



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 234 OF 2019

TRADE CIRCLES LIMITED.....PLAINTIFF

VERSUS

FAMILY BANK LIMITED.....1ST DEFENDANT

LEAKEY AUCTIONEERS LIMITED.....2ND DEFENDANT

RULING

1. By Certificate of Urgency Application dated 12th August 2020, filed together with Notice of Motion and Supporting Affidavit the Applicant herein urges the court to hear this matter on priority basis for reasons;

- a) This matter was dismissed for want of prosecution on 14th November 2019 by this Court.
- b) That the Plaintiff/Applicant filed an Application at the Environment and Land Court at Thika in October 2019 and before the application was heard, the matter was transferred to the Commercial and Tax Division Milimani.
- c) That the matter was slated for mention before this Court on 5th November 2019 and parties were duly notified by Court, However, the Counsel handling the matter inadvertently failed to diarize the date.

2. In the Certificate of Urgency brought under the provisions of **Sections 1, 1A, 3, 3A of the Civil Procedure Act, of the Civil Procedure (Revised) Rules of 2010** Laws of Kenya and other enabling provisions of the law. The Applicant sought orders;

- a) That this Court reinstates the suit against the 1st and 2nd Defendants.
- b) That the costs herein be in the cause.

3. The Application was premised on grounds;

- a) That the matter came up for mention before this Court on 5th November 2019, in the absence of

Counsel for the Plaintiff/ Applicant. On 5th November the Court scheduled the matter for mention on 14th November 2019 and directed that the parties be served with notices.

b) That it was until the Plaintiff/Applicant perused the Court file that they learnt that the matter had been dismissed for want of prosecution on 14th November 2019.

c) The Plaintiff never received any notice to that regard and consequently, did not attend Court on 14th November 2019 when the matter was dismissed for want of prosecution.

d) That prior to the matter being dismissed, the Plaintiff did not receive a notice from Court to show cause why the matter should not be dismissed.

e) That prior to filing this suit, the Plaintiff/Applicant had prosecuted a similar suit being, **HCCC No. 124 of 2003** albeit for a different notification for sale against the 1st and 2nd Defendants with diligence, dedication and devotion and a ruling was delivered in that matter and thus the Plaintiff is desirous and keen on prosecuting this matter to full determination by this Court.

4. In the supporting affidavit sworn by Hannah Gathoni Njeri, Counsel for the Plaintiff/Applicant, stated that the Applicant filed a suit in the Environment and Land Court, Thika, seeking an injunction against the 1st and 2nd Respondents for advertising the sale of a property without first issuing a statutory demand notice as required by law.

5. The Applicant stated that the suit was transferred from Thika High Court to the Milimani Commercial and Tax Division in November 2019, and on 5th November 2019 the matter was mentioned before this court in absence of Counsel for the Applicant.

6. The Applicant averred that failure to attend court on 5th November 2019 was an inadvertent error on the part of Counsel as the Advocate handling the matter at the time failed to diarize the matter hence the non-attendance and that the Plaintiff/Applicant should not suffer for the mistake of Counsel.

PLAINTIFF/APPLICANT'S SUBMISSIONS

7. On the issue of whether the mistake/error on the Advocate's part should be visited upon the Client, the Plaintiff submitted that this court generally has the discretion to set aside any *ex parte* orders that it has issued, if there is sufficient cause shown for the exercise of that discretion. The circumstances giving rise to the present application revolve around the mistake/error of the Plaintiff's Advocate handling the matter at that time who inadvertently failed to diarize the date when the matter was coming up in court.

8. The Plaintiff submitted that an advocate's mistake should not be visited upon the client as held in the case of **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173;**

"In law, the discretion that a court of law has, in deciding whether or not to set aside ex-parte order...was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It wouldnot be proper use of such a discretion if the court turns its back to a litigant who clearly demonstrates such as excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here.... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the Appellant by its Advocate."

See also **Belinda & Others vs Amoi Wainaina (1978);** and **Philip Chemowolo & Another vs Augustine Kubende, [1982 – 88] 1 KAR 103.**

9. On the issue of whether the Plaintiff/Applicant should have been given a Notice to show Cause

(NTSC) before dismissal of the suit, the Plaintiff submitted that the law does not state as much under **Order 17 Rule 2 (1) of the Civil Procedure Rules**.

