



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 203 OF 2015

GILLEY INVESTMENTS LTD.....PLAINTIFF

-VERSUS-

CFC STANBIC BANK LIMITED.....1ST DEFENDANT

DIKEMWA AUCTIONEERS.....2ND DEFENDANT

RULING

1. **CFC Stanbic Bank Limited**, the Defendant moved this Court by Notice of Motion application dated 25th June 2018. That application was served on the firm of Advocates, for the Plaintiff Wandugi & Co. Advocates, on 27th September 2018. The said firm of Advocates did not file documents in opposition to the application. They also did not attend Court on 25th October 2018 when the application was heard. The Court on that day granted the prayers sought by the Defendant, that is the Plaintiff's suit was struck out with costs for disclosing no cause of action.

2. Before me is an application filed by the Plaintiff dated 30th May 2019. The Plaintiff by that application, in the main prayer, seeks to set aside the striking out of his suit on 25th October 2018. The Plaintiff in the application is represented by the firm of Were & Oonge Advocate who, by the present application seek leave to come on record for the Plaintiff. Since that prayer is unopposed leave is hereby granted for the firm of Were Oonge Advocate to come on record for the Plaintiff in place of the firm of Wandugi & Company Advocates.

3. The affidavit in support of the Plaintiff's application is sworn by Oonge Edward Magoma. Much of the depositions in that affidavit fail to conform to Order 19 Rule 5 of Civil Procedure Rules which requires affidavits be drawn in the first person. To demonstrate this and to also show the basis upon which the Plaintiff seeks the orders in the application I will reproduce parts of the affidavit as hereunder:

"6. That on or about the 24th day of September 2018 the firm of Wandugi Advocates was served with a Notice to attend Court in this matter and the file was then passed over to Mr. Karoki who had unfortunately left our firm at the time.

7. That by express request, the firm of Wandugi Advocates had instructed Mr. Karoti to continue to handle the file as he was aware of all the facts.

8. That unfortunately on the said date Mr. Karoki did not report to our office and we later came to learn that he had been indisposed.

9. That unfortunately Mr. Karoki who did not inform the firm of his indisposition and hence the application before Court was heard in our absence.

10. That thereafter the matter had been taken for taxation before we had a chance to file the instant application.

11. That the failure to attend Court on the hearing date was fully occasioned by the failure of firm of Wandugi and Company Advocates and that Mr. Wandugi Advocates does own up to the mistake with unreserved apologies.

12. That nonetheless the said failure was not occasioned by deliberate willfulness but by inadvertences on his part, for which we greatly regret."

4. I don't know why the Advocate Oonge would so blatantly breach the rules on affidavits. He desposed to matters he had no first-hand

knowledge without revealing the source of that information. That is in breach of Order 9 Rule 3 of the Civil Procedure Rules. He also desposed in the second person, not first persona as required by Order 9 Rule 5.

5. Of concern is the matters to which he breached the Rules of procedure are the very matters this Court would need to weigh to determine whether the Plaintiff's application has merit. Again although Mr. Oonge practices law in the firm of Were Oonge & Company Advocates, when narrating facts in the affidavit which facts are only in the knowledge of Plaintiff's former Advocate Mr. Wandugi, he states "we" and "our office". There is an obvious anomaly there.

6. As rightly argued by the Defendant the Plaintiff failed to explain why it took him seven months to seek to set aside the striking of his suit. That delay on its own, without any explanation, defeats the application.

7. The Plaintiff was wrong to argue that the Defendant will not be prejudiced by reinstatement of his suit. Why would the Defendant not be prejudiced when it has for the last 7 months know that the suit against it had be struck out. Why should it again be shouldered with the burden of a suit it knew had gone away.

8. There is no credible explanation, from the firm of Wandugi & Company Advocates why firstly they did not oppose the application to strike out the suit, even though they were served, and secondly why they failed to attend Court on the hearing date. I am afraid that this is one of those cases where the holding in the case **OMWOYO VS AFRICAN HIGHLANDS & PRODUCE CO. LTD. [2002] 1 KLR** hold true, viz:

"Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant's Advocates. This is a proper case where the Defendants remedy is against its erstwhile Advocates for professional negligence and not setting aside the judgment".

9. The Defendant should not be made to shoulder the failure of the Plaintiff or his Advocate.

CONCLUSION

10. It is as a consequence of the above discussion that I grant the following orders:

a. Prayers numbers 2 and 3 of the Notice of Motion dated 30th May 2019 are granted with no orders as to costs.

b. Prayers numbers 4, 5 and 6 of the Notice of Motion dated 30th May 2019 are dismissed with costs to the Defendants.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 4TH day of OCTOBER, 2019.

MARY KASANGO

JUDGE

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

Sophie..... COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE 1ST DEFENDANT

.....FOR THE 2ND DEFENDANT