



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 319 OF 2010

PETROMIN LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA REVENUE AUTHORITY.....DEFENDANT/RESPONDENT

RULING

1. The application before this court is the Plaintiff's/Applicant's **Notice of Motion** Application dated **25th June, 2020** brought under the provision of **Order 12 Rule 7** of the **Civil Procedure Rules**. By the application, the Plaintiff/Applicant seeks the following orders:-

a) Spent.

b) That this Honourable Court do set aside its order of 2.07.2018 dismissing the Applicant's Application dated 06.04.2018 and the said application dated 06.04.2018 thereafter be reinstated for full trial.

c) That the costs of this Application be provided for;

2. The application is based on grounds that:-

a) That the Plaintiff is desirous to have this matter heard and finalized soonest on its merits.

b) That the Plaintiff should not be penalized by the mistake of its advocated by the mistake of its Advocates who did not attend Court on 2nd July, 2018.

c) That the Defendant shall not be prejudiced if the orders sought are granted.

d) That it was not deliberate and or intentional that the Plaintiff's Advocate was not in Court on 2nd July, 2018 when the matter was called out.

e) That the Plaintiff were not aware that the Application was due for hearing on 2 July, 2018 otherwise they would have attended Court.

f) That there was a mistake on part of the Advocate who instructed to attend Court on 2nd July, 2018.

g) That the Plaintiff should be allowed to prosecute its Application of 6th April, 2018 on merits.

3. The application is supported by an **Affidavit of Hanshi Warsame Feisal**, the Plaintiff's Director sworn on **25th June, 2020**. He reiterates the grounds on face of the application and further depones that the Plaintiff should not be penalized for a mistake of its former advocates who failed to attend court on **2nd July, 2018** without any reason whatsoever. It is also alleged that unlike the Respondent, the Plaintiff/Applicant will be prejudiced as result of a mistake which was neither deliberate nor intentional if the orders are not set aside as sought.

4. The Respondent opposes the application and filed a **Replying Affidavit** sworn by its Advocate **Victor Andambi Chabala**, on **8th July, 2020**. He averred there are no grounds set out in the application to warrant the grant of the orders sought especially when it is close to five years since the suit was dismissed pursuant to **Order 17 Rule 2** of the **Civil Procedure Rules**. The Counsel was further agitated by the facts that the application subject to which the present orders are sought was dismissed two years ago on **6th April, 2018** and avers that there has been inexcusable delay and indolence on the part of the Applicant to remedy against the orders of this court.

5. It is the deponed's assertion that the Applicant has not tendered an explanation as to why it did not attend court on **2nd July, 2018** when the application dated **6th April, 2018** came up for hearing. That the conduct of the Plaintiff as exhibited is indicative of a litigant who has lost interest in prosecuting its claim and full of latches to keep off the court from exercising its discretion in favour of the Plaintiff/Applicant. The Respondent further depones it faces a risk of suffering substantial loss and result into grave injustice since its witnesses have either retired, died or left employment with the Defendant.

6. The application was disposed by way of written submissions and both parties complied with the directions. The Plaintiff's/Applicant's submissions are dated and filed on **14th July, 2020** whilst the Defendant's submissions are dated **24th July, 2020** and filed on **28th July, 2020**.

Plaintiff's/Applicant's Submissions

7. The Plaintiff in its submissions reiterates that its previous Advocate (**Ahmednassir Abdikadir & Co. Advocates**) made a mistake by not attending court when the matter came up for hearing on **2nd July, 2018** and further failing to update the Plaintiff on the position of the suit. That the Plaintiff was in blatant shock when it instructed the current Advocates and found out that the application seeking the suit to be reinstated had long been dismissed. In that vein, it is argued that the Plaintiff should not be made to suffer or be punished for mistakes committed by previous Counsel.

8. The Plaintiff further contends that this court has unfettered discretion to set aside any order that is issued ex-parte so far as the party seeking such discretion has shown sufficient cause. To that end, it is submitted that the Plaintiff's former Advocates failed to act promptly by attending court especially on **2nd July, 2018** when the application was dismissed. This line of argument is support by excerpts from the cases of **Honorable Attorney General...Vs... Laws Society of Kenya & Another, Civil Appeal No.133 of 2011, Belinda Murai & Others...Vs...Amos Wainaina [1979] eKLR** and **Philip Chemwolo & Another...Vs... Augustine Kubende [1986]eKLR**.

9. It is the Plaintiff's submissions that the Defendant has not shown that it will be prejudiced if the orders sought are granted and in any event, the allegations that the Defendants witnesses might have left employment or died remains a mere point of speculation since no proof has been offered to support those allegations. Reliance is placed on the cases of **CMC Holdings Ltd...Vs...Nzioki [2004] 1 KLR 173** and **D.T Dobie & Co (K) LTD...Vs...Joseph Mbaria Muchina CA 37 of 1978**.

Defendant/Respondent's Submissions

10. The Defendant in its submission stated that the delay by the Plaintiff/Applicant appears not to be only intentional but one that is inexcusable in the circumstances. That the Plaintiff exhibited indolence since the inception of the suit leading to its dismissal for want of prosecution on **15th July, 2015**. Subsequently an application dated **6th April, 2018** was filed seeking to reinstate the suit but the Plaintiff never bothered to prosecute it and thus the court dismissed the same. The Plaintiff then went to slumber and has now awakened after a period of **two years**. As such, the Defendant avers that the Plaintiff's conduct is tantamount to an abuse of the court process and lack of good faith by bringing the instant application after such a long delay.

11. The Defendant concedes that the law stipulates that a litigant should not be punished for mistakes of a Counsel but takes the view that the Advocate is only a mere agent and the principal is bound to suffer for his/her mistakes and omissions as a consequence thereof. In any event, it is submitted that the remedy thereof would certainly lie in an action for negligence against the Advocate. To buttress these submissions, reliance is placed on the case of **Rajesh Rughani..Vs.. Fifty Investment Ltd. & Another [2005] eKLR**.

Analysis and Determination

12. Having read the application, replying affidavit and the submissions filed by the Counsel on record for the

Defendant/Applicant and the Plaintiff/Respondent, my finding is as follows: -

13. Firstly, whereas this Court agrees that this suit herein belongs to the Plaintiff/Applicant and not to his previous Advocate and whereas it agrees that it was upon the Plaintiff/Applicant to follow up the progress the same with his then Counsel, it is not in dispute that the Plaintiff/Applicant was represented by the **Firm of Ahmednasir, Abdikadir & Co. Advocates** who failed to attend court on **2nd July, 2018** when the Plaintiff's application dated **6th April, 2018** was dismissed. It is noted that the said Law Firm did not file an application to cease acting for the Plaintiff or further update the Plaintiff on the progress of its suit. Having failed to file such an application, the said Law Firm remained on record for the Plaintiff/Applicant for all practical purposes. The Plaintiff/Applicant has explained in **paragraph 3** of its **Supporting Affidavit** that it never heard from its then Advocate until it instructed the current Advocate and realized that the application dated **6th April, 2018** had been dismissed for Want of Prosecution.

14. Clearly, the Plaintiff/Applicant cannot be blamed for the eventual outcome of this matter as it expected its Advocate to keep it posted on the progress of the suit. I would therefore not agree with the Defendant's/Applicant's Counsel that given the circumstances of this matter, the mistakes of the Plaintiff's/Applicant's previous Advocate cannot be visited upon the Plaintiff/Applicant.

15. I have also considered the guiding principles in an application seeking the exercise of the court's discretion in setting aside an ex-parte Order as observed in the case of **Mbogo & Another...Vs...Shah [1968] EA 93**. The principles to be applied before setting aside a Judgment were enunciated by **Duffus P**, as follow:-

“Applying the principles that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

16. Consequently, the exercise of court's discretion to set aside an ex-parte Order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error.

17. From the authorities that were referred to me, it is clear that the primary duty of the court is to do justice to the parties and having found that the mistakes of the Plaintiff's/Applicant's Counsel then on record cannot be visited upon the Plaintiff/Applicant, it behoves this court to exercise its discretion to avoid injustice that would occur to the Plaintiff/Applicant if the orders sought are not granted.

18. In view of this Court, the Plaintiff/Applicant has provided a plausible reason to warrant this court set aside the orders issued on **2nd July, 2018** dismissing the Plaintiff's application dated **6th April, 2018** for non-attendance. In the upshot, I find the **Notice of Motion** dated **25th June, 2020** is merited and the same is hereby allowed.

19. However, the Defendant/Respondent shall have costs of the application since it was caused by none of its action.

It is so ordered.

DATED and SIGNED at MOMBASA this 5th day of October, 2020

D.O. CHEPKWONY

JUDGE

DELIVERED at MOMBASA this 9th day of October , 2020.

P. J. OTIENO

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.