



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 644 OF 2011

INTRA AFRICA ASSUARANCE CO. LIMITED.....APPELLANT

VERSUS

MOLYN CREDIT LIMITED.....RESPONDENT

RULING

1. Before the court is the Notice of Motion dated the 17th day of October, 2016 brought under Order 12 Rule 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders that;

(a) This Honourable Court be pleased to set aside its dismissal order dated 20th day of June 2016 dismissing the Appeal for want of prosecution and reinstate the same.

(b) There be a stay of proceedings and all consequential orders pending the hearing and determination of the application.

(c) Pending the hearing of this application inter-partes, interim relief in terms of prayer 3 above.

(d) Costs of the application be provided for.

(e) The application is supported by the affidavit of **GEORGE GITHAMBO KAMAU** and its premised on the grounds on the face of the application.

3. From the affidavit in support, it is deponed that no notice was served on the Appellant's Advocate prior to the said dismissal and that the Appellant was not aware that the same was coming up for hearing on 20th June, 2016 to enable them show cause why the Appeal ought not be dismissed.

4. He further depones that the delay in prosecuting the Appeal was caused by failure by the Lower Court to forward the file for Appellant's further action. As a result, he was unable to list the matter for directions though he filed a record of Appeal.

5. The Respondent filed a replying affidavit on 7th November 2016 in which it deponed that the Appellant has not been interested in prosecuting the Appeal as it was not even aware that it had been dismissed for want of prosecution. It was averred that the Appellant has only started showing interest in the Appeal after the same was dismissed.

6. With regard to the service upon the Appellant with the Notice to dismiss the Appeal, it was contended that the courts have been taking the necessary steps of issuing notices before dismissing matters by publishing in the court's website and therefore the Appellant cannot claim that it was not served with the notice. According to the Respondent, the Appeal has taken 4½ years without any action being taken by the Respondent and no sufficient reason has been given why the Appeal has not been prosecuted.

7. The application was disposed off by way of written submissions which this court has duly considered. The Appeal herein was dismissed under Order 42 Rule 35 (2) of the Civil Procedure Rules which provides as follows;

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

8. The court did set down the Appeal for Notice to Show Cause on the 20th day of June 2016. The perusal of the record shows that both

parties were absent following which the Appeal was dismissed. The Appellant contends that it was not aware that the matter was coming up for Notice to Show Cause and no notice had been served upon it. A clear reading of Order 42 Rule 35 (2), in my view, does not specify the form the notice should take.

9. As deponed by the Respondent and rightly so, the court had taken the necessary steps by publishing the notices in the judiciary website informing the parties about the dismissal of old matters. The court is prepared to take judicial notice and has indeed taken judicial notice of that fact and more particularly that the month of June, 2016 was set aside for dismissal of old matters in the Civil Division, Nairobi. The appellant cannot therefore be had to say that it was not aware of the notices.

10. The court also notes that the Appeal was filed way back in the year 2011 which is seven years ago and it's still pending in court. However, I note that the Appellant has already filed the Record of Appeal and its efforts to prosecute the Appeal has been hampered by the failure of the Lower Court to forward the file to this court. In keeping in line with the overriding objective and being guided by the reasoning in the case of **Waweru J in Milimani HCCC No. 389/2003 (Britana Oils Limited Vs B.P. Kenya Limited (2006) eKLR** where he observed thus;

“Shitting out a litigant from the court should be the last indication of justice. Parties should be accorded all due opportunity to be heard and their matters determined on merits unless there are very good grounds to deny them this right.”

11. I do hereby allow the Appellants application and order that the Appeal be reinstated to hearing.

12. Due to the age of the matter, I further order that the same be prosecuted within 120 days from today failing which it shall stand dismissed. The costs of the application in the sum of Ksh.10,000/= are hereby awarded to the Respondent and the same be paid within 14 days from the date of this ruling.

Dated, Signed and Delivered at Nairobi this 7th Day of June, 2018.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*