



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**CORAM: D. S. MAJANJA J.**  
**CIVIL CASE NO. 386 OF 2017**

**BETWEEN**

**FEMINA DAWOODIA..... PLAINTIFF**

**AND**

**KLARISSA WILLS..... 1<sup>ST</sup> DEFENDANT**

**LIUBOV MAKCHINA.....2<sup>ND</sup> DEFENDANT**

**MUTHAIGA TRAVEL LIMITED .....3<sup>RD</sup> DEFENDANT**

**AND**

**JOY WANJIKU VOGT..... 1<sup>ST</sup> INTERESTED PARTY**

**MIRA HEMAL BID SHAH ..... 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Notice of Motion for consideration before the court is dated 12<sup>th</sup> July 2019 and is made under **Sections 1A, 1B and 3A** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* and **Order 51 Rule 1** of the *Civil Procedure Rules*. The defendants and interested parties, as applicants, seek the following order:

*[2] That all the Costs incurred by Klarissa Wills, Liubov Makchina and Muthaiga Travel Limited described as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively, together with the costs incurred by Joy Wanjiku Vogt and Mira Hemal Bid Shah, described as the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties, to defend the claim and the proceedings be paid by Femina Dawoodia described as the plaintiff.*

2. The grounds for the application are set out in the face of the application and are matters of court record. The applicant's case is founded on the fact that on 11<sup>th</sup> July 2017, it was established that the plaintiff had not paid filing fees at the time of filing suit. The applicants therefore contend that as such, no suit existed

as the law requires that filing fees must be paid hence at the time the court fees were paid, the suit was time barred.

3. Counsel for the applicants submitted that the cause of action arose on 16<sup>th</sup> June 2013 and expired on 16<sup>th</sup> June 2019 and that by the time the plaintiff paid court filing fees on 16<sup>th</sup> October 2019 the claim was statute barred.

4. According to the court record, the Deputy Registrar, by a letter dated 8<sup>th</sup> March 2019, notified the plaintiff's advocate that the receipt issued to it, Serial No. 8561057 for Kshs. 73,120/- dated 19<sup>th</sup> September 2017, 'was a fake receipt and no monies were paid into the Judiciary account'. The plaintiff was given an opportunity to regularize the position.

5. In due course, the court fees were re-assessed and the plaintiff paid the correct court fees on 16<sup>th</sup> October 2019. The plaintiff contends that in the circumstances, the plaintiff should not be punished by dismissing the claim as the alleged fraud did not involve her.

6. Counsel for the applicants cited the case of *Motel Schweitzer v Thomas Edward Cunningham & Another* [1955] 22 EACA 252 where the Court of Appeal for Eastern Africa held that an appeal is not instituted in the Court of Appeal until the record of appeal is lodged and fees are paid. By parity of reasoning, counsel urged that no suit was in existence until such time as the court fees were paid and since the court fees were paid outside the limitation period the suit was statute barred and ought to be dismissed on that account.

7. In my view this matter is governed by **Section 96** of the *Civil Procedure Act* which states that:

*96. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.*

8. I hold that the aforesaid provision is permissive and the court has discretion to excuse the failure to pay fees where there are reasons given for such failure and in that case condone the consequences of the default (see *Mombasa Cement Ltd v Speaker, National Assembly & Another* NRB Pet. No. 177 of 2015 [2018] eKLR and *Agnes Kwamboka v Philemon Matoke Mosioma & 2 Others* KSI Civil Appeal No. 135 of 2018 [2019] eKLR).

9. In this case the court filing receipt was found to be fraudulent. There is no evidence that the plaintiff was involved in the fraud. If it was the act or mistake of her counsel's office or clerk or that of court staff, then she should not be punished such acts. Further, when the matter was brought to her counsel's attention, he did regularize the position by paying the assessed court filing fee. I do not think the defendants and interested parties have suffered any prejudice having participated fully in the proceedings for the last two years.

10. I therefore find the suit properly on record and deem that it was filed on the date the plaint was filed.

11. **The Notice of Motion dated 12<sup>th</sup> July 2019 is dismissed with no order as to costs.**

**DATED and DELIVERED at NAIROBI this 11<sup>th</sup> day of DECEMBER, 2019.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango

Ms Akello instructed by Shapley Barret and Company Advocates for the defendants and interested parties.

Mr Washika instructed by Wafula, Washika and Associates Advocates for the plaintiff.