



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 479 OF 2013

SELECTA KENYA GMBH & CO.KG.....PLAINTIFF/APPLICANT

VERSUS

MUZNA NURANI.....1ST DEFENDANT/RESPONDENT

MARY WAITHERA KARANJA.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling relates to the notice of motion application dated 2nd November 2016, brought under the provisions of; Section 3A and 3B of the Civil Procedure Act, Order 7 Rule 12, Order 51 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.
2. The Applicant is seeking for orders that:-
 - a. That Honourable court be pleased to reinstate this suit which was dismissed on 14th June 2019 by virtue of the orders of 22nd May 2019;
 - b. That the Honourable court be pleased to issue fresh directions for pre-trial before the duty registrar of the High court of Kenya, commercial division or in the alternative before this court;
 - c. That the Honourable court be pleased to issue fresh directions for the hearing of the main suit.
3. The application is premised on the grounds on the face of it and an affidavit of even date sworn by Jotham Okome Arwa, an Advocate of the High court of Kenya having conduct of this matter on behalf of the Applicant. He deposed that; on 22nd May 2019, the Honourable court issued an order reinstating the suit on conditions, inter alia, that the Applicant conducts and concludes pre-trial before the Honourable Deputy Registrar, within twenty-one (21) days of issuance of the order, failing which the suit would stand automatically dismissed.
4. Pursuant to the aforesaid order, the Applicant sought a pre-trial date from the court registry on three different occasions; including the 4th June 2019, but unfortunately and by no fault of its own, was granted a date outside of the period directed by court owing to unavailability of dates in the court's diary within the period directed, consequently rendering the suit dismissed.
5. The Applicant argued that the issuance of dates is purely a court administrative function in respect of which it bears no control or authority over and neither does it have control of the court's diary. Having conducted due diligence and taken all reasonable and necessary steps expected of it to obtain a date from the registry, it had no other choice but to accept the 18th June 2019, as the earliest date on which it could appear before the Honourable Deputy Registrar for case management conference.
6. That in any event, the delay occasioned was not deliberate and neither was it inordinate being only four (4) days outside of the twenty-one (21) days ordered by court but most importantly, the same was as a result of court administrative matters beyond the its control. The plaintiff is keen on prosecuting this matter and for that reason that it promptly complied with court orders directing it to pay throw away costs to the defendant's counsel.
7. Further, the instant application therefore seeks to reinstate the suit for hearing and determination on merit. It is urgent given the dismissal and the age of the suit which is fairly old. In view of the foregoing, the court reinstates the suit and issue fresh directions for pre-trial as well

as give directions on a hearing date. Finally, the defendants will suffer no prejudice if the suit is reinstated.

8. However, the Respondent filed a replying affidavit dated 1st October 2019, sworn by Mellyne Akinyi Ogonjo, an Advocate of the High court of Kenya, practicing as such in the firm of Messrs. Kemboi Law Advocates, duly instructed and having conduct of this matter on behalf of the 1st and 2nd Respondents.

9. She averred that, the plaintiff filed the suit herein by way of a plaint dated 4th November 2013. The defendants entered appearance through on 27th March 2014 and filed its defence and witness statements on 16th April 2014. On 2nd November 2016, the Plaintiff filed a notice of motion application dated 2nd November 2016, seeking for orders for inter alia; following and tracing of assets, disclosure of information and location of assets to the collective value of; Kshs. 116,514,091.84, freezing orders restraining the defendants from selling, disposing of, exchanging, charging/mortgaging, transferring or in any other way dealing with their properties including any share held in any company, cash held in bank accounts in any bank within Kenya and land owned by the defendants jointly or severally within the Republic of Kenya.

10. The Court dismissed the application on 27th July 2017 and the Plaintiff subsequently sought for leave to file an appeal against the said decision. The appeal never materialized. In the meantime; the suit remained inactive from 27th July 2017 to 22nd October 2018, when the matter was listed pursuant to a notice of dismissal issued by the Honourable court on 4th October 2018.

11. On that date, counsel for the Plaintiff failed to attend the proceedings and upon confirmation by the Honourable court, that sufficient notice had indeed been issued, the suit was dismissed for want of prosecution. After an inordinate delay of exactly thirty-five (35) days from the date of the dismissal, the Plaintiff filed an application dated 23rd November 2018; seeking orders to have the suit reinstated.

12. Upon hearing the parties, the Honourable court exercised its discretion in favour of the Plaintiff and reinstated the suit albeit under strict conditions as enumerated in the order issued on 21st June 2019 as follows:-

a. That the suit be and is hereby reinstated on the following conditions:-

i. The Applicants to pay Respondent throw away costs of Kshs. 15,000;

ii. Then set down the matter for pre-trial and purpose to conclude the same before the Hon. Deputy Registrar within twenty one (21) days of this order;

iii. Failure of which this suit will stand dismissed automatically without reference to this court;

iv. To facilitate the progress of this matter, the matter will be mentioned in thirty (30) days to fix it for hearing of the main suit.

b. That further mention on 10th July 2019

13. The Plaintiff did not comply with those conditions, occasioning that the instant application after the dismissal order issued by the Court on 22nd October 2018. That on 31st May 2019, within seven (7) days of the issuance of the order, counsel for the Plaintiff forwarded cheque No. 020172 for the sum of Kshs. 15,000 to cater for the throw away costs in compliance with the court order.

