



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO.1822 OF 2000

ORION EAST AFRICA LIMITED.....PLAINTIFF/APPLICANT

VERSUS

TETU COFFEE GROWERS CO-OPERATIVE

SOCIETY LIMITED (IN LIQUIDATION.....DEFENDANT/RESPONDENT

RULING

[1] The Plaintiff moved the Court vide its Notice of Motion dated 4 **November 2014** pursuant to **Article 159(1)(d)** of the **Constitution of Kenya, Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, and Order 9 Rule 9 and Order 51 Rule 1 of the Civil Procedure Rules, 2010**, for orders that:

[a] Spent;

[b] that the order dismissing the suit herein made on 1 February 2012 together with all consequential orders be set aside and the suit be reinstated;

[c] That the costs of the application be in the cause.

[2] The application is based on the grounds that this is a case in which final judgment was entered on **14 February 2001** and a decree issued dated **14 February 2001**; and that following the entry of judgment and issuance of decree, nothing remained to be prosecuted, save for execution of the decree. It was further averred by the Plaintiff that in the course of pursuing Garnishee proceedings it came to learn with surprise that the suit had been dismissed on **1 February 2012** for want of prosecution. It was thus the contention of the Plaintiff that the dismissal order was made *per incuriam*.

[3] The application was predicated on the Supporting Affidavit annexed thereto, sworn by **Peter Ruo Maina** on **4 November 2014** in which it was deponed that this suit was filed on **17 October 2000**, and that the Defendant's Defence was struck out and judgment entered for the Plaintiff on **14 February 2001**; and that following the issuance of the final decree the Plaintiff embarked on recovery of the decretal sum. To that end, it obtained a Garnishee Order on **4 December 2001**, which it followed with a view of having shares held by the Defendant attached. Thereafter, several correspondence were exchanged between its advocates and the Commissioner for Co-operative Development and the Garnishee, some of which were exhibited herein. In particular, the Plaintiff relied on the letters dated **4 December 2013** and **16**

December 2013 (marked **Annexures PRM6** and **PRM7** respectively), by which the Garnishee confirmed that it was reviewing the matter and would settle the decree; only to be informed by the Garnishee vide the letter dated **18 August 2014** (marked Annexure PRM8) that the suit had been dismissed for want of prosecution on **1 February 2012**.

[4] The Plaintiff further averred that it immediately instructed the firm of **Mbugua Nganga & Co. Advocates** to peruse the court file and establish the position; whereupon the dismissal was confirmed. The Plaintiff posited that the dismissal order was inadvertently made granted that final judgment and decree had been passed, which the Plaintiff was in the process of executing. It was further the contention of the Plaintiff that it was never served with the Notice for Dismissal, and on the authority of **Ibrahim Athman Said vs Ibrahim Abdille Abdulla & Another [2014] eKLR** and **National Bank of Kenya vs. Silas Kiptoo Cheburet [2012] eKLR**, the Plaintiff urged that the application dated **4 November 2014** be allowed and orders granted as prayed in prayer (2) thereof.

[5] The application was opposed by the Defendant on the grounds that it had been brought after inordinate delay; and that there was nothing to prove that the Plaintiff's Advocates had not been served with the Notice for Dismissal. It was further argued that not all the issues in dispute herein were dispensed with by the Court Order of **1 February 2012**; and therefore that, looking at the prayers set out in the Plaint, the Plaintiff was still expected to prosecute this suit. The Defendant, consequently, urged for the dismissal of the instant application with costs.

[4] The Plaint that was filed herein on **17 October 2000** was for recovery of the sum of **Kshs. 1,907,100** being the agreed value of goods supplied to the Defendant by the Plaintiff in the year **1999** at the Defendant's request, for which the Defendant issued cheques. It was pleaded that one of the cheques, for the sum of **Kshs. 575,000**, was dishonoured on presentation, thereby prompting the filing of this suit for the entire outstanding sum. Upon the Defendant entering appearance and filing a Statement of Defence, the Plaintiff moved the Court vide the application dated **12 January 2001** for the striking out of the Defence and for judgment to be entered for the Plaintiff against the Defendant for **Kshs. 1,907,100** together with interest and costs as prayed in the Plaint; and that costs of the application be provided for. The Court record shows that the Defendant conceded the application on **14 February 2001**, whereupon the Court made the following order:

"In the circumstances, the application is allowed and judgment entered in favour of the Plaintiff against the Defendant as prayed in the Plaint. Costs of the application to the Plaintiff."

[7] It is manifest therefore that the matter was concluded and a final decree issued for execution. Contrary to the submissions made by **Mr. Kiche** for the Defendant, nothing remained in contest for prosecution. Indeed, the record confirms the Plaintiff's posturing that the Plaintiff was in the process of enforcing the decree when the dismissal order of **1 February 2012** was issued. The letters annexed to the Supporting Affidavit and marked **PRM6** and **PRM7** confirm that as at **December 2013**, the Plaintiff was still pursuing the Garnishee proceedings with a view of recovering the decretal sum. I would therefore be of the same mind as **Wendoh, J** expressed the view-point in **National Bank of Kenya Ltd vs Silas Kiptoo Cheburet [2012] eKLR** that a case that is pending execution cannot be dismissed for want of prosecution.

[8] In the foregoing premises, the Court is satisfied that sufficient cause has been shown to warrant the setting aside of the dismissal order issued herein on **1 February 2012**. Thus, I would allow the application dated **4 November 2014** and set aside the order of **1 February 2012** that dismissed this suit for want of prosecution. The suit is hereby reinstated for the purpose of having the decree herein executed.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2017

OLGA SEWE

JUDGE