



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 249 OF 2000

JACK & JILL SUPERMARKET LIMITED.....PLAINTIFF

-VERSUS -

MARSHALLS EAST AFRICA LIMITED.....DEFENDANT

RULING

1. The plaintiff's suit was dismissed on 15th June 2015 by Hon. Mr. Justice J.M. Mativo. It is common ground that the order for the dismissal of the suit was made during a Judiciary Service Week, dubbed "*Justice at Last?*".
2. For the record, at the material time all the Judges who had just been appointed to serve at the High Court, were mandated by the Honourable the Chief Justice to help address the chronic problem of back-log by dismissing cases in which the parties had not taken steps for over a year.
3. According to the defendant, the dismissal of this suit was perfectly in order as the case was an old one, and also because the plaintiff had failed to show cause why the case should not have been dismissed.
4. The plaintiff's advocate, David Muthee Michuki, swore an affidavit explaining that he failed to attend court on 15th June 2015 due to an inadvertent mistake and confusion which arose from the existence of 2 different sets of cause-lists for that date.
5. The advocate said that when he checked the website of the Kenya Law, he failed to trace this case on the cause list of the Civil Cases scheduled to come up on 15th June 2015.
6. He therefore had no reason to come to court.
7. However, on the next day, the advocate, once again, checked the internet. It is on that date when he noticed that this case had been listed on a separate list of cases which were before the Commercial Division of the High Court. On that list, advocate Michuki found that this case had been listed before Mativo J.
8. The advocate says that he promptly dispatched his court clerk to the court registry, to peruse the court file.
9. If the court clerk was dispatched to peruse the court file promptly, one would have expected the plaintiff to have quickly verified that the case had been dismissed on 15th June 2015.
10. And upon learning about the dismissal of the suit, the plaintiff would have been expected to move swiftly, in trying to have the dismissal set aside.
11. Instead, the application for the reinstatement of the suit was only filed on 3rd August 2015.
12. That prompted the defendant to submit that there had been inordinate delay in making the application to set aside the dismissal of the suit.
13. It cannot be denied that if the plaintiff had learnt of the dismissal on 16th June 2015, it would have been expected that the plaintiff should have rushed back to court immediately thereafter.

14. The plaintiff explained to this court that it was not possible to file the application immediately after 15th June 2015 because the court file was not returned to the court registry until much later.
15. This court is aware that during the Judiciary Service Week in question, (*just like during other Service Weeks*) the Judiciary usually handles thousands of files. I therefore hold the view that the plaintiff's explanation for the delay of 49 days was plausible.
16. Finally, the defendant has not denied the plaintiff's contention that on 27th January 2015, the Law Firm of Michuki & Michuki Advocates, who represents the plaintiff, had written to the defendant's advocate, Mr. Odhiambo M.T. Adala, inviting him to attend court on 5th February 2015.
17. The invitation to the defendant's advocate, to attend at the Court Registry on 5th February 2015, was for the purposes of fixing a suitable hearing date.
18. In my considered opinion, the act of a party inviting another party to the Court Registry, so that the parties can then fix a date for the Hearing of a case, is definitely a step in the case.
19. A copy of the letter of invitation dated 27th January 2015 was endorsed with the stamp of **ODHIAMBO M.T. ADALA ADVOCATE** on 30th January 2015. The endorsement bears a signature as well as the time "3.14?", which is shown as the time when the defendant's advocate received the letter.
20. Considering that the suit was dismissed on 15th June 2015, it is evident that a period of one year had not lapsed after the plaintiff had taken steps with a view to having the case proceed to trial.
21. A perusal of the record of the proceedings on 15th June 2015, shows that the learned Judge was under the impression that the plaintiff had not taken any steps in the matter since 28th January 2014.
22. Of course, the period between that date and 15th June 2015 was in excess of a year. Therefore, if the plaintiff had actually failed to take any steps for that length of time, the case could have been a legitimate candidate for dismissal for want of prosecution.
23. But as the plaintiff had taken steps less than six months prior to the dismissal of the suit, I find that the dismissal was in error. For that reason, the order for the dismissal of the suit cannot be allowed to stand. I therefore set aside forthwith, the orders made on 15th June 2015.
24. However, the defendant did not play any role in the proceedings which had culminated in the dismissal of the suit. Therefore, it would not be right to order the defendant to pay the plaintiff's costs of the application dated 3rd August 2015.
25. Accordingly, I order that each party will pay its own costs for the said application.

DATED, SIGNED and DELIVERED at NAIROBI this 7th day of March 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Echesa for Michuki for the Plaintiff

Miss Awinja for the Defendant

Collins Odhiambo – Court clerk.