REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 432 OF 2009

NESTLE KENYA LIMITED.....PLAINTIFF

VERSUS

ESTON CARGO LINKS LIMITED.....DEFENDANT

RULING

1. The application before me is for an Order that the costs of the suit be awarded to the Defendant.

2. It is common ground that the suit was dismissed on 17th June 2015, for the reason that there had been a failure by the plaintiff to offer any reasonable and satisfactory answer to the Notice requiring it to show cause why the suit ought not to be dismissed for want of prosecution.

3. It is further common ground that on 17th June 2015, neither of the parties attended court.

4. On the said day, the court had taken steps, of its own motion. In other words, the suit was not dismissed at the instance of the defendant.

5. At the material time, the Judiciary in general, and the Commercial Division in particular, was conducting an initiative intended to address the huge problem of backlog of cases.

6. As the plaintiff has indicated in the Replying Affidavit, the cases which were to be the subject of the initiative were clearly indicated in the Court's online cause list.

7. A copy of the said online cause list was exhibited by the plaintiff.

8. Notwithstanding the fact that this case was reflected on the Court's online cause list, neither of the parties attended court.

9. The defendant says that it was never served with a Notice To Show Cause; that is its explanation for the failure to attend court.

10. The plaintiff's response to that assertion is that the defendant had misapprehended the provisions of Order 17 Rule 2 (1) of the Civil Procedure Rules. As far as the plaintiff was concerned, there was no legal requirement that parties be served with the Notice To Show Cause. The fact that the case was reflected on the Court's online cause list, is said to have constituted sufficient Notice to the parties.

11. In my considered view, it is not necessary for me to determine, in this case, whether or not the placing of the case in the Court's online cause list was sufficient Notice to the parties.

12. I am aware that my learned brother Gikonyo J. has expressed the considered view that there is no requirement, under Order 17 Rule 2 of the Civil Procedure Rules, that the parties have to be served with the Notice To Show Cause.

13. If my learned brother is correct in his interpretation of that Rule, it would imply that when the court had given notice of;

> **a) An impending process through which the court would dismiss suits which had remained dormant;**
>
> **and**
>
> **b) The cases which the court proposed to dismiss for want of prosecution –**

then the parties did not need to each be served with the Notice To Show Cause.

14. But as I have already indicated, my considered opinion is that I need not express my view on whether the giving of Notice, through publication of cases of the Court's online cause list, constituted appropriate notice. My said view is informed by the fact that when the court dismissed the suit, it stated as follows;

> **"After the inordinate delay of 4 years since the last step was taken on 14/6/2010, with a view to proceeding with the suit, and service of Notice having been effected to show cause why this suit should not be dismissed, and there being no satisfactory response, the Court in exercise of the powers conferred upon it by Order 17 Rule 2 of the Civil Procedure Rules, of the Civil Procedure Rules, hereby orders this suit dismissed/closed?.**

- emphasis is mine

15. Clearly, the court concluded that the Notice To Show Cause had been served, and that notwithstanding the said service, there was no satisfactory response.

16. At this moment in time, it is not known whether or not the plaintiff was served with the Notice To Show Cause. In the court records, I found no proof of service.

17. The defendant says that it had spent a huge amount of money in defending the suit, and that it had taken all steps to make the case ready for trial.

18. In this case, the 2 parties had executed a Statement of Agreed Issues dated 30th March 2011. As at that date, therefore, the suit was ready for trial.

19. There is no suggestion from the defendant that the plaintiff had not taken any requisite steps to prepare the case for trial.

20. Indeed, the court records show that on 18th January 2012, the plaintiff's advocates attended at the Court Registry, where the case was fixed for trial on 21st March 2012.

21. The court records show that prior to giving a trial date, which was done in the absence of the defendant's advocates, the court was satisfied that the plaintiff had written to the defendant, requesting it to attend court on 18th January 2012, for the purposes of fixing a Hearing Date for this case.

22. When the court noted that the plaintiff had not taken steps for 4 years, to proceed with the suit, the calculation was based on the 18th of January 2012, when the plaintiff attended at the court registry to fix

the trial date.

23. There is no record in the court file about what transpired on 21st March 2012, when the case had been scheduled to proceed to trial.

24. But there is no doubt that by 17th June 2015, more than 3 years had lapsed without the plaintiff taking any steps to prosecute the suit.

25. Whereas it is the primary responsibility of the plaintiff to prosecute his case, there is no bar in the defendant fixing a case for hearing, if the plaintiff had become dormant. But the defendant is not obliged to have the case set down for hearing. Instead of taking the initiative to fix a hearing date, the defendant is entitled, if he so decides, to make an application for the dismissal of the suit for want of prosecution.

26. In this case, the defendant took that step after the court had, of its own motion, dismissed the suit.

27. It is in those circumstances that I am now called upon to determine whether or not the defendant should be awarded the costs of the suit.

28. If the case was dismissed on the defendant's application, probably the court would have awarded to the defendant the costs of the suit, together with the costs of the application.

29. The plaintiff submitted that because the defendant failed to ask for its costs on the date when the suit was dismissed, and also because this application for costs was brought after considerable delay, the court should dismiss the application for costs of the suit.

30. But the defendant submitted that the period of 8 months, from the date it learnt that the suit had been dismissed and the date when it brought this application, does not constitute inordinate delay.

31. In my considered opinion, the defendant has failed to offer any explanation why it did not take steps sooner, to seek costs. In other words, there is no explanation for the delay in bringing the current application.

32. Such an unexplained delay, for a period of 8 months constitutes inordinate delay.

33. I also find that if the defendant was denied an opportunity to ask for its costs, the same reasoning would apply to the plaintiff, as there is no proof that the plaintiff was served with the Notice To Show Cause, prior to the dismissal of the suit.

34. Thirdly, when the court dismissed the suit, it was open to the court to make an order on the issue of costs. However, the court did not make any such order. Whether it was an oversight or a deliberate decision by the court, is not clear to me.

35. Having given the order dismissing the suit, but without an accompanying order on the issue of the costs of the suit, the court became *functus officio.* Therefore, when either of the parties thereafter asked the court to re-visit the issue of costs, that constituted a request for the review of the court's earlier decision.

36. I hold the considered view that the defendant has not demonstrated any sufficient reasons to warrant the re-opening of the matter, with a view to making a decision on the issue of costs.

37. Therefore, the application dated 3rd March 2016 is dismissed.

38. However, the costs thereof cannot be awarded to the plaintiff because it has not demonstrated why it should be awarded such costs.

39. In the event, each party shall bear its own costs.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **23rd day** of **January** 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Woodward for the Plaintiff

Miss Chepkurui for Wandayo for the Defendant

Collins Odhiambo – Court clerk.