



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.1 OF 2019

EXON INVESTMENTS LTD.....PLAINTIFF

VERSUS

AFRICAN BANKING CORPORATION LIMITED.....DEFENDANT

RULING

1. This Ruling relates to a **Notice of Motion** application dated **31st May, 2021** brought under **Article 50** of the **Constitution, Sections 3A, 1A and 1B** all of the **Civil Procedure Rules** and all enabling provisions of the law. The application is premised on the grounds on its face and **Supporting Affidavit** sworn by **Ateet Jetha** on even date.

2. In the application, the Applicant is seeking for orders that:-

a) Spent;

b) The Honourable Court be pleased to set aside the order issued on 27th April, 2021 dismissing the Plaintiff's suit with costs.

c) The Honourable Court be pleased to reinstate the suit and fix a hearing date.

Applicant's Case

3. The Applicant's case is that on **27th April, 2021**, this suit had been fixed for hearing but it was dismissed for non-attendance by the Plaintiff and or its advocate. The Applicant now seeks to have the said order set aside and suit reinstated. The main ground upon which the Applicant has based the application is that the suit was not cause-listed for hearing on **27th April, 2021**.

4. In the **Supporting Affidavit** sworn by **Ateet Jetha**, he has deponed that the matter was not cause-listed and has annexed a copy of the cause-list of matters for Tuesday, before me sitting at Mombasa High Court on **29th April, 2021** as **Annexure 'A-1'** to confirm this. He has also deponed that on realizing the matter had not been cause-listed, he visited the Civil Division Registry of the Mombasa High Court on that morning to follow up on the file but was informed that it was not in the Registry. That he then wrote to the Deputy Registrar of the court through the In-charge of the Mombasa High Court Civil and Commercial Division on **28th April, 2021** requesting that the court file be availed to enable them fix a hearing date and the same was availed on the same date. The deponent goes on to state that when their representative went to fix another date for hearing, he perused the file and found that the suit had been dismissed on **27th April, 2021**.

5. According to the Appellant, they were not at fault because they believed the court would follow the cause-list and only call matters listed thereon. It is further deponed that there was no addendum to the cause-list or other notice to the Applicant. And so, the Appellant had a legitimate expectation that matters not cause-listed would not be called out without any Notice to the parties or their advocates.

6. In response to the Applicant's application dated **31st May, 2021**, the Defendant filed a **Replying Affidavit** sworn by **Louis Onukulu**, an officer of the Defendant Bank on **18th June, 2021** in which it has strenuously opposed the same. The Defendant/Respondent has drawn court's attention to the facts of the said suit on the court records. The Defendant has deponed that as admitted by the Applicant on **1st February, 2021**, the suit was fixed for hearing on **27th April, 2021** in the presence of counsel for both parties. He goes on to depone that that being the case, it cannot be an excuse for a litigant and or their counsel not to attend court for the reason that their case has not been listed on a day's cause-list. The Respondent's officer has also depond that a cause-list is not superior to clear orders given by a court and recorded in the court file, which orders are supposed to be adhered to and obeyed by all parties for as long as they remain in subsistence,

unless the court orders or directs otherwise. He further states that the hearing date having been given by the court, the parties were bound to attend court and proceed with the hearing irrespective of whether or not the same was cause-listed on that particular day. It is the Respondent's/Defendant's position that the Applicant/Plaintiff and or their counsel on record have not advanced any valid or proper reason for not attending court on the date the matter was scheduled for hearing, as they could even have logged onto the on-line virtual platform to make inquiries with regard to the matter or seek any directions or orders over the same from the court. It has also been submitted that it is for the parties to be vigilant in attending court and ensure their case proceeds for hearing on a specific date. If they deliberately opt to disobey or disregard the directions issued by the court, then they should be prepared to bear the consequences of their disobedience and or disregard. The Respondent has urged the court to find the application without merit, an abuse of the court process, and dismiss the same.

7. On **10th June, 2021**, the counsel for the parties were directed to dispose of the application by way of written submissions which they obliged. The Plaintiff/Applicant filed their submissions on **1st July, 2021** while the Defendant/Respondent filed theirs on **18th June, 2021**. I have read through the respective submissions and find they are a replica of the grounds set out in either parties affidavits save for the cited statute and case law in support of each party's position with regard to the application dated **31st May, 2021**.

