



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.1116 OF 1999

KANJUMBA CONSULTANTS LIMITED.....PLAINTIFF

VERSUS

KENYA NATIONAL LIBRARY SERVICES.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. The Plaintiff/Applicant through an application dated 29th June 2017 brought pursuant to order 12 Rule7, Order 51 rule 1 of Civil Procedure Rules and section 3A of Civil Procedure Act and all enabling provisions of the law seeks the following orders:-

1. The Honourable Court be pleased to set aside the order issued on 16th April, 2004 dismissing the suit herein for want of prosecution.
2. The suit herein be reinstated.
3. The costs of the application be in the cause.

2. The application is premised on the grounds on the face of the application inter alia:-

- a) On 25th April, 2004, the parties herein informed the Honourable Court that they wished to settle the matter out of court and as a result the court proceedings were held in abeyance.
- b) That the out of court settlement proceedings running from the year 2004 to 2014 collapsed and thereafter the Applicant's then Advocates on records Messrs. Wanjagi Macharia & Company Advocates did not take the necessary steps to move the Honourable Court to revive the proceedings.
- c) That due to this delay to prosecute the suit the Applicant approached the firm of Kembi-Gitura & Co. Advocates in May 2017 and instructed them to take up conduct of the matter and prosecute the same to conclusion.
- d) That after the said instructions the Firm perused the court file at the court registry and discovered that the suit had been dismissed on 16th April, 2008 on the court's own motion.
- e) That this information was never relayed to the Applicant by its then Advocates on record Messrs. Wanjagi Macharia & Company Advocates and it has been the Applicant's belief that the suit was still alive in court.
- f) That the Applicant is still keen and interested in proceeding with the matter and prays that this Honourable Court exercise its judicial discretion to set aside the order dismissing this suit and decide the matter on its merit.
- g) That this Honourable Court has the power and the discretion to set aside its own order dismissing the suit and to re-instate the same.
- h) The Respondents will not suffer any prejudice in the event that the instant application is allowed.

3. The application is supported by supporting affidavit of Faith W. Wanjumba dated 29th June 2017 and several annexures thereto.
4. The application is opposed. The 1st Defendant/Respondent filed a Replying affidavit dated 23rd October 2017 deponed upon by Jack Wafula, a deputy Director for the 1st Defendant/Respondent.
5. Before the hearing of the application the parties were directed to file written submissions in respect of their opposing positions. The Plaintiff's/Applicant's submission were filed on 23rd July 2018 whereas the 1st Defendant's/Respondent's submission were filed on 18th August 2018. At the hearing Miss Gasuru appeared for the Plaintiff/Applicant whereas Miss Wambui Gathera appeared for the 1st Defendant/Respondent.
6. I have very carefully considered the application, affidavit in support and the Replying affidavit as well as the rival submissions by the counsel. From the above the arising issues for consideration are as follows:-

- a) **Whether the applicant's notice of motion is defective?**
- b) **Whether there has been inordinate delay in filing of the application?**
- c) **Whether the suit should be reinstated?**

A. Whether the applicant's notice of motion is defective?

7. The plaintiff's suit was dismissed on 16th April 2008 by Hon. Justice Warsame, (*as he then was*) under **order XV1 Rule 6 of Civil Procedure Rules (Repealed)**. The said Rule provided:-

"In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed; and in such case the plaintiff may subject to the law of limitation, bring a fresh suit."

8. The Notice of Motion before the court seeks to set aside the order purportedly issued on 16th April 2004 dismissing the suit for want of prosecution. The court record does not have any order made on the 16th April 2004 but on 16th April 2008. There is no order attached to the Applicant's application to demonstrate existence of any order of 16th April 2004. The court is being asked to set aside non-existing order which is not amenable in law.
9. In the issue of **Waki Clearing & Forwarding Ltd Vs Rem Communications Systems Ltd Civil Case No. 1721 of 2001**; Hon. Justice O.K. Mutungi; as he then was, declined to grant orders sought on the ground that the Applicant was seeking to set aside non-existence orders.
10. The order on record is that of Hon Justice Warsame, dated 16th April 2008. It is not sought to set aside. The Applicant is urging there is an order of Hon. Justice Warsame and the same is the one that this court should consider and set aside the said order. The said order is not sought to be set aside in the applicant's application in this matter. It is trite law that party is bound by its own pleadings and that a party cannot be granted what it has not sought for.
11. Having considered the application and respective submissions I find the Applicant's application defective.

B. Whether there has been inordinate delay in filing of the application?

12. It is urged the application should be allowed as the Applicant was not issued with notice to show cause why the suit should not be dismissed for want of prosecution. The record reveals indeed that no notice was issued. **Under Order XV1 Rule 6 of Civil Procedure (Repealed)** there is no requirement of issuance of notice to the parties. It is not mandatory for notice to issue and the court may on its own motion dismiss the suit for want of prosecution.
13. The plaintiff's suit was last before court on 28th April 2004 before its dismissal on 16th April 2008; a period of 4 years without any action being taken by the plaintiff. A period of 4 years is inordinate by all standards. I therefore find the suit had been inordinately delayed without a hearing date being taken.

C. Whether the suit should be reinstated?

14. In order to consider reinstating the suit or not the Applicant should demonstrate good cause for failure to set the suit down for hearing. The Applicant blames court for non-service of Notice to show cause. The suit was not dismissed under the provisions of **Order 17 Rule 2(1) of the Civil Procedure Rules** as submitted on behalf of the Applicant but under **Order XV1 Rule 6 of Civil Procedure Rules (Repealed)**. **Order 17 Rule 2(1) of Civil Procedure** provides:-
- "(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."**

15. Under **Order XV1 Rule 6 of Civil Procedure Rules** under which the suit was dismissed there is no legal requirement for service of

notice to show cause to any of the parties. In the case of **Republic Vs Nyamira Land Dispute Tribunal & 2 others Ex-parte David Komenda Tumbo & another Elc Misc No. 90/2006 (Kisii)** Hon. Justice S. Okong'o held:-

"Order XV1 rule 6 of the repealed Civil Procedure Rules did not require a Notice to Show Cause to be served upon the parties before a suit was dismissed by the court for want of prosecution. Such notice was only necessary where the suit was to be dismissed for want of prosecution under Order XV1 rule 2 of the said rules. It was therefore proper for the court to dismiss the applicants' judicial review application under Order XV1 rule 6 of the repealed Civil Procedure Rules without any notice to the applicants provided the conditions of that order were met. A suit could only be dismissed under Order XV1 rule 6 aforesaid if no application had been made or step taken for a period of three years with a view to proceeding with the same."

16. Having carefully considered the parties submissions and the Applicant's application, I am satisfied the Applicant has failed to demonstrate, the order sought to be set aside, was issued in complete disregard of the provision of the law requiring service. I also find that the Applicant has failed to satisfy the court that this suit should be reinstated. I am alive to the fact that this suit was filed in 1999 and dismissed for want of prosecution 10 years ago; and the supportive documents and may be; witnesses may not be traced if the suit is reinstated. The defendant may be prejudiced by such cause in the event witnesses and documents can't be traced after 19 years of waiting. I find no justification to issue orders sought.

17. The upshot is that the application dated 29th June 2017 is without merits and is accordingly dismissed with costs.

Dated, signed and delivered at Nairobi this 8th day of November, 2018.

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J .A. MAKAU

JUDGE