



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 403 OF 2012

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF

-VERSUS-

NAEN RECH LIMITED.....1ST DEFENDANT

MAINA CHEGE.....2ND DEFENDANT

RULING

1. The Notice of Motion dated 27th September, 2018 is brought by the Plaintiff under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 51, Rules 1 and 4 of the Civil Procedure Rules; and is supported by the grounds set out on the body thereof and the facts deponed to, in the affidavit sworn by **Roslyne Murugi**. The orders sought are:

i) Spent.

ii) THAT Roslyne Murugi Advocate be granted leave to come on record for the Plaintiff.

iii) Spent.

iv) THAT the order made on 23rd February, 2018 dismissing the suit for want of prosecution be set aside and that the suit be reinstated for hearing at the earliest before the Anti-Corruption and Economic Crimes Division.

v) THAT costs be provided for.

2. In her supporting affidavit mentioned hereinabove, the deponent stated that the matter was previously being handled by an advocate who was transferred to a different department and the Plaintiff could not allocate the file to another advocate since the file could not be traced from the Plaintiff's offices. The deponent added that the Plaintiff only came to learn about the dismissal of the suit upon being served with a bill of costs by the Defendants and that attempts to peruse the court file were unsuccessful as the same was missing from the registry.

3. Further to the above, it was the deponent's averment that the Plaintiff did not receive the notice to show cause issued by the court and as such, could not attend court on 16th February, 2018 to show cause why the suit ought not to be dismissed. In view of the above, the deponent maintains that the Plaintiff was not indolent in prosecuting the suit and that the delay in prosecuting the case is excusable.

4. In opposition to the aforesaid Motion, is the affidavit of Fredrick Okeyo filed on 15th October, 2018. The averments made herein were that, indeed, the notice to show cause was issued to both parties and when the said parties appeared before the court on 16th February 2018, the Plaintiff sought time to file a reply to the aforementioned notice; that time was extended and the hearing of the notice postponed to 23rd February, 2018 and subsequently, the Plaintiff not only failed to file the Reply as directed but also neglected to turn up in court on the 23rd of February 2018.

5. The deponent went ahead to contend that the Plaintiff was therefore aware of the notice to show cause and in view of this, the Motion lacks merit and has been brought late in the day.

6. The motion was canvassed by way of oral arguments. The Plaintiff's advocate restated the contents of the affidavit save for the submission that on the date during which the notice to show cause was scheduled to come up in court, the matter was taken out and postponed to 23rd February, 2018 and that the Plaintiff did not appear on the 23rd since it had not been served; and that in any case the Defendants will not suffer any prejudice. The Defendants' advocate submitted that the last action in the suit took place on 4th May, 2015 and that the Plaintiff has not given good reasons for not prosecuting the same. The advocate also maintained that both parties were served with copies of the notice to

show cause and hence the Plaintiff was aware of its existence; as such, the application is merely a reaction to the bill of costs.

7. Before the court can proceed to consider the substance of the application, it is imperative to give a brief background of the case. The Plaintiff alleges that there was conspiracy, fraud and illegality involving the Defendants and third parties against the Nairobi City Council, in a transaction pertaining to the purchase of a public cemetery. Further, that, two related criminal cases were lodged, heard and determined and that the respective accused persons were found culpable. To add on, the Plaintiff averred that the 2nd Defendant has been charged in a criminal case which is still pending in court.

8. Having laid out the above, the court acknowledges that it has considered the arguments presented by the respective parties and the authorities relied upon by the Plaintiff. The questions arising therefrom are essentially whether the advocate should be granted leave to come on record for the Plaintiff and whether the court should exercise its discretion in favour of the Plaintiff by setting aside the dismissal order and reinstating the suit.

9. On the issue of leave to come on record for the Plaintiff, it was submitted that the advocate previously acting for the Plaintiff (Mr. Edwin Waudu) has since been transferred to another department in the Plaintiff's offices. Under the circumstances, the court is satisfied with the reasons given and is thus inclined to allow the advocate **Rosslyne Murugi** to come on record.

10. On the issue of dismissal, it is clear that the suit was dismissed for want of prosecution by the court *suo moto* under Order 17, Rule 2 of the Civil Procedure Rules. The applicability of this provision was triggered by the fact that no action had been taken by the parties for over one (1) year.

