REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL CAUSE NO. 40 OF 2008

HAWKWIND CORPORATION

("THE OWNER OF THE MV KAIROS" .....PLAINTIFF

VERSUS

AFRICA MARINE & GENERAL

ENGINEERING COMPANY LIMITED.....DEFENDANT

R U L I N G

1. By its application dated 24/10/2018 the plaintiff prays for an order that out of abundance of caution, the suit be marked as reinstated and be fixed for hearing.

2. The grounds preferred to ground the applications were that the suit was deemed dismissed for non-compliance with the orders made on pre-trial and that the plaintiff was prepared to prosecute the case. It was added that the cause of action has left the plaintiff's business shuttered after the vessel which was taken to the defendant's yard for routine repairs was destroyed and that the defendant stands to suffer no prejudice if the orders are granted.

3. The application was opposed by the defendant on the basis of the grounds of opposition dated 4/2/2019 and filed on the 5/2/2019. Those grounds fault the application for being frivolous, vexatious and an abuse of the process of the court; for being guilty of laches and failure to properly invoke the court's powers. Lastly it was asserted that once the suit was deemed dismissed, the defendant did inform its insurers of the development and the insurers began the close of their file hence to grant the orders sought will occasion immense prejudice to the defendant.

4. The application was argued orally with Mr. Wafula appearing for the plaintiff/applicant while Miss Muyaa appeared for the defendant/respondent.

5. Mr. Wafula's submissions were short and precise. Counsel told the court that there was indeed non-compliance with directions that parties file detailed witness statements making reference to the documents to be produced as exhibits but ask the court to consider that the principle of law that before a final judgment is entered on the merits the court reserve the discretion to revoke own orders made purely on account of default. The decision in **Philip Kiptoo Chemwolo & another v Augustine Kubende [1986] eKLR** was cited to the court for that proposition. The decision in Richard **Ncharpi Leiyagu v Independent Electoral Boundaries Commmission & 2 others [2013] eKLR** was also cited from the proposition that the doors of justice ought not be closed just on account of a mistake. Counsel concluded by stating that they were unable to trace the witness in time and pleaded for indulgence of the court to enable the plaintiff be heard.

6. In her submissions Miss Muyaa retraced the court orders not complied with the by the Applicant and pointed out to court that there had not be offered any explanation for failures to comply. In particular counsel pointed out that both orders made on 8/11/2017 and the extension granted on 17/4/2019 were all not complied with and that upon non-compliance the default close took effect. Counsel then stressed the fact that the court having deemed the suit dismissed on the 18/6/2018 it took the plaintiff up to November 2018 to bring the current application. To counsel, that delay was inordinate and would amount to abuse of the process of the court.

7. On prejudice to the defendant counsel submitted that the defendant's witnesses were to come from South Africa and were discharged upon dismissal hence it would be difficult to trace thus a prejudice to the defendants case if the matter is reinstated. Counsel asked the court to invoke its inherent powers to help achieve overriding objectives of the court.

8. On the two the decisions cited by the applicant's counsel, miss muyaa took the view that in both instances there was a reason advanced for the default unlike in this case. She rounded off her submissions by submitting that it is now permissible to let the mistake of counsel fall

upon the client and that the litigation belongs to the party not counsel.

8. In his closing response Mr. Wafula pleaded for mercy to enable a hearing and sought to correct the assertions at paragraph 7 of the Affidavit in support stating that there would be no prejudice upon the plaintiff to have been by error.

9. The only issue for the courts determination is whether a case has been made out for the court to set aside its orders made on the 18/6/2018 by which the court marked the suit as dismissed on account of default to comply with court orders. In order that the real picture be brought into proper focus, one needs to retrace the court orders the plaintiff did not comply with.

10. The first time the matter ever came before me was on 22/9/2015 when it was scheduled for pre-trail directions. On that day no directions could be given because the two counsel informed the court that there were documents filed by both which were missing from the court file hence they sought four(4) weeks to avail the same to court. Their request was granted for a period of 45 days to enable the documents be placed in the court file and for settlement of issues. That became the first direction by this court not to be complied with by the 17/5/2016 when the court once again extended time for the issues to be filed and for the parties to confirm that all documents filed were on record before case conference could be conducted.

11. One year later, on the 3/5/2017, the matter was once again in court for case conference when it turned out that parties had not yet agreed on agreed issues and the matter was once again by consent adjourned to enable them to agree on not only the issues but also on the manner of production of the documents at the hearing. At that time there was already a draft statement of agreed issues to work with. When the matter was next in court on 28/6/2017 it was reported by the defendant's counsel that he had written to the plaintiff counsel on the three isolated issues but there had not been a response. Even Mr. Ondego advocate who appeared as holding brief for the plaintiffs' counsel reported to court that he had not been instructed by the counsel on the way forward.

