



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI**

CIVIL CASE NO.226 OF 2001

TRUST BANK LIMITEDPLAINTIFF

VERSUS

BONIFACE NJIRU T/A

NJIRU BONIFACE & COMPANY.....1ST DEFENDANT

PAWI ENTERPRISES2ND DEFENDANT

STEPHEN MUGO MUTOTHORI3RD DEFENDANT

MUTOTHORII MUGO4TH DEFENDANT

AGNES MUTHOTHORI MUGO5TH DEFENDANT

HORERIA & COMPANY6TH DEFENDANT

RULING

The Plaintiff seeks by this application (Notice of Motion dated 4th June 2003) an order to set aside or review the order of the court dated 28th March 2003 by which the suit was dismissed for want of prosecution. The application is said to be brought under section 3A of the Civil Procedure Act, Cap 21 (the Act) and also under Order 44, rule 1 (1) of the Civil Procedure Rules (the Rules). The grounds for the application as stated on the face thereof are, first, that the Notice To Show Cause why the suit should not be dismissed for want of prosecution set for 28th March 2003 at 9.00 a.m. reached the then Plaintiff's advocates, M/s Ibrahim & Isaack, on the same 28/03/03 at 10.00 am; and, second, that the suit was not yet due for hearing as the 2nd, 3rd, 4th and 5th Defendants had not yet been served with summons to enter appearance and copies of the plaint. There is an affidavit sworn in support of the application.

The 1st and 6th Defendants have opposed the application upon the various grounds set out in their respective notice of objection dated 15th September 2003 and grounds of opposition dated 27th August 2003. In addition there is a replying affidavit filed on 26th September 2003 on behalf of the 6th Defendant. At the hearing of the application there was no appearance for the 1st Defendant whose advocates had been duly served with hearing notice. There was appearance for the 2nd, 3rd, 4th and 5th Defendants, as well as for the 6th Defendant.

I have considered the submissions of all three learned counsels appearing. When the order of dismissal of suit was made on 28th March 2003 there was no appearance for any of the parties. The Plaintiff's then

advocates were apparently served with the Notice To Show Cause why the suit should not be dismissed for want of prosecution the very day that the Notice To Show Cause came up before the court. But as correctly pointed out by learned counsel for the 2nd, 3rd, 4th and 5th Defendants, the suit was dismissed, not for non-attendance on 28th March 2003, but because since close of pleadings in about April 2001 no party had taken any steps towards fixing the case for hearing or applied for any other order. It was therefore incumbent upon the Plaintiff, who now seeks the discretion of the court to set aside the order of dismissal, to explain why there was no application made or step taken towards hearing of the suit for nearly two years.

The Plaintiff's explanation is that the suit could not have been fixed for hearing because the 2nd, 3rd, 4th and 5th Defendants have yet to be served with summons to enter appearance and copies of plaint. But this cannot possibly be so. On 22 March 2001 a memorandum of appearance was filed for these four defendants. On 4th April 2001 a joint statement of defence was filed for them. I do not see how they could have entered appearance and filed defence without having been served with summons and copies of plaint. The Plaintiff's explanation of the inactivity of nearly two years thus falls on its face.

The Plaintiff has invoked the inherent power of the court under section 3A of the Act. Such power will be used only as may be necessary for the ends of justice or to prevent abuse of the process of the court. That power is not an unfettered discretion. It has not been demonstrated to the court why its inherent power should be exercised in favour of the Plaintiff when it has not offered an acceptable or even reasonable explanation for its inactivity of nearly two years. Likewise I find no sufficient reason as would enable me to grant the relief sought under rule 3 (2) of Order 44 of the Rules. It is also to be noted that the application, in so far as it is made under rule 1(1) of the same Order is incompetent in that the order sought to be reviewed has not been formally extracted and issued.

For the above reasons the application is without merit. It is hereby dismissed with costs to the Defendants. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF OCTOBER 2004

H. P. G. WAWERU

JUDGE