



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 542 OF 2012

TWO TONE BRANDING AFRICA LIMITED.....PLAINTIFF

-VERSUS-

COCA COLA EAST & CENTRAL

AFRICA PTY LIMITED.....RESPONDENT

RULING

1. This is a ruling of an application filed by the Plaintiff, **Two Tone Branding Africa Limited**. The application was filed in Court on 30th October 2017. By that application the Plaintiff seeks to set aside the dismissal of this suit and for its reinstatement.

2. This suit was dismissed on the application, by **Coca Cola East & Central Africa PTY Limited**, the Defendant, dated 16th September 2016. This suit was dismissed on 29th November 2016 for want of prosecution.

BRIEF BACKGROUND

3. The Plaintiff filed this suit on 24th August 2012. The Defendant filed defence and counter-claim on 10th April 2013. The Plaintiff filed a reply to that defence and counter-claim on 21st May 2013.

4. This suit was certified ready for hearing on 5th December 2013. It is the period from 5th December 2013 that the Defendant, by its application dated 16th September 2016 alleged there was failure, on the Plaintiff's part, to set down the suit for hearing.

PLAINTIFF'S NOTICE OF MOTION FILED 30TH OCTOBER 2017

5. As stated before by that application the Plaintiff seeks reinstatement of the dismissed suit. The affidavit in support of the application was sworn by Eunice Lumallas, the Advocate for the Plaintiff.

6. This is what she deponed. She was appointed, by the Plaintiff, to take the conduct of this case in September 2017. On perusing the Court file she found that this suit was dismissed on 29th November 2016 for want of prosecution. That the hearing notice for 29th November 2016 was served upon the Plaintiff, by the Defendant, by registered mail, which was not sanctioned by the Court and which was not received by the Plaintiff.

7. Attached to that affidavit are email communications between the Plaintiff and their then Advocate, namely Robert Githaiga which shows the Plaintiff's inquiry on the fixing of a hearing date.

8. The Learned Advocate Eunice Lumallas, by her affidavit attached Law Society web page on the said Mathenge Robert Githaiga Advocate which shows he had been inactive since 2016.

9. The Law Society's information on the Advocate Mathenge Robert Githaiga corresponds with what the Defendant by their Replying Affidavit stated. That is that Defendant's Counsel tried to contact Mathenge Robert Githaiga Advocate but found that he was no longer at the physical address shown in his letterhead and that the telephone number supplied by the Law Society did not go through.

10. The Defendant, in opposition, stated that it would be prejudiced by reinstatement of this suit because five of its witnesses were no longer employed by the service providers engaged by the Defendant and there would be difficulty in procuring their attendance because they were

based in South Africa.

ANALYSIS AND DETERMINATION

11. I have considered the application, the affidavit evidence, the grounds of opposition and the authorities. Having done so the operative period of alleged delay, I will consider, is from the date this suit was certified as ready for hearing that is from 5th December 2013.

12. It is clear from the record that the Plaintiff's Learned Counsel was participating in the interlocutory application, for further and better particulars, and even participated in consent when *ex parte* judgment entered against the Defendant was set aside by consent of the parties.

13. What is before Court makes it clear that the Plaintiff's Advocate was inactive, as far as Law Society is concerned from the year 2016. The record of the proceedings show that from mid 2015 the Plaintiff was unrepresented in Court. The Court sees, from the attached emails, between the Plaintiff's representative and Mathenge Robert Githaiga Advocate, that the Plaintiffs from February to May 2016 were led to believe, by that Advocate, that he was fixing this case for hearing. That information was obviously incorrect and is not supported by the Court record.

14. I have come across a Supreme Court decision of South Australia case which I find persuasive. This is the case; **BEVERAGE BOTTLERS (SA) LTD (IN LIQUIDATION) & ANOR V ABODE ENTERPRISES PTY LTD [2009] SASC 272** (3 September 2009) where the Court in discussion referred to the following passage –that is:

“...I cannot accept either that if the Plaintiff fails to show a reasonable explanation for a long delay the action will be dismissed irrespective to other considerations, or that unless the Defendant can show that a fair trial would not be possible in the circumstances the action must proceed irrespective of the considerations. Both explanation for delay and possible prejudice to a fair trial are highly important but I am not prepared to say that either of them amounts to a sine qua non for the making of any particular order.”

15. I am aware that the Defendant has stated that its witnesses are not in employment of the Defendant's service providers, but I have perused those witness statements and have found that the postal addresses of those witnesses, in South Africa, is stated. There was no evidence set before me to show that those witnesses had been contacted and had failed to respond through those addresses.

16. The Defendant submitted that the application should be declined because the Plaintiff had failed to give good reason for delay in prosecuting this suit.

17. The Plaintiff's produced emails of their former Advocate where that Advocate gave them the impression that action was being taken, by him, in this case. Further there is evidence, which is confirmed by the Defendants, that the Plaintiff's then advocate ceased being an active member of Law Society of Kenya in the year 2016, the year this case was dismissed for want of prosecution. In those circumstances, I am of the view that it would be unjust to shut out the Plaintiff from prosecuting its claim in this action. In support of that finding I rely on the case **GOLD LIDA LIMITED V NIC BANK LIMITED & 2 OTHERS [2018] eKLR** where the Court referred to one of the gems of Madan J in the case **BELINDA MURAI & OTHERS V AMOI WAINAINA (1978)** where the Learned Judge stated:

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of legal point of view which Courts of appeal sometimes overrule”

18. Additionally as stated before, the Defendant filed a defence and counter-claim in this matter. When the Court on 29th November 2016 dismissed this case for want of prosecution, did that dismissal also include the Defendant's counter-claim? There is ambiguity in that regard.

19. But perhaps more importantly the Defendants also had an obligation to prosecute its counter-claim just as the Plaintiff had an obligation to prosecute its claim. Why did the Defendant fail to set the suit for hearing and if the Plaintiff failed to attend then proceed to prosecute its counter-claim.

20. The Plaintiff by its application stated that it was not served with the application for dismissal of the suit for want of prosecution.

21. The Defendant attached its search of the Plaintiff company at the companies Registry which showed the Plaintiff company's postal address as P. O. Box 10067 – 00100 NAIROBI. Defendant stated that service was effected through that address.

22. I have perused the affidavit of service sworn by Irene Kashindi on 14th November 2016. By that affidavit is the Postal Corporation of Kenya, list of Registered Postal packages form which indicates service was effected on the Plaintiff through Post Office Box Number 10067 NAIROBI. There is no indication on that form that the postal code of the Plaintiff 00100 was indicated in the letter of service to the Plaintiff. It is therefore difficult to ascertain whether the Plaintiff's registered letter was ever delivered in the absence of that postal code.

23. All in all the best interest of justice will be served by setting aside the dismissal of their suit in view of the discussion above.

24. In view of the fact that both the Plaintiff and the Defendants had an obligation to fix this case for hearing the costs of the application shall be in the cause.

25. I grant the following orders:

a) Order of 29th November 2016 dismissing this suit for want of prosecution are hereby set aside and this suit is hereby reinstated.

b) The costs of the Notice of Motion filed 30th October 2017 shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 15TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT