



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 86 OF 2008

DAIMA BANK LIMITED (IN LIQUIDATION).....PLAINTIFF

versus

SAVANAH DEVELOPMENT COMPANY LIMITED.....1ST DEFENDANT

LUCY W. KAIRU.....2ND DEFENDANT

RULING

1. On 17th June 2015, Lady Justice A. Ongeru dismissed the plaintiff's suit for want of prosecution.
2. The plaintiff has now asked this court to set aside the dismissal, so that the suit can be reinstated.
3. According to the plaintiff, the inactivity on its part was almost wholly attributable to the fact that the court file had been missing from the Court Registry.
4. On 21st August 2014 the learned Deputy Registrar formally notified the plaintiff that the Court file could not be traced, and that the plaintiff could make an application for the reconstitution of the said file.
5. On 3rd November 2014 the court granted orders for the reconstitution of the Court File. But that file also went missing thereafter.
6. When the file was finally traced, the plaintiff was shocked to learn that the suit had been dismissed.
7. The Court records show that the learned Judge dismissed the suit because she was convinced that there had been no action taken by the plaintiff for over 5 years.
8. According to the learned Judge, the last step which the plaintiff had taken on the case, was on 30th April 2010.
9. Secondly, the Judge was persuaded that even though the plaintiff was served with a Notice requiring it to show cause, the plaintiff failed to give a satisfactory response to the Notice.
10. The plaintiff insists that it was not served with any Notice requiring it to show cause why the suit should not be dismissed.
11. Secondly, and in any event, the plaintiff pointed out that the period which had lapsed between the time it last took steps in the case and the date when the court dismissed the suit, was less than a year.
12. The 2nd defendant has opposed the attempts to have the suit reinstated.
13. In her summary of the facts that 2nd defendant pointed out that on 11th July 2014 the court certified the case to be ready for Hearing.
14. Even going by the 2nd defendant's position, it is clear that between 11th July 2014 and 17th June 2015, a period of a year had not yet lapsed.

15. By dint of the provisions of Order 17 Rule 2 (1) of the Civil Procedure Rules, a suit may be dismissed if no applications had been made or no steps had been taken in a case, for one year.
16. It therefore follows that the suit was dismissed prematurely.
17. The defendant submitted that the plaintiff had failed to give a satisfactory answer for the failure to take steps to set down the suit for hearing since 11th July 2014.
18. In my considered view, the plaintiff has explained that the court file had gone missing, thus frustrating its efforts to take steps in prosecuting its case.
19. I am fully alive to the decision in **IVITA Vs KYUMBU [1984] KLR 441**, in which Chesoni J. (as he then was) held that the test, in an application for the dismissal of a suit was;

“...whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the Defendant; so both parties to the suit must be considered and the position of the Judge too, because it is no easy task for the documents, and/or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time...”

20. It is true that whilst the court would be called upon to consider the situation of both parties in a case, the primary responsibility of the plaintiff is to take steps to move forward his case against the defendant. It cannot be expected that the defendant would have the responsibility of pursuing the claim against himself.
21. However, it is possible for a defendant to wish to move forward the case, so that the claim against him is determined.
22. But in this case, we are not dealing with an application for the dismissal of the plaintiff's case. The application before me is for the reinstatement of the suit.
23. In any event, the basis upon which the suit was dismissed was not that the suit had stayed in the court for so long that it was probable for the memories of witnesses to have faded.
24. The court had dismissed the suit pursuant to Order 17 Rule 2 of the Civil Procedure Rules, which allows the court to dismiss a suit after more than one year had lapsed from the date when the last step was taken in the case.
25. A party cannot be said to have failed to give a satisfactory response to a notice which he knew nothing about.
26. Furthermore, the learned Judge who dismissed the suit herein, expressly made a finding that Notice had been served upon the plaintiff.
27. Therefore, when it now transpires that the plaintiff was not served with a Notice requiring it to show cause, that means that the decision to dismiss the suit was founded upon a false premise.
28. Accordingly, there is merit in the plaintiff's application dated 2nd December 2015. Therefore, the order made on 17th June 2015 is set aside, and the suit is reinstated.
29. The costs of the application shall be in the cause. I so order because the defendants did not play any role in the initial dismissal of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 12th day of April 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Njeru for the Plaintiff

No appearance for the 1st Defendant

Ndambiri for Macharia for the 2nd Defendant

Collins Odhiambo – Court clerk