



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 515 OF 2004

THINK TANK LIMITED.....PLAINTIFF

VS

KENYA BREWERIES LIMITED.....DEFENDANT

RULING

1. The Notice of Motion dated **4 February 2016** was filed herein by the Plaintiff on **5 February 2016**. That application is expressed to have been brought under **Article 159(2)(d) of the Constitution of Kenya, Sections 1A, 3A, 80 and 100 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** as well as **Order 17 Rule 2(2), and Order 51 Rule 1 of the Civil Procedure Rules, 2010**. The orders sought thereby are as hereunder:-

a) (Spent)

b) that the Court be pleased to vacate and/or set aside the Orders made on the 16 June 2015 and reinstate the suit for hearing on merit.

c) that the costs of the application be provided for.

2. The application is based on the grounds that the Advocate that was charged with the conduct of this matter in the firm of **Lumumba & Lumumba Advocates** had left the said firm without preparing handing over notes to enable smooth taking over of this matter, hence the inaction. It was that averred that the Plaintiff should not be punished for the mistake of his erstwhile Advocate. It was further the contention of the Plaintiff that no Notice to Show Cause was ever served on it before the dismissal order was made, and that therefore it would be in the interests of justice that the dismissal order be set aside as the Plaintiff has always been interested in prosecuting this suit.

3. The Application is supported by the Affidavit sworn on **4 February, 2016** by **TESSY MARIENGA**, an Advocate of the High Court of Kenya, who currently has the conduct of this suit on behalf of the Plaintiff. She deponed that it was upon taking over the file, that she perused the court file and noted that the Defendant had changed advocates and appointed the firm of **Muthoga Gaturu & company Advocates**; but that such change had not been brought to their attention by way of Notice of Change of Advocates. She further averred that the Plaintiff's suit has merit and should be allowed to proceed to hearing and determination on the merits; and that the Plaintiff is ready and willing to abide by any terms or conditions that the Court may impose.

4. The Plaintiff further relied on the Supplementary Affidavit sworn by **Waigwa Kiboi**, a Director of the Plaintiff Company, which was filed herein on **26 April 2016**, to underscore the Plaintiff's eagerness to prosecute this matter if given the chance. It was further averred that, on several occasions, the court file was unavailable whenever the Plaintiff's Advocates visited the Court Registry with a view of taking action in the file; and that it was only on **21 October 2015** that the file was found and upon perusal, it was noted that a dismissal order had been made herein. The Plaintiff contends that it then acted with due dispatch in filing the instant application and urged the court to find that the circumstances surrounding this matter are excusable, since no prejudice will befall the Defendant should the application be allowed.

5. The Defendant opposed the Plaintiff's application vide the Replying Affidavit sworn by **EVA KAGONDU** on **29 February 2016**. According to the Defendant, the Plaintiff has failed to demonstrate a just cause for the inordinate delay that led to the dismissal of the suit in the first place. The deponent recalled that the Plaintiff filed an affidavit to show cause why the suit should not be dismissed and prayed to be accorded a last chance to prosecute the matter; and that the opportunity was provided by the Court on **23 January 2012** when **Mutava, J** directed that the suit be prepared for hearing **within 30 days**. That the Plaintiff did not comply, and proceeded in its inertia for three years. It was thus the contention of the Defendant that the suit was rightfully dismissed on **16 June 2015** for want of prosecution. It was further deponed on behalf of the Defendant that even after the dismissal, the Plaintiff saw no need to act swiftly, for it took it another **8 months** before filing the instant application for reinstatement of the suit without proffering any just cause for the delay. On the other hand, they submitted, there is the Defendant who stands to suffer extreme prejudice if the matter is reinstated as it will be denied an opportunity to have this matter, which was filed in **September 2004**, put to rest.

6. The application proceeded by way of written submissions. The Plaintiff relied on its written submissions dated **10 June, 2016**, while the Defendant filed his submissions dated **23 June, 2016** on **24 June, 2016**. I have considered those submissions, including the authorities cited, in the light of the pleadings filed and the proceedings held to date. The principles guiding the setting aside of *ex parte* orders are now well settled, and the court has wide powers to set aside such *ex parte* orders so long as the discretion is exercised on terms that are just. In the case of **Shah vs. Mbogo [1967] EA 470** it was held thus with regard to the court's powers:

"This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

7. Thus, the issue for me to determine is whether sufficient cause has been shown for the setting aside of the dismissal order of **16 June 2015**. In **Ivita vs Kyumbu [1984] KLR 441** the court laid down the applicable principles in such situations thus:

"The test is 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; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff."