8. According to the submissions by the Plaintiff/Applicant, the court is being urged to administer substantive justice by reinstating the suit so that the same is heard and decided on merit. On the other hand, the Defendant/Respondent has submitted that there is no reason for the court to exercise its discretion by setting aside the orders issued on **27th April, 2021** dismissing the Plaintiff's suit for non-attendance since the application is without merit, and an abuse of the court process, hence should be dismissed with costs.

Analysis and Determination

9. To determine the application dated **31st May, 2021**, I have read through the grounds set out in the affidavits filed by either party and considered their respective written submissions together with the cited case and statute laws. I find that the only question for determination is whether or not the court should set aside the order issued on **27th April, 2021** dismissing the Plaintiff's suit with costs, reinstate the same and grant a hearing date for the main suit.

10. This suit was instituted by the Plaintiff by way of a **Plaint** dated **17th January, 2019** and filed on **18th January, 2019**, which was accompanied by a **Notice of Motion** application dated **17th January, 2019** seeking for interim restraining orders to issue pending the hearing and determination of the suit.

11. The application dated **17th January, 2019** was determined vide a Ruling delivered on **24th January, 2020** where the same was allowed. The Plaintiff again filed an application dated **11th June, 2020** seeking for leave of court to amend its **Plaint** dated **17th January, 2019** and the **draft amended Plaint** attached to the application deemed as duly filed and served upon payment of requisite court fees. The application was canvassed by way of written submissions by both parties, and vide a Ruling delivered on **6th November, 2020**, the same was allowed with directions on when the **amended Plaint** and defence should be filed and served.

12. On **8th December, 2020**, the matter was mentioned, but since the Plaintiff had not filed an **amended Plaint**, the timelines were extended and matter fixed for mention on **1st February, 2021** for pre-trial directions.

13. On **1st February, 2021** when the matter came up for pre-trial conference, counsel for both parties appeared in court whereby counsel for the Plaintiff informed court that the Plaintiff was yet to comply with **Order 11** of the **Civil Procedure Rules** and sought for an additional 14 days to put in the Plaintiff's documents. The Defendant's counsel on the other hand informed court that the Defendant had complied with **Order 11** and filed all requisite documents before the court to enable the matter be certified ready for hearing. While not objecting to the Plaintiff being granted 14 days to comply with **Order 11** of the **Civil Procedure Rules**, the Defendant's counsel requested that the matter be fixed for hearing after that. The Plaintiff's counsel did not raise any objection to the request for the matter being fixed for hearing. The court then proceeded to grant the Plaintiff further leave of 14 days to comply with **Order 11** of the **Civil Procedure Rules** and fixed the case for hearing on **27th April, 2021**.

14. When the matter came up for hearing on **27th April, 2021**, neither the Plaintiff nor their counsel attended court to prosecute their case. The counsel for the Defendant was in court and he sought to have the Plaintiff's suit dismissed for non-attendance by the Plaintiff and or their counsel. The court, while noting that the date had been taken in the presence and with the consent of counsel for both parties, proceeded to dismiss the Plaintiff's suit with costs under **Order 12 Rule 3** of the **Civil Procedure Rules**. This is what prompted the filing of this application under consideration.

15. Having chronologised the court proceedings on record in this matter, I have also looked at the cause-list for Court No.5 of **27th April, 2021**, and confirm that indeed this matter was not cause-listed on this day.

16. It is worthnoting that the hearing date of **27th April, 2021** was fixed by court in the presence and knowledge of counsel for both parties and the same was recorded in the court file as an order of the court on **1st February, 2021**. When this happened, the court expected that the parties and or their counsel had taken note of this by either noting down the date in a diary or notebook or piece of paper. This is what usually happens in most cases where dates for court appearances are pronounced in court and diarized in the court's diary.