11. The first question arising therefrom is on whether there is evidence of inordinate delay in prosecuting the case. In answering this, the court is guided by the case of **PROFESSOR MWANGI S. KIMENYI VERSUS THE HON. ATTORNEY GENERAL & ANOTHER (HIGH COURT CIVIL CASE NO. 720 OF 2009)** cited by the Plaintiff wherein, it was argued that what amounts to inordinate delay cannot be measured with precision but varies from one case to another. In this instance, the court record confirms that prior to its dismissal, the suit was last active in 2015. This goes to show that there was a dormancy period of three (3) years. To the court's mind, this is evidence of inordinate delay in view of the fact that parties are called to prosecute their cases conscientiously and expeditiously.

12. Having established the above, the court is now supposed to consider the reasons for the delay in prosecuting the case. The Plaintiff submitted that the matter was being handled by an advocate who was later transferred to another department and that the relevant file was never assigned to a different advocate as it went missing. The court is not entirely convinced by the explanation given especially considering the nature of the claim and the year of filing. If anything, it portrays a lack of seriousness on the part of the Plaintiff.

13. It was also argued by the Plaintiff that the Defendants did not comply with pre-trial directions. The court has perused the file and ascertained that in truth, no documents were filed by the Defendants. Nonetheless, this fact does not ease the burden on the Plaintiff to set the suit down for hearing. The Plaintiff should at all times be proactive in prosecuting its case.

14. The court is also required to consider the circumstances surrounding the notice to show cause. Once again, reference is made to the case of **PROFESSOR MWANGI S. KIMENYI** (*supra*) where the judge reasonably held that there is no legal requirement for notice to be served upon the parties as long as the same has been issued. In the present case, the record reveals that the court served copies of the notice to show cause to the respective parties hereto. Whereas the Defendants acknowledged having been served with the same, the Plaintiff maintained that its advocate was never served. Be that as it may, the court opines that there is no way of ascertaining whether the Plaintiff was truly served.

15. The court has similarly noted that the Defendants' advocate submitted that both parties attended court on 16th February, 2018 for the notice to show cause, that the Plaintiff's counsel sought time to put in a reply and that the matter was adjourned to 23rd February, 2018 at which point the Plaintiff failed to attend court and/or file the reply. A perusal of the court record does not indicate that the parties attended court on 16th February, 2018. In fact, the court makes reference to a copy of the cause list dated 16th February rescheduling matters originally listed for dismissal on that day to 23rd February, 2018.

16. This brings me to the question of prejudice. The Plaintiff argued that the Defendants will not suffer prejudice. The Defendants on their part did not submit on the subject. In addressing its mind to this issue, the court relies upon the cases of **PROFESSOR MWANGI S. KIMENYI** and **KENYA ANTI-CORRUPTION COMMISSION-V-KIMEO STORES LIMITED (ELC CASE NO. 138 OF 2008)** in the sense that prejudice should be viewed in light of both parties. On the part of the Plaintiff, prejudice ought to be regarded in terms of factors such as the nature of the claim; the subject matter; the impact on a fair trial, inter alia. On the flip side, the prejudice that will be occasioned by the Defendants should be considered in terms of the costs; impact on a fair trial and unique hardships. Though not cited by the Plaintiff, the court appreciates the applicability of *Article 48* of the Constitution on access to justice. By virtue of that Article, the Plaintiff is entitled to access justice. It is clear that the Plaintiff stands to be denied the right of arguing the merits of its case should the dismissal order stand. As concerns the Defendants, it is not in dispute that they did not comply with Order 11 and in failing to do so, contributed to delaying the matter. Be that as it may, the court is well aware that the Defendants filed and served upon the Plaintiff a bill of costs dated 13th March, 2018. Going by this, the Defendants would be prejudiced if the suit is reinstated as this would in turn impede their entitlement to costs. Under the circumstances, the court would be required to weigh the interests of both parties.

17. To the court's mind, the Plaintiff is likely to suffer a greater degree of prejudice since it will be denied an opportunity of prosecuting its case. In any event, the court restates that it is not possible to tell whether indeed the Plaintiff was served with the notice to show cause. Though a copy of the same has been ticked by the court process server, it would be unfair to come to the conclusion that the plaintiff was aware that the matter was coming up in court for notice to show cause. In this instance, the court is of the view that the reason given by the Plaintiff is plausible. The Plaintiff, like every other party, is entitled to access justice as depicted in *Article 48* of the Constitution by at the very least being granted another chance to argue the merits of its case. Either way, the Defendants will have an equal right to defend themselves fully.

18. The upshot is that the court allows prayers (ii) and (iv) of the Motion. The suit is hereby reinstated and transferred to the Ethics and Anti-Corruption Crimes Division for hearing and final determination.

The Defendants shall have the costs of the application.

Dated, signed and delivered at NAIROBI this 6th day of December, 2018.

L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant