



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 628 OF 2011

LINCOLN DALE ENTERPRISES.....PLAINTIFF

VERSUS

CMA CGM (KENYA) LTD.....DEFENDANT

R U L I N G

1. By a notice of motion dated 22/01/2019, the plaintiff/applicant sought orders that the orders issued on 8/7/2015 be set aside and the dismissed suit be reinstated for hearing on the merits. The grounds advanced for the application on its face and in the Affidavit of the counsel, filed in support thereof, was that the suit was dismissed on a date neither the advocate nor the plaintiff were notified of the matter coming up to show cause why the suit should not be dismissed for want of prosecution, that the plaintiff has always been keen to prosecute the same and that the record of the file revealed several attempts made to have suit listed for hearing.

2. The application was opposed by the defendant by the Grounds of opposition dated 1/2/2019 as well the Replying Affidavit sworn by one Cecilia Ndeti, a legal officer with the defendant. The gravamen of the grounds of opposition is that the application offends Order 17 Rule 3 Civil Procedure Rules and in thus abusive of the of the court process for being tainted with non-disclosure, that it had been overtaken by events and intervening circumstances and merely calculated to scuttle the orders made by the court. On the other hand the Replying Affidavit faults the plaintiff for indolence in that having filed the suit, it took no steps to prosecute it leading to the dismissal by the court. It was then added that even though the fact of dismissal was brought to the attention of both parties in open court on 17/7/2017, the plaintiff took no steps to remedy the situation opting to wait till January 2019, more than 18 months later, to bring the current application. The Affidavit then delved into the events which have occurred since dismissal to show that the plaintiff was anything but diligent in bringing the application. The defendant therefore prayed that the application be dismissed because no material had been availed to show that the plaintiff was still keen to prosecute the suit.

3. Parties attended court to argue the application and offered oral submissions for that purpose. Mr. Mokaya for the plaintiff/applicant was fairly brief in his submissions. Beyond stating that the dismissal order was made on a date not connected to both him and the plaintiff, he conceded that he offered no explanation for the delay in bringing the application between the date of dismissal and January 2019 when he ultimately filed the Application. He however added, more importantly, that having been notified by the court of the dismissal order on the 17/7/2017, he speedily prepared an application supported by an Affidavit in the name of the client but could not have the application filed because the client did not turn up to sign the Affidavit because, counsel stated from the bar, the plaintiff moved operators from Kenya to Uganda hence the loss of touch with him.

4. For the Defendant/Respondent, Mr. Lutta made submissions relying on the Replying Affidavit of Cecilia Ndeti to the effect that it is the duty of the plaintiff to prosecute the suit and that all facts here demonstrated that the plaintiff had totally lost interest in the matter and deserves no discretion towards setting aside the dismissal order.

5. On the need to act expeditiously counsel submitted that the application was made after inordinate delay without explanation and that there was no evidence at all that the plaintiff had even made attempts to prosecute the suit.

6. In his closing submissions Mr. Mokaya implored the court to appreciate the fact that the flip side of the courts power to dismiss a suit for want of prosecution was the power to set aside the dismissal order and reinstate the dismissed suit.

Analysis and determination

7. It is the duty of all litigants and counsel to help the court achieve its overriding objective to determine disputes brought to court in a fair, just, proportionate and financially affordable fashion. Fundamental to all the dictates to court is that justice shall not be delayed because delay defeats justice.

8. In this matter, I have had a chance to peruse the court records which is not much. That perusal reveal that since filing the suit and application dated 7/12/2011, which was withdrawn by consent, the defendant had filed an application dated 13/4/2012 seeking to amend the

defence, a notice of preliminary objection seeking to dismiss the suit on account of alleged defect for failure to accompany the plaint with a verifying affidavit and instead filing a verifying affidavit by a stranger. There was also an application dated 3/10/2012 seeking to strike out the suit for being a prejudice and embarrassing to the fair trial of the action, before filing the application of 5/5/2017 to dismiss for want of prosecution. Over and above those attacks on the plaintiff's suit, the defendant was evidently the party who moved the court in all occasions save for the first occasion on 8/12/2011 when the matter came to court under certificate of urgency at the instance of the plaintiff. That history coupled with the un-explained delay sparing over some 2 years without taking action to revive the suit depict the picture of a plaintiff who has totally lost interest in the suit.

9. In addition Mr. Mokaya was candid from the bar that he did draft an application immediately after leaving court on the 17/7/2017 but could not file same because the client who was to swear the Affidavit in support wholly failed to show up compelling counsel to swear an affidavit by self. This fact begs the question as to whose suit it is in court.

10. My view and knowledge is that the litigation belongs to parties and never the advocate who must never acquire an interest in a client's chose in action. To the extent that the client has not consulted the counsel even to be appraised of the status of the matter leave alone to swear an affidavit, is evidence enough that the client has lost interest in the litigation and it will serve no purpose to set aside the dismissal as there is no assurance that the lost interest would be revived to have the matter prosecuted.

11. In addition, a court setting to set aside a dismissal order and reinstating the dismissed suit must consider what is the strength and character of the suit to be revived. Since 2009, the law has been that a plaint be accompany by a verifying affidavit verifying the correctness of the content of the plaint including an averment that there is no other suit pending between the parties.

12. In this suit the verifying affidavit file was sworn by one KASIMU KATUMBA who alleges to be the plaintiff contrary to the text of the plaint itself. Granted that the plaintiff is a corporate who could not swear an Affidavit by itself but through its officers, that is not a ground for the said KASIMU KATUMBA to walk into a suit and allege what cannot be supported. There is also an averment in the defence to which no reply was filed that there was a claim in the United Kingdom over the same goods. On those two points I have posed to myself the propriety of the suit to be reinstated and I have formed the opinion that the validity and competence of the suit itself may be an issue. I however hesitate to make a determination in that regard and say no mine. Suffice to say that in the absence of an explanation for the delay I am unable to exercise the courts discretion in favour of the plaintiff. Accordingly, I order that the application be dismissed for lacking merits and not furthering the overriding objectives of the court.

13. I make no orders as to costs.

Dated and delivered at Mombasa this 11th day of March 2019.

P.J.O. OTIENO

JUDGE