



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 20 OF 2010

ZANAA FREIGHT LTD

T/A ZAHAL TRADERS.....PLAINTIFF

VERSUS

1. KENYA PORTS AUTHORITY

2. COMPACT CFS LTD..... DEFENDANTS

RULING

1. The application before the court for determination is dated **3rd September, 2020** filed by the Plaintiff/Applicant on the **23rd October, 2020**. By that application the Plaintiff seeks for the following orders: -

- a) That the Honorable court be pleased to set aside the orders made on the 23rd October, 2018 dismissing the instant suit for want of prosecution.***
- b) That the Honorable court be pleased to reinstate this suit and allow the same be heard fully and determined on merit.***
- c) That costs of this application be provided.***

2. The grounds relied on by the Plaintiff in support of the application are on its face and in the affidavit of *Bare Farah Sahal*, its managing director. It is the Plaintiff's case that on **2nd October, 2018**, this court had directed that parties do comply with **Order 11 of the Civil Procedure Rules** within twenty (20) days thereof, failure to which the suit would stand dismissed. Those orders were further confirmed by this court on **23rd October, 2018**. Additionally, the Plaintiff alleges that it had complied with **Order 11** as per the directions issued on **2nd October, 2018** contrary to the assertion that it had not complied.

3. It is also averred that neither the Plaintiff nor his advocate were present in court to show cause why the suit should not be dismissed. It is explained that the non-attendance by the Plaintiff's advocate was as due to the failure of not indicating the matter in the diary and hence such mistake should not be visited upon the innocent Plaintiff, who stands to be denied an opportunity to ventilate its claim in a fair manner.

4. Further, the Plaintiff alleges that it will be denied its Constitutional right to be heard and therefore continue to suffer hardship, and yet if the suit is reinstated, the Defendants would not be occasioned any prejudice.

5. In its submissions, the Plaintiff/Applicant submitted that it is not deliberately obstructing or delaying the course of justice and in any event, the court should set aside the dismissal order to avoid hardship and injustice which may have resulted from an excusable mistake by a counsel. In supporting those submissions, the Plaintiff's counsel relied on the cases of ***Philip Chemwolo & Another -vs- Augustine Kubende [1986], eKLR, Esther Wamaita Njihia & 2 others -versus- Safaricom Ltd. [2014] eKLR, Daniel Kabuba Maina -vs- Mercilline N. Muriithi [2018] eKLR, Petromin Ltd. - vs- Kenya Revenue Authority [2020] eKLR*** and ***Mwangi S. Kimenyi -vs- Attorney General & Another [2014]eKLR.***

6. In response to the Application, the 2nd Defendant filed a **Replying Affidavit** sworn by its advocate on **18th January, 2021** and filed on even date. In that affidavit, the Defendant avers that the Plaintiff has not shown or tendered any viable explanation as to why it did not comply with **Order 11** of the **Civil Procedure Rules** wherein it was directed to comply within twenty (20) days or have the suit dismissed for non-compliance or attendance.

7. According to the 2nd Defendant, there has been a delay of ten (10) years in having the matter prosecuted since it was filed, with no reasonable explanation. That reinstating the same, would be defeating the overriding objective which is geared towards hearing and

determination of cases expeditiously and in embracing the principle that “*litigation must come to an end*”.

8. In its submissions filed on **16th February, 2021** the 2nd Defendant submitted that failure to comply with the court’s directions, warrants a dismissal of the suit. Therefore, in the Plaintiff failing to comply with **Order 11** of the **Civil Procedure Rules** as directed, the court was justified in dismissing the suit herein. This line of view was buttressed by the excerpts from the cases of **Kenya Postal Directories Ltd. – vs- Yellow Pages Publishing and Marketing Limited & 2 others [2016] eKLR.**

9. It was further submitted that under **Order 12 Rule 3 (1)** of the **Civil Procedure Rules, 2010**, a suit can be dismissed for failure by a party to attend court. However, **Order 12 Rule 7** of the **Civil Procedure Rules** provides that the dismissal order may be set aside if the reasons given by the Plaintiff are excusable. In that regard, the reason that has been advanced by the Plaintiff is that its advocate mistakenly failed to diarize the date that was issued by the court, hence the mistake should not be visited on the Plaintiff.

10. However, according to the 2nd Defendant, the advocate alleged to have committed the mistake has not sworn an affidavit to confirm the same, and that what has been put forth is just a mere explanation, which is not tenable. These submissions are buttressed by excerpts from the cases of **Daqare Transporters Ltd. –vs- Chevron Kenya Ltd [2020] eKLR**, **Nambayi Multi-Purpose Co. Ltd –vs- Agricultural Finance Corporation [2013] eKLR** and **Muchiri Karanja –vs- Zipporah Wangui [2003] eKLR.**

11. Additionally, the 2nd Defendant stated that the Plaintiff has not offered any explanation why it took no action to reinstate the suit until two (2) years after its dismissal. As such, it is submitted that the Plaintiff is guilty of inordinate delay which has, and would occasion the 2nd Defendant great prejudice in the event that the suit is reinstated. It is also averred that the 2nd Defendant would not be able to trace and call its witnesses or trace the relevant documents required in this case.