12. Once more the case conference was adjourned for some 3 months to the 13/9/2017 when the matter did not proceed hence it was rescheduled for the 8/11/2017. Come the day fixed, still issues had not been agreed on and counsel for the plaintiff pointed out that the documents filed as translated documents were not related to the matter for which reason it was agreed by consent that both parties file, within 14 days, detailed witness statements making reference to the documents each witness would seek to rely on and that such statement and documents be bond together in a bundle and duty paginated. It was further agreed that the agreed issues be filed within 30 days from that date. It was equally agreed that the documents thereto before filed stood discarded and a new date for case conference was set. On 21/8/2019 when the matter came up for the same case conference only the plaintiff's counsel attended court and informed the court that there still was no compliance and once again pleaded for time to comply. Having indulged the parties all the while, since September 2015 to 17/4/2018, when the matter came up on the 17/4/2018, the court extended time for another 30 days for the parties to comply but this time placed a consequence for failure to comply that the suit would stand dismissed. Instead of setting a date for a case conference the court set a mention date to confirm compliance.

11. That consequence came to pass in that 60 days later when the matter was mentioned, it was the advocate appearing for the plaintiff who set the pace pointing out lack of compliance with the directions of 18/11/2017 as reiterated on 17/4/2018 and prayed that the default clause be postponed to enable compliance by the parties.

12. The court was not impressed by parties conduct and observed that the time for compliance ended on 18/5/2018 when the suit stood dismissed and on the date counsel was addressing court there was no suit upon which the parties could address the court prior to the dismissal being upset. To that order counsel sought leave to appeal which leave was granted. It would appear that no appeal was ever filed till the current application was filed on the 29/11/2018.

13. That history point the manner in which the plaintiff, as the person who filed the suit, has performed in its obligations to court under Section 1 of (3) of the Civil Procedure Act. It is to be noted that despite indulgence by the court, over a period of more than two and a half (2 ½) years, while prodding the parties to move the matter forward the plaintiff maintained a steady complacence.

13. To this court, all attempts at introduction of the oxygen principles and even the need to file witness statements and documents beforehand, were all endeavors towards achieving the objective of expediting resolution of court disputes as a core principle and dictate of the constitution that justice should not be delayed. In this matter it is not deniable that counsel and client had not served the court towards meeting and achieving the overriding objectives.

14. The length of delay cannot be removed from the description of a litigant not keen to prosecute his matter once filed in court. By the time the matter was being dismissed it had acquired for itself a career of some ten years of very uneventful stay in court. When the application was filed, even the words deployed were themselves not warranted at all or just wanting in candour. When the prayer says that the suit *be reinstated out of abundance of caution,* one wonders on what account the court had to caution itself. Is it that repercussions would befall the court if the matter was not reinstated?

15. I continue to hold the view and belief that all court orders and directions need to be complied with for the orderly transacting of court business and that to allow court orders be flouted with abandon does nothing towards achieving the objects and purposes of justice but rather defect the purpose and casts a court system in bad light.

16. Furthermore, I understand the law to be that even where there occurs a default or failure on a party, of whatever nature, it is the duty of that party to explain the delay or failure to the satisfaction of the court.[1] Setting aside a court order invokes courts judicial discretion which must be exercised upon reason and not on emotional consideration like sympathy or mercy as Mr. Wafula submitted to court. Here the nearest the plaintiff came to giving an explanation was on submission from the bar that the witnesses were not traced in time. However that cannot be a sufficient explanation because it was never put on oath in the affidavit or grounds of the application and thus passes as an afterthought. Secondly even that assertion for the bar did not confirm that the witnesses had now been traced. In any event it is now trite that the litigation belongs to the party and not the counsel.[2] The apex court in this country has laid whose burden it is in an application for extension of time in its decision in **Kenya Revenue Authority v Habimana Sued Hemed & another [2017] eKLR** when the court said:-

> **"It is the applicant's responsibility to convince the Court that it should exercise its discretion and grant extension of time. We find that the applicant has failed to satisfy the Court that the 1st respondent will not suffer prejudice if the application for extension of time is granted".**

18. The totality is that no satisfactory reason has been advanced to merit the court exercising its discretion in favour of its plaintiff. For those reasons, I am unable to find for the plaintiff on the application, what I find unmerited and I order that the same be dismissed with costs.

Dated and delivered at **Mombasa** this **20th** day of **May 2019**.

P.J.O. OTIENO

JUDGE

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[1] ***Nicholas Kiptoo arap Korir Salat v. Independent Electoral and Boundaries Commission and 7 Others***, Sup. Ct Application No. 16 of 2014.

[2] *Per* Olao j, in **Stephen Muigi Ruri v Francis Njogu & 2 others [2018] eKLR;**

" Litigation belongs to the party and not to his counsel. He should therefore be vigilant to ensure that his case is prosecuted and all orders made by the Court in that respect are complied with".