17. There are also instances where dates for court appearances are fixed by parties and or their counsel in the court registries. In such instances, parties invite each other by way of notice that they attend the court registry for mention for purposes of either fixing a hearing date or further mention in a particular case. Where one of the parties is not present in the Registry, a mention or hearing notice is issued and served to notify them of when they are to attend court and for what purpose. And in this case, a **Return of Service** will be filed to confirm that a party was duly notified of the mention or hearing date.

18. In all these instances, the dates fixed by the court and those taken in the Registry by the parties are consolidated to generate a daily cause-list, which is prepared by the staff in the Registry. For the dates fixed by the court, the Court Assistant is required to reconcile the same with the dates taken in the Registry by taking the court's diary to the Registry. And because of this, there are instances where there is a lapse or oversight when a Court Assistant fails or forgets to take the court diary to the Registry for such reconciliation. Even then, the court files are taken back to the Registry and kept according to the dates when they will next be availed in court. They are then taken back and placed before a court on the date indicated on them.

19. I want to point out that the generation of a cause-list which is then either posted at a conspicuous place within the court precincts or circulated on-line or published in whatever media is just an administrative process which is meant to inform and direct the public, more particularly the parties on what cases are before a particular court or Judicial Officer. Its main purpose is to facilitate access to justice. Failure to have a matter cause-listed on a particular date cannot therefore override the date fixed by the court, which translates into a court order, to be obeyed by parties. (Also see the decision by the Hon. Justice Munyao Sila in the case of **Albert Kigera Karume –vs- Robert Cully Kiruri Mbugua [2018]eKLR**).

20. Having considered the arguments by counsel for the parties with regard to the issue of whether or not to set aside the order of dismissal of the Plaintiff's suit and reinstate the same. I find that the hearing date, having been pronounced by the court in the presence of counsel for both parties, just like the Defendant's counsel did, the Plaintiff's counsel ought to have attended court or logged onto the online virtual platform for hearing of the suit or taking of any other directions. And even when the Plaintiff found that the matter had not been cause-listed and was missing in the Registry, the most logical thing they ought to have done was to log onto the online virtual platform and inquire from court the whereabouts of the court file and seek directions over the same. The Plaintiff has even indicated that their representative was in the court precincts then. It is clear that this was not done.

21. Furthermore, it is worth noting that a court, even though has a cause-list to guide it on the matters before it, will call out the matters whose files are placed before it on a particular day, that is, the ones cause-listed and even the ones not cause-listed. There was therefore nothing wrong or sinister in the court calling out the matter even though the same had not been cause-listed. There is even no requirement that when a matter has been fixed for hearing in court and the same is not cause-listed, a notice should issue to the parties, and or their advocates, especially when it is clear on record that they were present when the date was fixed.

22. That having been said, even though dismissal of a suit is a draconian order which has the effect of driving away a litigant from the seat of justice, a litigant is equally expected to be vigilant in pursuing and ensuring that a case filed by them is prosecuted without undue delay and with all fairness to the other party. This is the objective of **Order 12 Rule 3** of the **Civil Procedure Rules**, which serves as a check on indolent litigants.

23. Be that as it may, even though I find that the Applicant has not advanced a proper and tangible reason for their failure to attend court for hearing on **27th April, 2021** as had been ordered and scheduled, I will abide by the saving provisions of **Article 159(2)(d)** of the **Constitution** and **Sections 1A, 1B and 3A**, all of the **Civil Procedure Act** which obligate the courts to exercise judicial authority without undue regard to technicalities so as to administer substantive justice to the parties. I therefore proceed to allow the application but with conditions.

24. I therefore order that:-

a) The Order issued on 27th April, 2021 dismissing the Plaintiff's suit set aside.

b) The Plaintiff's suit filed vide a Plaint dated 17th January, 2019 and amended on 6th November, 2020 reinstated.

c) Either party be at liberty to set down the main suit for hearing within 30 days from the date of this Ruling. Failure to comply with the Order in (c), the suit will stand dismissed with costs.

d) The Plaintiff to pay costs of this application to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF NOVEMBER 2021.

D. O. CHEPKWONY

JUDGE

IN THE PRESENCE OF:

MR. KARINA COUNSEL FOR THE APPELLANTS

M/S GITARI COUNSEL FOR THE RESPONDENT

COURT ASSISTANT - GITONGA