



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 114 OF 2011

PRIME CONSULT LIMITED.....PLAINTIFF

VERSUS

KENYA CIVIL AVIATION AUTHORITY.....DEFENDANT

RULING

1. On 13/3/2014 the court delivered a ruling in the absence of the parties and granted leave to the plaintiff to amend the plaint within 14 days for that date. The order was not complied with until the 8/7/2015 when this suit was fixed for a notice to show cause why it should not be dismissed for wait of prosecution.

2. On that date, Mr. Omwenga Advocate appeared for the plaintiff and pleaded with the court, while asserting that the ruling was given in their absence and that they had always been under the impression that it was still pending before the judge hence no steps were taken to amend the plaint nor fix the suit for hearing. At the advocates' request, the court extended the time for filling the amended plaint by another days.

3. It would appear that yet again there was never compliance and the amendment was not filed till 29/7/2015 some 21 days later. In effect there was a delay of 7 days to comply with the order of the court. It is that delay the plaintiff now seeks to remedy by the Notice of motion dated 2nd April 2016 and amended on 7/9/2016.

4. Even though the amended application seeks review of the orders of 13/3/2014 and 8/7/2015 the plain intention and purpose of the application, as I understand it, is to enlarge time within which to file the amendment and to deem the amendment filed out of time duly filed. The reasons advance for delay is attributed to mistake and omission by counsel which is contended should not be visited upon the plaintiff.

5. The application is opposed by the Defendant/Respondent who filed both grounds of opposition Replying affidavit and list of authorities. The gist of the opposition can be summarized that :-

i) The court is functus officio.

ii) The court would be sitting on appeal against own decision.

iii) That by dint of the ruling of 13/3/2014 the suit stood dismissed on defunct to file the amendment and that the matter could only be revisited by an order for review.

6. The Replying affidavit filed by the defendants on the other hand faults the plaintiff for misleading the court that the ruling of 13/3/2014 was delivered without notice and in the absence of the parties and pointed out that the date, 13/3/2014, was given in court in the presence of the parties on 17/12/2013 on which day the plaintiff was represented in court. It is then contended that the court is *functus officio* because a decree has been extracted. It is added that there has been inordinate delay bringing the application and that the court was misled to give orders of 8/7/2015. Reliance was placed on the decision of the Supreme Court in ***Raila Odinga & 2 Others vs IEBC & 3 Others [2013]eKLR*** for the position that once a decree is drawn the court becomes *functus officio*.

7. I have considered the papers filed by the parties, the authorities cited and copies thereof provided together with the oral submissions offered. Since the introduction of the overriding objective of the court in our statutes, itself a precursor to article 159(2) d of the constitution, no consideration now ways upon a courts' mind than the need for substantial justice between the parties to be achieved. That effectively and essentially mean that before a party shows intent to overreach, steal a march or just abuse the court processed and visit prejudice on the opposite side, incapable of remedy by an award of costs, every dispute should be heard on the merits and that the fact that a mistake or blunder has occurred should not be a bar or an impediment to that purpose of the court.

8. In this suit, there was undoubted failure to comply with the orders of 8/7/2015 in time in that the amended plaint was filed some seven days late. If I was to allow the application, I would be inviting both parties to avail evidence before the court for the court to determine whether or not the sum of Kshs.36,692,987, claimed as professional fees for consultancy services, is genuinely and justly claimed. However if I was to decline the application, I would be curtailing the parties from availing to the court each evidence. In my opinion a refusal of the order sought would not be a determination of the substance of the dispute between the parties. There would not have been a determination whether the money is owed or just imagined. That to me would be a failure on this court to undertake its core duty.

9. It is now well accepted by the courts in Kenya that the fact that a blunder has occurred, should never be a basis for a court of law to shut out a litigant from the seat of justice. This has been the position of the law even prior to the introduction of the overriding objectives of the court. In ***Savings and Loans Kenya Ltd vs Onyancha Bovonote***, the Court of Appeal while agreeing with other past eminent judges of that Court, ***A paloo JA in Chemwolo vs Chemwolo [1982 – 88] KLR 103 at 1040*** and ***Madan JA in Belinda Murai & 9 Others vs Amos Wainaina, C.A.C.A No. 9 of 1975*** observed that a mistake should not be a basis to drive a litigant from the seat of justice.

10. In the matter before me I am prepared to accept the explanation by the plaintiff that there was a mistake and omission on the part of the advocate which should not be a basis to deny the plaintiff his day in court. I will grant to the plaintiff his prayers and deem the amended plaint and the written authority filed out of time as duly filed.

11. There is the contention by the defendant that this court is *functus officio* in that the effect of the ruling of 13/3/2014 is that the suit stands dismissed. I find it difficult to buy that argument. Although that is the textual effect of the order that granted leave, its terms and conditions were tinkered with and reviewed by the court orders of 8/7/2015. If the defendant contends that the orders of 8/7/2015 were obtained by falsehood, the only proper course would have been to challenge same by review or appeal. No such challenge has been mounted and it can only be inferred that they are content with those orders.

12. In extending time, I have proceeded from the understanding that on the 8/7/2015 this court enlarged time to file the amendment and it is that order which I have extend again to ran upto the 29/7/2015 when the amended defence was filed.

13. On costs, the plaintiff's side concede that this application has been occasion and necessitated by an omission and a mistake on their side. Even though the plaintiff has succeeded, this is a situation that it would be prejudicial to award to it costs. Instead there is a benefit the defendant had derived by the delay caused by the plaintiff which is now forfeited by this order. In those circumstances it is only fair that the defendant be awarded the costs thrown away and occasioned by this discretion exercised in favour of the

plaintiff. I award to the defendant the costs of this application which I assess at Kshs.20,000 to be paid by the plaintiff within 30 days from the day of this ruling.

Dated at Mombasa this 17th day of February 2017.

P.J.O. OTIENO

JUDGE