



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 5426 of 93**

**MA NI UTHERI LIMITED.....PLAINTIFF**

**VERSUS**

**PRAM COMPANY LIMITED.....DEFENDANT**

**RULING**

This suit was filed on 9<sup>th</sup> November, 1993. The last time it was placed before the Principal Deputy Registrar of the court for directions was on 8<sup>th</sup> March, 2000. As parties did not appear on that day the matter was stood over generally. Fifteen years thereafter on 23<sup>rd</sup> February, 2015 the case was listed for dismissal under Order 17 Rule 2 of the Civil Procedure Rules. On that day the counsel for the plaintiff appeared but there was no appearance for the defendant. The court then listed the matter for hearing on 28<sup>th</sup> April, 2015 and ordered the plaintiff to comply with Order 11 of the Civil Procedure Rules within 30 days from that date.

The plaintiff was ordered to serve the defendant by way of advertisement in one of the daily newspapers in circulation, failure of which the suit would stand dismissed with costs. On 28<sup>th</sup> April, 2015 both counsel for the parties appeared before the court whereby the plaintiffs' counsel informed the court that the plaintiff had filed the list of witnesses, witness statements and bundle of documents which had just been served upon the defendant's counsel in court.

The counsel for the defendant informed the court that they had just been served that morning and needed time to file their documents as they had not received the original documents from the firm previously on record for the defendant. The court noted however that, since the plaintiff had not complied with the order made on 23<sup>rd</sup> February, 2015 whereby compliance with Order 11 of the Civil Procedure Rules was required, the suit stood dismissed by the 25<sup>th</sup> of March, 2015, and since there was no suit in existence, no proceedings could be undertaken. Since that order was still in force and had not been reviewed or set aside, no valid orders or directions could be made. The plaintiff however could take such steps as may be necessary to remedy the situation.

There is now before me an application by way of notice of motion under Section 1A, 1B,3A, 63 (e) of the Civil Procedure Act, Order 51 Rule 1 and Order 50 Rule 6 of the Civil Procedure Rules for orders that the order made by the court on 23<sup>rd</sup> February, 2015 be reviewed and the suit be reinstated. Further, that time within which the plaintiff was to comply with Order 11 of the Civil Procedure Rules and the documents filed on 27<sup>th</sup> April, 2015 be validated and deemed as properly on record.

The application is based on the grounds set out on the face of the application and the affidavit sworn by the learned counsel for the plaintiff. The application is opposed and there is a replying affidavit sworn by the learned counsel for the defendant followed by a supplementary affidavit by one of the directors of the plaintiff company.

Both learned counsel have filed submissions and cited some authorities. It is admitted that the plaintiff defaulted in the compliance of the court order made on 23<sup>rd</sup> February, 2015 in which compliance with Order 11 of the Civil Procedure Rules was required. I note from the court record that notwithstanding the default, the learned counsel for the defendant did not raise any objection to the late filing. It is the court that observed the default and I believe rightly so that there was no suit upon which any orders or

direction could be made.

I have related the application to the pleadings and submissions by the parties herein. The civil procedure rules are hand maiden of justice. Compliance thereof is necessary in the administration of justice and default may cause injustice to the parties. That notwithstanding, the Civil Procedure Act has provided, in deserving cases, the ends of justice will be met if accommodation is granted to defaulting parties provided no injustice is visited upon the other.

Sections 1 A,1B and 3A of the Civil Procedure Act are intended to achieve that objective. Whereas the delay in prosecuting this suit over the years appears inordinate, the filing of the list of witnesses, witness statement and documents by the plaintiff is a demonstration of the wish to proceed with the matter.

Granted that there was default in complying with the court order, I am persuaded, in the interests of justice, to review the order of the court made on 23<sup>rd</sup> February, 2015 by extending the time to comply with Order 11 of the Civil Procedure Rules to the date when compliance was met. Consequently the suit is hereby reinstated. The documents filed on 27<sup>th</sup> April, 2015 are hereby validated and deemed to be properly on record. The defendant shall now file their list of witnesses and witness statements within 30 days of today, after which the case shall be listed or direction with a view to finalising this old matter. The plaintiff shall pay the defendant all the costs occasioned by this application.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 14<sup>th</sup> Day of September, 2016.***

**MBOGHOLI MSAGHA**

**JUDGE**