REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 18 OF 2015

SOLAI RUIYOBEI FARM LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

PHILIP S. CHEPTUMO.....1ST DEFENDANT/APPLICANT

SIMON KIPCHUMBA KANDIE.....2ND DEFENDANT/APPLICANT

RULING

1. Before me is an **Application** dated **10th October 2019** brought by the plaintiff Solai Ruiyobei Farm Limited under provisions of **Order 36 rule 7 and 51 rule 1 of Civil Procedure Rule (CPR**) as well as **Sections 1A, 1B and 3A of the Civil Procedure Act**.

The main prayer by the applicant is **an order for re-instatement of the suit and all proceedings in regard to the suit from the 19th July 2015.**

Charles Olare Chebet and Richardson Kipkoech Bundotich swore the supporting affidavit on the 10th October 2017 and filed on the same date. These two dependents aver that they are the chairman and secretary of the applicant company.

2. The application is based on grounds that the suit was struck out and dismissed on the 28th September 2017 upon the court declaring that proceedings in the suit from 19th July 2015 were a nullity in view of a court order made on the 4th February 2016 that directed the plaintiff to set down the suit for hearing within 90 days from the said date. 90 days expired on the 4th May 2016.

3. The application is opposed by a replying affidavit filed on the 29th November 2017. It is sworn by Simon Kipchumba Kandie the 2nd defendant/Respondent. He depones that the suit was struck out by a court order dated 28th September 2017, that further vacated the orders of 4th February 2016.

It is averred that the plaintiff failed to attend to or respond to a Notice to Show cause on the 28th September 2017.

Order 36 CPR deals with issues of summary procedure in hearing of suits. I do not think it is relevant in the circumstances hereto.

4. This suit stood dismissed 90 days from the 19th March 2015, meaning by 18th June 2015. The plaintiff having failed to set it down for hearing as directed by the court. It is stood thus dismissed.

Therefore as at 4th February 2016 and 28th July 2017 there was no case upon which any application and/or orders could be made, unless the suit had been re-instated for hearing. The dismissal of the suit discharged all orders made after the due date including those made on the 4th February 2016.

5. I have considered the parties submissions.

Whether the suit should be re-instated for hearing

In the first instance, the suit was filed by the company against its alleged directors and involves the manner of management of its affairs. It therefore was a joint duty of the parties to take active steps to have the dispute resolved by taking a hearing date for the suit, though minded that essentially the case belonged to the plaintiff. It was not explained to the satisfaction of the court why it did not attend court on the 19th March 2015 when orders to set the suit down for hearing within 90 days, or its failure on the subsequent hearings.

6. From the record, it took the applicant over three years to discover that its case had been dismissed. This is not consistent with a party who is interested in prosecution of its case – see **Ivita –vs- Kyumbu (1984) E KR, Court of Appeal case – Bi-Mach Engineers Ltd –vs- Jamas Kahoro Mwangi (2011) e KLR, Joseph gitahi Njenga & Another –vs- Daniel Karanja Kaburu (2017) e KLR.**

7. It is submitted for the applicant that reinstatement of the suit will not cause any prejudice to the respondents citing the case **Njuki Gachuru –vs- Githui (1977) KLR 102**. In the case, the court rendered that for a suit to be re-instated the plaintiff must show that it would suffer substantial prejudice that would result to aggravated costs and specific hardship to the defendant due to the would be impending trial of the suit. In addition, a court must satisfy itself of the nature of the case, the importance of the claim or subject matter and legal capacity or status of the parties to the suit.

8. **Whether a suit should be re-instated is a matter of justice and depends on the facts of each particular case – Ivita –vs- Kyumbu (Supra) cited in Mwangi S. Kimenji –vs- AG and Another (2014) e KLR.**

9. The Respondents/defendants submitted at length on the delay by the plaintiff to progress its case and agreed with learned decisions of the court that the plaintiff has a duty to progress its case, and unless plausible reasons are tendered, no reinstatement should be allowed.

10. It is trite that a situation as obtained in this matter, justice must be accorded to both parties by considering the rival positions, including that of the court. – See **Ivita** case above.

11. In **John Muruti Thurui & 4 Others –vs- Fidelity Commercial Bank Ltd & 4 Others (2016) e KLR**, the court held that even if the delay is prolonged and the court is satisfied with the excuse for the delay, the action ought not be dismissed, but will order it to be set down for hearing at the earliest available time.

That is what the judge did in making the **order of the 19th March 2015**, by extending the period for 90 days. However the plaintiffs failed to take advantage of the court order, and continued in its slumber.

12. It is trite that a court order ought to be complied with as it is neither a mere suggestion nor an opinion. It is a command that remains so until set aside by another court order, and it is the interest of all parties to always comply with court orders as failure and defiance is not only disrespect of the court but would lead to chaos and anarchy – See **Sam Nyamweya & 3 Others –vs- Kenya Premier League Ltd & Others (2015) e KLR.**

13. I have noted that the plaintiff company is embroiled in numerous court cases with its members and shareholders and directors both in the High Court and at the Environment and Land Court - **ELC No. 532 of 2013**.

Spreading its disputes to all the court divisions may not be in its best interest. It ought to progress the cases to their logical conclusion to resolve the leadership disputes.

14. The current suit (now dismissed) revolves around a dispute between the company and two of shareholders. The court has not been told of the status of the ELC case. In the circumstances, I find no prejudice that may be caused to the applicant by a denial of the orders it seeks.

15. Guided by principles that the court has to consider in re-instating a suit upon a dismissal for want of prosecution, I come to the conclusion that the applicant has not sufficiently made out a case for the court to allow its application. The court will not indulge an indolent party to the prejudice of an otherwise defendant who has been dragged to court by the party not willing to have its case completed by disobedience of lawful court orders – **Sam Nyamweya case (Supra).**

16. I find no merit in the application dated 10th October 2017. It is dismissed with costs.

Delivered, Signed and Dated at Nakuru this 18th Day of July 2019.

J.N. MULWA

JUDGE