The Plaintiff relied on the case of *Fran Investments Limited vs G4s Security Services Limited [2015] eKLR* where the Court stated;

“Order 17 Rule 2(1) of the Civil Procedure Rules does not require service of notice; it uses the word “give notice”. The court may give notice of dismissal through its official website or through the cause list. And those mediums will constitute sufficient notice for purposes of order 17 Rule 2(1) of the Civil Procedure Rules.”

10. On the issue of whether reinstating this suit will cause (irreparable) prejudice to the parties herein, the Plaintiff submitted that justice calls upon the court to look into the circumstances of all parties to the suit before arriving at a determination on an issue such as this one. In opposing the Plaintiff’s application, the Respondent alleged that they shall be prejudiced should the matter be reinstated. The Plaintiff urged the court to take note of the glaring lack of evidence to support that claim. The Plaintiff submitted that on the contrary, it is them who will be prejudiced should the matter remain dismissed, as they will not have had their case heard on its merits in essence taking away its constitutional right to a fair hearing. In *Richard Ncharpi leiyagu vs IEBC & 2 Others CA 18/2013*, the Court of Appeal held;

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”
(emphasis added)

11. It was Plaintiff’s submission that the Defendants have not in any way demonstrated to this Court how, if at all the Plaintiff’s conduct or the present application before this court is an abuse of the court process. As previously stated, this is all borne out of an inadvertent mistake, too which human nature is prone.

12. The Plaintiff submitted that it is well settled law that when claiming one will suffer prejudice or some other form of harm, the Defendant must satisfy the Court as to how exactly the said prejudice will occur, should the suit be reinstated.

1ST DEFENDANT’S SUBMISSIONS

13. The 1st Defendant submitted that, in the court record for the 14th November 2020, the matter was dismissed by the court in the absence of all parties. That the Court will note that the 1st Defendant entered appearance on 18th August 2020, noting that the 1st Defendant was served with a Mention Notice and the instant application on 17th August 2020.

14. The 1st Defendant stated that up until August 2020, the Plaintiff proceeded with this matter on their own. The Plaintiff has since the dismissal of the suit on 14th November 2019 to date, being almost year, been asleep and has now realized that it needs the court’s assistance.

15. It was 1st Defendant submission that the case should not be reinstated on the account of issuance of the Notice to show cause, stating that the law is well laid out on the consequences of non-attendance and non-prosecution of any matter before the court. **Order 12 Rule 1 of the Civil Procedure Rules** provides as follows;

“if on the day fixed for hearing, after the suit has been called out on for hearing outside the court, neither party attends, the court may dismiss the suit.”

16. By virtue of a matter being listed on the Court’s official website or on the cause-list, it serves as sufficient notice to the parties. The matter herein was listed on the daily cause-list uploaded on Kenya

Law Reports and the Judiciary official website.

17. Further to the foregoing application, the 1st Defendant reminds the court that from the court record and in their submissions, the Plaintiff admitted that they were aware of the mention date of 5th November 2019 but that their lawyers failed to diarize the matter hence their non-attendance on the said 5th November 2019.

18. The 1st Defendant submitted that it was curious that since the said 5th November 2019 or even after transfer of the suit from Thika to Nairobi High Court, the Plaintiff had not shown by way of evidence what they did in the almost a year that they had failed to take action to move the matter forward.

19. On the issue of failure to act by Counsel for the Plaintiff, the 1st Defendant submitted that it was Plaintiff's case that the Advocate handling the matter at the time failed to diarize the matter hence the non-attendance on the material date. The Plaintiff's advocate has not provided any evidence to prove that indeed it failed to diarize the matter.

In *Ruga Distributors Limited vs Nairobi Bottlers Limited [2015]eKLR*, Abirili J. cited the decision of Kimaru J. in *Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi HCCC397/2002*, where he stated;

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case.

The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.

In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal.”

