



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 591 OF 2012**

**YAMKO YADPAZ INDUSTRIES LIMITED.....APPLICANT/PLAINTIFF**

**VERSUS**

**KALKA FLOWERS LIMITED.....RESPONDENT/DEFENDANT**

**RULING**

1. The plaint in this matter was **filed on 11th September 2012**. The plaintiff was served with a notice to show cause why this suit should not be dismissed for want prosecution. The plaintiff by that notice was required to show cause on 9th September 2019. On that day the learned judge on hearing the matter dismissed the suit for want of prosecution. It is important to note that prior to the plaintiff being required to show cause why the suit should not be dismissed had not taken any action in this matter since July 2016.

2. By a **Notice of Motion dated 19th November 2019** the plaintiff prays for the setting aside of the order made on 9th September 2019 dismissing the suit. In seeking that prayer the plaintiff brought before court the following grounds: that the matter on been set down for the plaintiff to show cause the plaintiff's learned advocate attended court and addressed the court by giving elaborate and sufficient reasons why there was delay in prosecuting this matter; that despite those submissions the learned judge failed to indicate the reasons why he dismissed the suit; and that no reasons were captured by the learned judge for that dismissal. The plaintiff also referred to the affidavit filed in support of the present application which sets out the efforts made, by the plaintiff to set the case down for hearing.

**ANALYSIS AND DETERMINATION**

3. It is obvious that the plaintiff seeks to have the order of dismissal set aside on the basis that the learned judge failed to assign reason on why he dismissed the suit for want of prosecution. The plaintiff in bringing the present application is faulting the learned judge who effected that dismissal. Since the plaintiff was so aggrieved the plaintiff should have appealed the judge's decision. This court cannot sit in an appeal of a decision of a judge of coordinate jurisdiction. An appeal from this court can only be entertained in the court of appeal. This finding is bolstered, by the court of appeal decision by which, the court was considering an appeal against a ruling on review. This is the case **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** where the court stated:

*"We think Bennett J was correct in **Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557** when he held that:*

***"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal"***

4. I would repeat and say, whereas the plaintiff's allegation that the learned judge failed to assign a reason for dismissing the suit may be a good ground to an appeal, at the court of appeal, it cannot be a ground to set aside the order of dismissal. It follows that I find no merit in the application before me.

5. Accordingly, the **Notice of Motion dated 19th November 2019** is **dismissed with no order as to costs**.

**DATED, SIGNED and DELIVERED at NAIROBI this 17<sup>TH</sup> day of DECEMBER, 2019.**

**MARY KASANGO**

**JUDGE**

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

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**