12. Finally, it is submitted that the adage rule that “*the mistake of the Counsel should not visited upon an innocent litigant*”, does not have a blanket application and in considering whether there was any mistake, the court should take into account the entire conduct of the Plaintiff. In this case, the conduct of the Plaintiff is said to have been so inordinate that the court cannot exercise its discretion in its (Plaintiff) favour.

13. The submissions by the 2nd Defendant prompted the Plaintiff into filing further submissions on **25th February, 2021**. While conceding that no affidavit had been sworn by the advocate who failed to diarize the matter, the Plaintiff submitted that a copy of the advocate’s diary for that particular date was annexed to the application to demonstrate that the advocate innocently failed to diarize the matter. In view of the Plaintiff’s counsel, it would be a technicality and an attempt to visit the sins of the advocate upon the client if the court adopts the 2nd Defendant’s view that an affidavit by the advocate who failed to diarize the matter was the only way an explanation could be offered.

14. The Plaintiff further submitted that the 2nd Defendant had failed to demonstrate satisfactorily what prejudice it would suffer i.e. there was no evidence adduced to show that the witness of the 2nd Defendant had left employment or were indisposed or in the alternative not demonstrate what difficulty there would be to make it impossible to produce the alleged documents. In fact, the Plaintiff also faulted the 2nd Defendant for not having complied with the pre-trial directions under **Order 11** of the **Civil Procedure Rules**. The Plaintiff’s subsequent submissions heavily relied on the case of **D. Chandulal K. Vora & Co. Ltd. –vs- Kenya Revenue Authority [2017] eKLR.**

Analysis and Determination

15. I have considered the application, the entire record in this matter as well as contested positions taken by each party in their respective affidavits and submissions. The main issue for consideration in the instant application is whether the Plaintiff suit should be reinstated in the circumstances of this case.

16. It is an uncontested fact that this suit was dismissed on **23rd October, 2018** pursuant to earlier directions that had been issued by this court on **2nd October, 2018**. The court record shows that by **2nd October, 2018**, the parties were yet to comply with the pre-trial directions despite having been directed to do so. To ensure strict compliance, on this date, the court directed the parties to comply with pre-trial directions under **Order 11** of the **Civil Procedure Rules** within a period of 20 days from **2nd October, 2018**, and more specifically, the Plaintiff was directed to comply on or before **12th October, 2018**, failure to which the suit would stand dismissed. Similarly, the Defendants were equally directed to comply within 10 days of being served.

17. When the court reconvened on **23rd October, 2018**, both Plaintiff and its Counsel failed to show up while on the other hand, the 2nd Defendants were represented by **Mr. Masila**. On this date, the court established that the Plaintiff had not complied with the Court’s directions as articulated at Paragraph 15 above, and accordingly dismissed the suit.

18. In seeking those orders to be set aside, the Plaintiff avers that it had complied with **Order 11** of the **Civil Procedure Rules** as directed by the court and annexed to the application a list of its witnesses and documents both filed on **12th October, 2018**.

19. Nonetheless, the court record confirms that it is true the Plaintiff filed witness statements of **Bare Farah Sahal** and a list of documents on **12th October, 2018** although the documents attached therein are not among the ten documents listed by the Plaintiff. If the Plaintiff’s advocate would have attended court on that particular date, I believe he would have brought those facts to the attention of the court. The issue to be considered now is whether the orders dismissing the suit can be set aside on the explanation by the Plaintiff that its advocate forgot to diarize the matter for that day.

20. Although the 2nd Defendant termed the reasons advanced by the Plaintiff as mere explanation, I have perused the court record and noted that the Plaintiff’s advocate has always attended court save for that material date. I have also read through the authorities that have been relied on by both parties and taken note of their diversity. I wish to reiterate that this Court has wide powers to set aside ex-parte orders save

that where such discretion is exercised, the court should do so on terms that are just. In the celebrated case of Shah –vs- Mbogo [1967]EA 116, it was stated:-

“This discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice”

21. In this matter, there is nothing on record to show that the failure of the Plaintiff’s advocate to attend court was deliberate in view of the Photostat copy of the advocate’s diary annexed to the application.

22. While it is true that the Plaintiff has not been diligent in the prosecution of its suit, especially in bringing up the instant application late in the day, it is worthnoting that the dismissal orders were issued after it had complied with **Order 11** of the **Civil Procedure Rules**. I also take cognizance of the provisions of **Article 50** of the **Constitution**, on the right to be heard.

23. Consequently, it is my humble view that where a suit can be prosecuted and justice done inspite of the delay in its prosecution, a party should be given a chance to do so. I am not convinced that the Plaintiff in this suit is deliberately seeking to undermine or obstruct the course of justice in seeking the suit to be reinstated.

24. In the premises, and for the foregoing reasons, the court is satisfied that it is in the interest of justice to allow the said application in view of the fact that the Plaintiff, before the dismissal of the suit had filed its list of witnesses and documents in compliance with **Order 11** of the **Civil Procedure Rules** for purposes of preparing for the trial of the suit.

25. The upshot of the foregoing is that the application dated **3rd September, 2020** is allowed in the interest of justice, but with costs to the **2nd Defendant/Respondent**. The **1st Defendant** is not awarded costs since it has not participated in the instant application.

It is hereby ordered.

DELIVERED, DATED and SIGNED VIRTUALLY at MOMBASA

THIS 4TH DAY OF MAY, 2021

D. O. CHEPKWONY

JUDGE