20. On the issue of the delay to reinstate the suit, the 1st Defendant submitted that the suit was dismissed on 14th November 2019; the Plaintiff filed the present application on 13th August 2020. That is a period of nine(9) months since the matter was last in court. No credible, satisfactory and sufficient explanation has been provided by the Plaintiff why it took a total of nine months to file an application to reinstate the suit. It is 1st Defendant's case that the Plaintiff is not keen on prosecuting the matter.

The 1st Defendant relied on the case of *Gideon Sitelu Konchella vs Daima Bank Limited (2013)eKLR* where the court while citing the case of *Mobil Kitale Service Limited vs Mobil Oil Kenya Limited*, held that;

“It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiouslythe overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

21. On the issue of whether the Defendant is likely to be prejudiced by the reinstatement, the 1st Defendant submitted that justice must be done to all parties to a suit and not to only one party. It is the 1st Defendant's case that it stands to be prejudiced by the reinstatement of the suit herein noting that the final prayers being sought by the Plaintiff are not attainable.

DETERMINATION

22. The Court has perused the pleadings and submissions by parties and the issue is whether the suit dismissed by this Court ought to be reinstated.

23. The Court record confirms as follows;

On 8/10/2019, the matter was mentioned before LJ Gacheru of ELC Court Thika who transferred the same matter to Milimani High Court Commercial & Tax Division

On 22nd October 2019, the Presiding Judge LJ M. Kasango mentioned the matter and it was allocated to this Court to be mentioned on 5th November 2019. The Deputy Registrar was to inform parties.

On 5th November 2019, the 1st Defendant was represented by Mr Mutua Advocate holding brief for Mr Onzare, the Plaintiff did not appear neither was there representation by Counsel. The 2nd Defendant had not entered appearance. The 1st Defendant's Counsel informed this Court that they were not served with date of 5th November 2019 but saw the matter in the day's Cause list. The Court adjourned the matter to 14th November 2019 and that all parties were to be served by the 1st Defendant's Advocate. **HCCC124 of 2003** was also to be availed from our Registry and to be produced on 14th November 2019.

On 14th November 2019, none of the parties to the suit appeared or sent representatives or filed any communication with reasons or circumstances for the Court to consider. The suit was dismissed for non-attendance and non-prosecution of the matter.

24. I have laid down the facts process and events that culminated to the dismissal of the suit.

25. The Applicant attributes blame to the Court for not serving Notice to Show Cause (NTSC) before dismissal of suit. This Notice is required for dismissal under **Order 17 and not Order 12 CPR 2010**. The form of Notice is not specified as NTSC it may be on Causelist on Judiciary website. Secondly, it is abundantly clear from the Court record that on 5th November 2019 parties/Counsel did not appear, except for 1st Defendant's Counsel and he informed the Court that all parties were not served with the date, this Court adjourned to allow parties be served by 1st Defendant's advocate to appear in court on the next mention date 14th November 2019.

26. Be that as it may, in light of the fact that the suit was transferred from **ELC THIKA to HIGH COURT NAIROBI**, there may have occurred a breakdown of communication between the Court to parties as to when the matter was slated for mention or hearing in this Court.

27. Secondly, as illustrated by Case-law cited by parties, it is unfair and unjust to lock out a party from access to justice if it is not abundantly clear that it is the party that was indolent and delayed after being properly informed and/or served by the Court on the next mention/hearing date.

28. Thirdly, since from the Court record, 1st Defendant's Counsel was to serve all other parties with mention date of 14th November 2020 and apparently did not do so, the Advocate's mistake or oversight ought not to be visited on the client.

29. In this matter due to the transfer of the case, the justice of the case tilts to allowing the Plaintiff pursue the case/matter to its logical conclusion.

DISPOSITION

30. **The Court order of 14th November 2020 of dismissal of the suit is hereby discharged and withdrawn forthwith and the suit reinstated.**

31. The parties through Counsel to obtain mention date from Registry within 30 days for determining the Way Forward.

32. Each party shall bear its costs.

DELIVERED SIGNED 7 DATED IN OPEN COURT ON 17TH MAY 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MS GATHONI H/B MR. KARIUKI FOR THE PLAINTIFF

MS MUTUA FOR 1ST DEFENDANT

COURT ASSISTANT: GRACE