14. However, despite being granted another opportunity to prosecute its suit, the Plaintiff failed to comply with the court's order at clause 1(c) and thus as at 12th June 2019, when the twenty-one (21) days' timeline lapsed, the suit stood automatically dismissed. Further the Plaintiff has attempted by way of its supporting affidavit, excuse the recurring lapse on its part by diverting responsibility to the registry impermissibly, tagging the delay as a purely administrative mistake beyond its control and for which it ought not to suffer consequences flowing from clause 1(c) of the order of 22nd May 2019.

15. That the legitimacy of the plaintiff's claim is flawed, borne of mischief and cannot hold water to warrant this court's repeated exercise of discretion to reinstate the suit for the reasons highlighted hereunder. That whereas the plaintiff avers to making various attempts to obtaining a pre-trial date from the court registry, the only evidence tendered is, curiously, a letter dated 4th June 2019 but filed on 11th June 2019, a day to the lapse of the twenty one (21) days timeline. Notably, whereas the same is apparently copied to the defendants counsel on record, the same was never served upon it and only came to their attention on service of the application.

16. To cement the plaintiff's mischief, it shall be noted that whereas the letter annexed to the instant application as "JOA-1" is stamped as received by the court registry on 4th June 2019, the letter bearing the firm's letterhead as contained in the court file was stamped as received by the court registry on 11th June 2019. That, even if the court were to afford the applicant the benefit of doubt and consider the letter bearing the stamp of 4th June 2019, neither the court file as perused on 7th August 2019, nor the face of the letter dated 4th June 2019, contain any notes or directions by the Deputy Registrar explaining its reasons for issuing a date outside the timelines issued by the trial judge.

17. Further, as a matter of practice, once a judge is seized of a matter and issues orders, the Deputy Registrar can only comply with those orders. It is therefore inconceivable that, the Deputy Registrar or nay official of the registry, having the impugned letter placed before it and knowledge of the strict timelines contained in the Orders of 22nd May 2019, would opt to issue directions to the detriment of a litigant.

18. That, it is evident that, the applicant fell into slumber and upon awakening to the realization that it had squandered its second bite at the cherry moved in a rush to deceitfully cover its tracks in a manner wholly incompatible with the principles of fairness and justice and further

in complete abuse of the Honourable Court's magnanimity.

19. The Respondent argued that, the intent manner in which the applicant's counsel downplays the gravity is evident in its averment that "... the delay occasioned was not deliberate and neither was it inordinate being that the date granted was only FOUR days outside the 21 days ordered by the court". Such an utterance is indicative of its nonchalant attitude towards the prosecution of the suit as well as the implication of its obvious subterfuge.

20. The respondents should not be made to suffer further hold up from an applicant who has evidently from its inaction expressed its disinterest in prosecuting the suit and further by its subsequent duplicity dispossessed itself of any right to seek the audience of the court or benefit from the exercise of its discretion to either reinstate the suit or an extension of the time under clause 1(c) of the Orders of 22nd May 2019 as sought. Further, it is in the interest of justice that the instant application be disallowed with costs to the respondents.

21. I have considered the arguments advanced herein and I find that the only issue to consider is whether the applicant lived within the orders made by the court on 22nd May 2019, in so far as they required this matter be set down for pre-trial directions within twenty one (21) days from the date of the court.

22. The applicant acknowledges that there was no compliance thereof. The question that arises is whether the reasons advanced by the applicant for non-compliance are reasonable and sufficient. In the same vein, it is worth considering whether the objection raised by the respondent has merit. In that regard, I find that although the applicant attributes the delay in complying with the subject order to the court Registry, the only evidence availed in support of that allegation is a letter dated 4th June 2019. That letter was received at the Registry on the same date. The Applicant's period to comply commenced on 22nd May 2019. No reason is advanced as to why the applicant did not move to court, to seek for a date for pre-trial by 23rd May 2019 or immediately thereafter and waited until 4th June 2019.

23. The applicant knew the twenty-one (21) days period was expiring on 12th June 2019. There is no evidence that, even when the applicant was given a date of 18th June 2019 for pre-trial and knew it was outside the period given by the court, the applicants moved the court for extension of the twenty one (21) days period. As a matter of fact, the pre-trial conducted on 18th June 2019 is null and void as it is contrary to the court orders given on 22nd June 2019.

24. In fact, it is after the court noted the same that, the Applicants belatedly filed this application on 11th June 2019. The conduct of the applicants is less than impressive. The applicant has a duty to progress its suit pursuant to the provisions of; Section 1A and 1B of the Civil Procedure Act, in furtherance of the provisions of; Article 159 (2)(b) of the Constitution of Kenya.

25. I concur with the Respondent that the applicant is displaying a rather casual approach to this matter by averring that the delay was merely of "four days" outside the twenty-one (21) days ordered by the court. I therefore hold that the applicant has not been vigilant in prosecuting this matter, and that certainly causes the respondents prejudice.

26. However, in the interest of justice and taking into account that the parties appeared before the Honourable Deputy Registrar on 18th June 2019; for case management conference, I shall grant the applicant the last opportunity on condition that it concludes the case management conference within seven (7) days of the date of this order. To mitigate the continuous attendance of the defendant, I order that the applicant pay the respondents throw away costs of ten thousand (Kshs. 10,000) and the costs of application herein.

27. It is so ordered.

Dated, delivered and signed in an open court this 18th day of February, 2020

G.L. NZIOKA

JUDGE

In the presence of;

No appearance for the Applicant

Mr Kimetto holding brief for Kemboi for the Respondents

Dennis -----court Assistant