

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1266 OF 1999

**ASSOCIATED WAREHOUSE COMPANY LTD
1ST PLAINTIFF**

**NITINCHANDRA KRISHNALAL
PANDYA2nd PLAINTIFF**

**BHAVNA PANDYA.....3rd
PLAINTIFF**

VERSUS

**TRUST BANK LTD (UNDER CBK STATUTORY
MANAGEMENT).....:DEFENDANT**

RULING

This is an application by the Plaintiff to set aside an order made on 4th April, 2003 dismissing the Plaintiff's suit for want of prosecution. The application is supported by an affidavit sworn by Nitchandra Krishnalal Pandya the Second Plaintiff. The application is opposed. One Clement Kinuthia Nduru the Defendant's Liquidation Agent filed a replying affidavit.

The dismissal of the Plaintiff's suit was ordered pursuant to a Notice to Show Cause issued under Order XVI Rule 2(1). Neither the Plaintiff nor the Defendant attended the Court when the Notice to Show Cause came up for hearing on 4th April, 2003. The reason for the Plaintiff's failure to attend was that the Notice to Show Cause was not received by the Plaintiffs or their advocates prior to the dismissal of the suit. Counsel for the Plaintiff discovered that the suit had been dismissed on 5th December, 2003. At this time, persons interested in purchasing the suit property were making enquiries. The 2nd Plaintiff got concerned and instructed their present advocates to check the position of this case. The advocates informed him that the suit had been dismissed on 4th April, 2003. This information led to the filing of the present application.

Counsel for the Plaintiff subsequently enquired from the Plaintiffs' former advocate whether they had been served with the Notice to Show Cause why the suit should not be dismissed. The said Advocates, Waruhiu K'owade and Ng'ang'a wrote back on 7th January, 2004 denying that they received the Notice To Show Cause. Counsel further submitted that the record does not show how the Notice to Show Cause was served as there is no affidavit of service to confirm service of the Notice to Show Cause. In Counsel's view the Court has inherent powers to set aside an order of dismissal for want of prosecution and prayed that the Plaintiff's suit be revived. He added that an order of injunction issued earlier in this suit was conditional on the Defendant performing certain orders which it had not and this interpretation of the order of injunction made the Plaintiff fail to fix this case for hearing. Otherwise the Plaintiffs are still interested in their suit.

Counsel placed reliance on the decision in the case of Rawal – v- The Mombasa Hardware Ltd (1968) EA/ 392 for the proposition that the remedy provided for in Order 16 (6) Rule 6 (that is of bringing a fresh suit) was not intended to be exhaustive and the inherent jurisdiction vested in the Court by Section 97 of the Civil Procedure Act was for that reason not excluded.

Counsel also relied on the decision in the case of Trust Bank Ltd –v- Anglo African Property Holdings Ltd and 2 Others: HCCC No. 2118 of 2000 (unreported) for the proposition that where costs are a sufficient compensation a party should not be denied a hearing. In reply Counsel for the Defendant opposed the application to revive the suit arguing that the Plaintiff was guilty of inordinate delay and once

they obtained an injunction they lost interest in the suit. Their former Advocates had not filed a supporting affidavit to confirm that indeed they did not receive the Notice to Show Cause. Even if they had had the Notice, their mistake would have been visited on the Plaintiff as Aganyanya J. said in *Gichuru – v- Ngumba* (2000) LLR 2649 (HC..)

Counsel further relied on the case of *Ryan Investments Ltd and Another –v- the United States of America* (1970) E.A.675 for the proposition that inherent jurisdiction should not be invoked on this case as there is a specific remedy of filing a fresh suit under Order 16 Rule (6) of the Civil Procedure Rules.

Reliance was also placed on the decision of my brother Judge Ibrahim in the case of *Kingangi –v- Industrial and Commercial Development Corporation & Watts Enterprises*: (1996) LLR 2378 (CCK) for the proposition that the Court has no jurisdiction to entertain an application to revive a suit dismissed under Order 16 Rule 6 of the Civil Procedure Rules. Ibrahim J. was of the view that a Plaintiff whose suit has been dismissed under Order 16 Rule 6 can only file a fresh suit subject to the Law of Limitation.

Finally Counsel relied on the decision in *Fehmi and Co –V- The Owners of the Motor Vessel “Zulfikar”* (1997) LLR 331 (HCK) for the proposition that even if the Court has a discretion in the matter it should be exercised judicially and not whimsically. The above are the rival submissions made for and against the application to revive the suit. I will first deal with the issue of jurisdiction raised by the Defendant. Order 16 Rule 2 (6) provides:- 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. AND order 16 Rule (2) (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. The Notice to Show Cause why this suit should not be dismissed for want of prosecution was issued pursuant to the provisions of Order 16 Rule 2(1) I do not detect exclusion of the Court’s jurisdiction to set aside an order of dismissal made under this rule. I do not therefore agree with Counsel for the Defendant that I have no power or jurisdiction to set aside the order of dismissal made in this case. My brother Judge Ibrahim was not dealing with dismissal under Order 16 Rule 2(1) but order 16 Rule 6. Indeed this is the Order and Rule he quoted at page 2 of his ruling. The decision in the case of *Fehmi & Co. –v- The Owners of the Motor Vessel Zulfikar* (supra) was not under Order 16 Rule 2(1) of the Civil Procedure Rules and *Aganyanya J.* in the case of *Gichuru - v- Ngumba* (supra) dealt with dismissal for want of prosecution as Counsel did not attend the hearing. These cases are therefore not relevant to the present circumstances.

The Plaintiffs state that they did not receive the Notice to Show Cause why their suit should be dismissed. Their Advocates were also not served with the Notice. It is not alleged that the letter dated 7th January 2004 from M/S Waruhiu K’owade and Ng’ang’a Advocates to the present Advocates for the Plaintiffs is a forgery. In the absence of any challenge to this letter I believe that the Notice to Show Cause was not served upon the Plaintiffs or their advocates. The dismissal order was therefore made without the knowledge of the Plaintiffs or their agents. There is no affidavit of service. The *ex parte* dismissal of the Plaintiffs’ suit was therefore irregular.

Rule 2(1) of Order 16 presupposes service before dismissal. It is also clear under this rule that even where cause is not shown, dismissal is not mandatory as the rule is permissive. In this case the Plaintiffs were not given a chance to Show Cause why their suit should not be dismissed. The plaintiffs have this persistent complaint regarding alleged “Bearer Certificates of Deposit”. The Plaintiffs may have misinterpreted the effect of the interlocutory order made by Gacheche, Commissioner of Assize as she then was. This reason for delay in prosecuting this suit may be unsatisfactory, but I will not hold it against the Plaintiffs. In any event the Defendant has not demonstrated the prejudice it will suffer.

In the result I am inclined to give the Plaintiffs’ a last chance and accordingly order that the Order made on 4th April, 2003 dismissing the Plaintiffs suit for want of prosecution be and is hereby set aside. The Plaintiffs shall pay to the Defendant the costs of the application. It is further ordered that the parties hereto commence discovery and or pretrial proceedings within the next fourteen (14) days. These then are

the orders of this Court.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of: