



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**HCCC 418 OF 2014**

**PASICO EASTERN AFRICA LTD.....PLAINTIFF**

**VERSUS**

**ECOBANK KENYA LIMITED.....DEFENDANT**

**RULING**

**PLEADINGS**

By an application filed on 10<sup>th</sup> September 2018, the Plaintiff/Applicant sought under **Section 3 ,3A 80 of CPA Order 12 Rule 7, Order 17, Order 51 CPR 2010** that court orders by LJ R. Ngetich on 27<sup>th</sup> July 2018 dismissing the entire suit for want of prosecution and all other consequential orders be reviewed, varied and/or set aside. The suit herein be reinstated and heard on merits.

The Applicant relied on the following grounds;

The Plaintiff and/or advocates on record were not served with the Notice to Show Cause (NTSC) and the Hearing Notice of the NTSC.

The Orders granted on 27<sup>th</sup> July 2018 were made through no fault or wrongdoing by the Plaintiff

The Plaintiff was always ready to prosecute the suit and therefore it is in the best interest of justice that the dismissal order is set aside and the matter is heard on merit.

Mr Keith Wesonga, Counsel for the Plaintiff in an affidavit filed on 10<sup>th</sup> September 2018, deponed that the matter was scheduled for hearing before Tuiyott J on 28<sup>th</sup> November 2017 but was taken out due to hearing of election petitions, that took priority.

Counsel was in the process of obtaining another hearing date as per the annexed letter of invitation to the Defendant/Representative to take a hearing date in the Registry. The letter is dated 25th July 2018 marked **KW1**.

The Plaintiff was not adequately served with NTSC and the NTSC was heard *ex parte* without the Plaintiff's presence or representation and an opportunity to be heard was not granted. The Notice to Show Cause copy is annexed and marked **KW 2**. The NTSC shows details as;

**Kibere & Ochieng & Co Advocates; Solar House 5th Floor Room 504 P. O. box 9588-0100 Nairobi.**

The Defendant/Respondent through Mr Charles Gichangi Ndirangu, Counsel for the Defendant deponed in a Replying Affidavit filed on 12<sup>th</sup> March 2019 as follows;

The Notice to show cause why the suit should not be dismissed was served upon Defendant's advocates and the Plaintiff's advocate and was received on 25<sup>th</sup> July 2018.

Notwithstanding the above, the Court on 6<sup>th</sup> June 2017 ordered that the Plaintiff was to comply with Pre-trial requirements within 60 days from the said date of the order failure to which the matter would stand dismissed. Therefore, since the Plaintiff did not comply with the Court order of 6<sup>th</sup> June 2017, within 60 days from the date of the order failure to which the matter would stand dismissed, the matter stood

dismissed as a result of the Court's order of 6<sup>th</sup> June 2017.

Counsel for the Plaintiff filed a Further Affidavit on 14<sup>th</sup> March 2018 and contended that the Plaintiff complied with the order of 6<sup>th</sup> June 2017 as parties had exchanged documents and issues for determination prior to orders of 6<sup>th</sup> June 2017 and had filed Witness statement within 60 days as required by the order of 6<sup>th</sup> June 2017. Also, that the Trial Court was not sitting on 27<sup>th</sup> November 2017 and the matter was taken out.

## **SUBMISSIONS**

The Plaintiff relied on the case of ;

### **Wachira Karani vs Bildad Wachira 2016 eKLR HCCC101 of 2011**

Where an exparte judgment was set aside and all consequential orders and the matter was to proceed afresh as a defended suit on grounds;

- a. The hearing proceeded exparte and judgment was entered**
- b. The Hearing date was not served, or service was improper, defective and concealed**
- c. The defendant would suffer great prejudice if judgment remained and was executed.**

The Plaintiff relied on the case of;

### **Ruth Odiola vs National Bank of Kenya Ltd vs Anor eKLR ELC 117 of 2017;**

where exparte orders issued were set aside and the suit was dismissed for being res judicata

**In Kenya Broadcasting Corporation vs National Authority –NACADA HCCC 209 of 2015 eKLR** where an exparte interlocutory judgment was set aside where the issue of jurisdiction and whether the matter was for hearing in Arbitration proceedings or not.

The Defendant relied on the case of ;

**Nilesh Premchand Mulji Shah & Anor t/a Ketan Emporium vs MD Popat & Others [2016] eKLR;** where the Court dismissed the suit because of continued delay which infringed on the Defendant's rights and legitimate expectations that disputes against them should be resolved expeditiously. It also held that **Art. 159 COK 2010 & Order 17 Rule 2(3) CPR 2010** gives the Court discretion to dismiss the suit where no action has been taken for 1 year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity.

In the case of; **Fran Investments Ltd vs G4S Security Ltd [2015] eKLR** the Court held;

**“Order 17 R 2 CPR 2010 does not require service of notice; it uses the words ‘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 CPR**. But nothing precludes the Court from serving the notice as per **Order 5 of CPR 2010**.

## **DETERMINATION**

### **ISSUE**

**The issue is whether the Plaintiff is entitled to reinstatement of the suit and/or vacation of dismissal order (s)**

### **COURT RECORD**

The Plaintiff filed suit via Plaintiff on 25<sup>th</sup> September 2014 and Amended Plaintiff on 5<sup>th</sup> August 2016. The Defendant filed Amended Defence on 18<sup>th</sup> August 2016 and Amended Reply to Defence on 28<sup>th</sup> November 2014.

The Plaintiff filed Issues to be determined and Pre Trial Questionnaire on 17<sup>th</sup> March 2015.

The Defendant filed Defendant's List of Witnesses and Witness Statement and List and bundle of documents on 17<sup>th</sup> November 2016.

On 26<sup>th</sup> July 2016, the Trial Court Judge Tuiyott recorded Consent on the application of 30<sup>th</sup> November 2015 and scheduled Case Management (CMC) on 27<sup>th</sup> September 2016. Parties were to comply in the meantime with case management.

On 27<sup>th</sup> September 2016 the defendant through Counsel sought to paginate and index list and bundle of documents, the Plaintiff was absent and not represented by Counsel. Further Mention was scheduled on 14<sup>th</sup> October 2016, the Plaintiff was absent, the Court confirmed the

Plaintiff was served. Case Management was scheduled on 18<sup>th</sup> November 2016 on which date the Plaintiff was absent and the Defendant was present. The Court ordered Defendant to comply with CMC before hearing date which was slated on 6<sup>th</sup> June 2017.

On 6<sup>th</sup> June 2017 both parties were represented, the Plaintiff sought adjournment on account of ongoing negotiations. The Defendant refused the claim that negotiations were on and instead was ready to proceed with 1 witness. The Court ordered the Plaintiff to comply with Pre trial requirements within 60 days in default the suit stood dismissed and hearing was scheduled on 28<sup>th</sup> November 2017.

On 28<sup>th</sup> November 2017, the matter was placed before L.J.Ngetich and on record was/is Notice of Dismissal/ Notice to show cause why the case should not be dismissed brought under **order 17 Rule 2 CPR 2010** addressed to both advocates for Plaintiff and Defendant to...

**“Take Notice that the above matter [was]is now listed for the aforesaid purpose on the 27<sup>th</sup> day of July 2018in Court as shown on the cause list of the day at Court 39 2nd Floor at 9.30am.If no sufficient cause is shown the suit will be dismissed.”**

On 27<sup>th</sup> July 2018, the Plaintiff was not represented and was not in Court; the Defendant was represented by Counsel and did not object to dismissal of the suit. The suit was dismissed for want of prosecution.

## **ANALYSIS**

From consideration of pleadings proceedings and submissions on the matter this Court finds as follows;

**Order 17 Rule 2 CPR provides;**

**Notice to show cause why suit should not be dismissed;**

- (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**
- (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**
- (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**
- (4) The court may dismiss the suit for non-compliance with any direction given under this Order.**

The Plaintiff failed to comply with the Court order of 6<sup>th</sup> June 2017 after Plaintiff's Counsel admitted that he noticed the Plaintiff had not filed witness statement(s) and List and bundle of documents. The Court adjourned the hearing for Plaintiff to comply within 60 days. I have perused the Court file and I did not find any Witness statement(s) and/or List and Bundle of documents filed by the Plaintiff as ordered by the Trial Court. What is in the Court file is List of Witnesses and list of Documents filed with the original Plaintiff filed on 25<sup>th</sup> September 2014 which was later amended. Be that as it may, Notice to Show Cause was issued & served to both advocates of Plaintiff and Defendant; the details, particulars and physical address are derived from pleadings filed by the respective Counsel in the court file.

