that the lease which was the subject of the suit had since run its time and so reinstating the suit – would be a futile exercise. That a review did not avail the applicant under O16 r 6 Civil Procedure Rules because that provision of law only allows for instituting a fresh suit subject to the law of limitation.

O16 r 6 reads:-

“6. In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed; and in such case the plaintiff may subject to the law of limitation, bring a fresh suit.”

Mr. Kingi argued two points on account of error on the face of the record – the letter dated 19th July 2004 by the defendant inquiring as to the whereabouts of the file that had gone missing for 2 years and inclusion of O5 r 1 (7) Civil Procedure Rules.

Beginning with the letter dated 19th July 2004 to be considered as a step taken by a party in the suit the Njoroge case above says:-

“The court had to decide what was recorded and it held that a record includes documents which are the basis of the decision as well as the statement of the decision itself. In the instant case the documents forming the basis for decision would in my view include (a) chambers summons, the affidavits .....

grounds of opposition, the replying affidavits, further affidavits, all the annexures of the affidavits ..... proceedings of the hearing of application (s). The statement of decision itself comprises the final decision and an order of a ruling .....

A letter to the registry does not feature in the above and in this court’s view, it cannot form a basis of a decision as well as the statement of the decision itself. So it is with the letter of 19th July 2004 addressed for some administrative action only.

The minute placed before Judge Khaminwa to consider on 13th May 2005 read:-

“Notice for Dismissal Case is hereby dismissed under Order XVI Rule 6 and Order V Rule 1(7) of Civil Procedure Rules.

.....

Judge.”

Whereas O16 r. 6 Civil Procedure Rule was properly invoked because the case had been stood over last on 14th November 2001, citing O5 r 1 (7) Civil Procedure Rules seemed hardly applicable. It relates to extending of time to serve summons on the defendant 12 months after the initial summons was taken out. That if no application is made to extend the validity, the court may without notice dismiss the suit. Why the registry introduced O1 r 1 (7) Civil Procedure Rules along side O16 r 6 Civil Procedure Rules in the minute above is not known or whichever is not applicable required being deleted and the registry forgot. The two cannot operate side by side. Each has its own field. It was thus irrelevant when the judge considered dismissing the suit after 3 years when neither party took a step to proceed with the case. To this court it does not appear an error on the face of the record because its presence in the minute did not influence the judge. It could not.

Mrs. Osolika posed the issue that filing a fresh suit and not seeking a review was the only course open to the plaintiff. Mr. Kingi was of the view that even if his client could not consider appealing against the

ruling of 13th May 2005 it was not barred from seeking a review. In this court's opinion seeking a review from orders under O16 r 6 Civil Procedure Rules is not barred eg in case the dismissal is ordered by error before 3 years expire. That cannot suitably be considered for an appeal. Rather the plaintiff will seek a review, and not to file a fresh suit subject to the law of limitation by telling the judge that by computation of time 3 years had in fact not expired since the last application or step was taken by the time dismissal was ordered.

Having found that the defendant's letter of 19th July 2004 was not a proper "last step" in the cause or that including O1 r1(7) Civil Procedure Rules was only superfluous and irrelevant and thus none constituted an error on the face of the record, we turn to for any sufficient cause a review can issue.

This the court finds in the fact that the file could not be traced for a long time. Although the applicant did not show evidence of trying to know whether the file was in the registry or not or even a move to reconstruct one, the defendant did on 19th July 2004.

The plaintiff simply sat there yet this was its case which one should expect, the plaintiff should move forward. Perhaps it was enjoying the injunction with no hurry to move forward. Indeed before this court were two files. The original one and another made up of copies of documents. No party enlightened the court as to how the latter came about and when.

For the fact that the file appears to have gone missing between 16th November 2001 and 13th May 2005, may that be sufficient reason to allow the sought review.

Accordingly the review sought is granted. The order of 13th May 2005 was not made on the application of the defendant / respondent at all.

The suit is reinstated but without the injunction orders. The plaintiff appears to have gone to sleep since it got the same.

Orders accordingly: the orders of 13th May 2005 reviewed on sufficient reason.

Suit reinstated. The plaintiff to pay the costs. The reinstatement is without injunction orders.

**Delivered on 17th November 2005.**

**J. W. MWERA**

**JUDGE**