8. It is the Plaintiffs' case that the dismissal of the suit was occasioned by the failure of the Plaintiff's erstwhile Advocate to give proper handing over notes when he exited the firm on record for Plaintiff. In the written submissions filed herein on behalf of the Plaintiff, it was urged that the mistake of the Advocate should not be visited on the Plaintiff, and that therefore it would be in the interest of justice to allow the Plaintiff a chance to present its case for disposal on the merits. The case of **Philip Chemwolo & Another vs Augustine Kubende (1982-88) KAR 103** was cited for the proposition that the mistake of Counsel should not be visited on the client in which the court expressed the view that it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on

merit; and that courts exist for the purpose of deciding rights of the parties and not the purpose of imposing discipline.

9. The Defendant on their part made submissions on the principles governing dismissal of suits; the circumstances that led to the dismissal of this suit for want of prosecution on **16 June 2015**; and whether the Plaintiff has demonstrated a just cause for what the Defence considers to be inordinate delay in prosecuting this suit. It was thus the submission of the Defendant that a litigant cannot rely on the misdoings of Counsel to support an application of this sort, and that it behoves every litigant not only to own his case, but to also follow up and check on its progress.

10. A perusal of the record herein shows that the suit was filed on **22 September 2004** seeking an award of special and general damages, interest and costs following alleged breach of an oral sales promotion contract between the parties. The last step for purposes of the dismissal order of **16 June 2015** took place on **22 May 2012**, when the court directed the parties to take a hearing date in the Registry. Accordingly, the suit had been dormant for a period of **3 years** by the time of its dismissal, notwithstanding the fact that the matter had earlier been scheduled for dismissal before **Mutava, J** on **23 January 2012** when the Court granted the Plaintiff a lifeline and made an order as follows:

"I have perused the affidavit sworn to show cause why this matter should not be dismissed and is satisfied that the Plaintiff should be accorded an opportunity to prosecute its case. I will therefore order that this suit be retained as an active file and direct that the parties do prepare the matter for hearing within 30 days from today. The same will be mentioned on 1st March 2012 to review steps taken to prepare the matter for hearing."

Needless to say that the aforesaid order was not complied with. The case was mentioned on **1 March 2012** and thereafter on **22 May 2012**, when the Court directed that a hearing date be fixed in the Registry. No action was taken thereafter towards the prosecution of the suit.

11. It is noteworthy too that though in the Supplementary Affidavit, it was deponed that the dismissal order came to the attention of the Plaintiff's Counsel on **21 October 2015**, the instant application was not filed until **5 February 2016**. This is telling, and is a significant factor, granted that the matter had been earlier listed for dismissal for the same reason. Moreover, the documents annexed to the Supplementary Affidavit do not at all support the allegation that the court file had been missing for a considerable while. Besides, there is no inkling in all the foregoing as to what the Plaintiff did towards ensuring expeditious disposal of its case. For the foregoing reasons, I am far from persuaded that the Plaintiff merits the discretion of this court. Indeed in the case of **Rajesh Rughani vs Fifty Investments Ltd & Another [2016] eKLR**, the Court of Appeal held that:

"...no credible, satisfactory and sufficient explanation for the delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay."

12. Thus, my considered finding is that the cumulative effect of the conduct of the Plaintiff and its Counsel herein betrays the sort of lethargy that is inexcusable. I would, in the circumstances agree with the expressions of **Lord Denning MR** in **Fitzpatrick vs Batger & Co. Ltd [1967] 2 All ER 657** that:

"...it is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. ... It is impossible to have a fair trial after so long a time...This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution."

13. In the premises, it is my finding that the Plaintiff's Notice of Motion dated **4 February 2016** and filed on **5 February 2016** lacks merit and the same is hereby dismissed with costs.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2016

OLGA SEWE

JUDGE