



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 52 OF 2009

NEPTUNE CREDIT MANAGEMENT LTD.PLAINTIFF

VERSUS

INVESCO ASSURANCE CO. LTD.1ST DEFENDANT

JOSEPH KYULA.....2ND DEFENDANT

JOSEPH GITAU MBURU.....3RD DEFENDANT

TAFI ENTERPRISES.....4TH DEFENDANT

ROMICHI COMPANY LTD.5TH DEFENDANT

GALE COURT HOLDINGS LTD.6TH DEFENDANT

NGUYU NGUBUINI.....7TH DEFENDANT

LINMERX INVESTMENTS LTD.8TH DEFENDANT

SUBSIDIARY OF INVESCO ASSURANCE CO. LTD. ...9TH DEFENDANT

RULING

1. On 2nd November 2016, the Court dismissed the Plaintiffs case because of non-attendance of both the Plaintiff and Counsel. The Plaintiff returns to Court with an application dated 24th January 2017 seeking the setting aside of the order of 2nd November 2016 and reinstatement of his suit. That is the application this Ruling determines.

2. The explanation given by Tim also the Plaintiff's counsel for non-attendance is that Apollo Mboya, who leads him on the matter, took the hearing date but did not inform him of the hearing date. For this reason he did not inform his client of the hearing date, hence the failure of both to attend Court.

3. The 1st Defendant opposes the application and has sworn a replying affidavit.

4. This Court has heard the explanation given by the Plaintiff's advocate and has no reason to doubt it. Nobody is perfect and we all err. That is the nature of being human. Looking at the Court record, I see that the Plaintiff has previously attended Court for mentions and was ready to proceed with the hearing on 21st January 2014 but the 3rd and 4th Defendants were not ready and an adjournment was granted.

5. The record further shows that it took the 1st Defendant some time to file its bound documents as directed by Court on that day and it was not until 8th December 2015 that the matter was confirmed ready for hearing and a hearing date of 22nd and 23rd March 2016 given. On 22nd March 2016, counsel for the 2nd, 3rd and 4th Defendants was not ready to proceed as he had filed an application dated 16th March 2015 to cease acting. That application was allowed on 19th April 2016. The next hearing date was on 2nd November 2016.

6. The record does not indict the Plaintiff as inactive. It shows a keenness on their part to get on with their suit. Yet before I grant the prayer, I need to consider the issues raised by the 1st Defendant in response.

7. The first is that the Plaintiff's claim lacks merit as it was compromised by a consent dated 27th November 2009 and adopted on 3rd December 2009. The short answer to this argument is that the effect of the consent on the prospects of the Plaintiff's claim was considered by Mugo J in her Ruling of 12th September 2011 in which she held, "*inter alia*".

“Considering the above, I am of the view that the suit ought to be sustained in order that the various issues, including fraud, are proved once and for all in the interests of all concerned. I accept counsel for the Respondent's interpretation of a moratorium and do hold that filing of the suit during the pendency of the Court's order which gave effect to the moratorium is not fatal although it does constitute a clear ground for contempt proceedings”.

8. The Plaintiff is criticized for bringing the application two (2) months after the dismissal order. The suit was dismissed on 2nd November 2016 and the application filed on 24th January 2017. Even though the Plaintiff could have filed the application more promptly, the delay is in my view not inordinate if one considers the freeze of time during the Christmas recess of 21st December 2016 to 13th January 2017. Indeed this delay cannot be compared with that in Rina Shem Mbaye v Fredrick L. Namusende & 2 others [2019] eKLR where the delay was for about 11 months.

9. Does an order for reinstatement prejudice the Defence case? The 1st Defendant says that it closed its accounts with its advocates once the suit was dismissed and that this matter has been hanging over its head for 10 years. That may be so but this Court is not told that the passage of time has compromised the Defendants ability to summon its evidence or otherwise defend its case. Further, that any prejudice is greater now than it was on 2nd November 2016 when the hearing was ready to proceed but for the absence of the Plaintiff and its counsel.

10. All in all the application of 24th January 2017 is for allowing. It is hereby allowed. Each party shall bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 17th Day of January 2020

F. TUIYOTT

JUDGE

PRESENT:

Kingara holding brief Kabugu for Respondent

No appearance for Applicant

Court Assistant: Nixon