The Plaintiff's Counsel alluded in oral submissions that the NTSC Notice was not officially stamped to confirm service to parties and/or advocates, that the Plaintiffs Advocates' offices were Madonna House Mezzanine Floor Rm 14 Westlands Road and not Solar House as indicated in the Notice.

**Order 17 Rule 2 CPR 2010** does not mandate compliance of service but any process/notice that amounts to Giving notice.

In the instant case, pleadings filed by Plaintiffs Advocates on record, the Plaintiff's advocates gave their physical address as Solar House, 5<sup>th</sup> Floor, Rm 504 Harambee Avenue. That is the address indicated in the NTSC. The Court used the address as given by the Plaintiff in all its filed pleadings. If the process to give notice was vitiated by the address and subsequent service; the Plaintiff's advocates are solely to blame as that is the address on all their pleadings. Secondly, the notice to show cause indicated that the case would also be placed in the Cause-List of the day. Thirdly, it appears strange, all other pleadings filed and served service was not contested except this notice to show cause. Thirdly, there was the daily Cause-list which listed the matter which all litigants/advocates and court personnel ought to look at.

From these facts, am satisfied that the Plaintiff was duly given notice vide the NTSC based on the address the Plaintiff's advocate gave and used in all pleadings filed in this matter and daily Cause-list where the case was listed.

Fourthly, the chronology of events as per the Court record, the Plaintiff failed to do anything in furtherance of having the matter placed for hearing for 1 year from 6<sup>th</sup> June 2017 upto 6<sup>th</sup> June 2018. The Court noted that since 2014 when the suit was filed until 2018, 5 years later, the matter had not been prosecuted nor case management completed. The letter annexed to the application to invite the Defendant's lawyers/Representative to meet in the Registry to take a hearing date is dated 25<sup>th</sup> July 2018, 30 days before filing the instant application of certificate of urgency, the Notice of Motion was filed on 10<sup>th</sup> September 2018 but is dated 30<sup>th</sup> August, 2018.

The Plaintiff stated that on 28<sup>th</sup> November 2017, scheduled date for hearing, the matter was taken out of the Causelist due to the Trial Court hearing election petition. There was no evidence or confirmation of this fact but it is true Courts prioritized Election Petitions and all other

matters were put off. Be that as it may the election petitions were over within 6 months, so the Plaintiff had ample time and opportunity to obtain a hearing date for the matter before 1 year was over or at least show evidence of effort to do so.

In line with the cited cases by the Defendant *Nilesh Premchand Mulji Shah & Anor t/a Ketan Emporium vs MD Popat & Others [2016] eKLR*

*Fran Investments Ltd vs G4S Security Ltd [2015] eKLR, supra*, the Court adopts the reasoning therein, the Plaintiff was given notice by the NTSC and Cause List and that is sufficient notice in the circumstances.

*Ruth Odiola vs National Bank of Kenya Ltd vs Anor eKLR ELC 117 of 2017 & Kenya Broadcasting Corporation vs National Authority –NACADA HCCC 209 of 2015 eKLR supra*; are good law on setting aside interlocutory/default judgments but are not relevant to the present circumstances as the case was never heard and no *ex parte* judgment was entered against any party in the instant case.

#### **DISPOSITION**

1. In the absence of reasonable explanation for undue delay to prosecute the suit, the Court finds no new evidence to consider a review or sufficient cause to do so.
2. This Court upholds the Court order(s) of 27<sup>th</sup> July 2018 and the application of 10<sup>th</sup> September 2018 is dismissed with Costs.
3. Any right of appeal shall begin to run after the current Covid 19 pandemic lockdown is officially announced to be over and normalcy resumes.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 15<sup>TH</sup> APRIL 2020**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**KIBERE & OCHIENG & ASSOCIATES FOR PLAINTIFF**

**MURI MWANIKI WAMITI ADVOCATES FOR DEFENDANT**