



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 734 OF 2002

WAB HOTELS LTD (IN RECEIVERSHIP).....1ST PLAINTIFF

JOSEPH WAMBUA MULUSYA.....2ND PLAINTIFF

VERSUS -

INDUSTRIAL DEVELOPMENT BANK LTD.....1ST DEFENDANT

LAWRENCE ODORI NABWANA.....2ND DEFENDANT

PONANGIPALLI VENKATA RAMANA REO.....3RD DEFENDANT

KOLLURI VENKATA SUBBARAYA KAMA SANTRY.....4TH DEFENDANT

RULING

1. The application dated 1st April 2016 seeks the reinstatement of the suit, following its dismissal on 16th June 2015.
2. According to the 2nd plaintiff, **JOSEPH WAMBUA MULUSYA**, he only became aware about the dismissal of the suit on 31st March 2016.
3. He says that on that date his agent had attended at the Court Registry, with a view to getting a date for the hearing of the plaintiffs' application for leave to amend the plaint. The said agent is named Benson Maweu Muindi.
4. Whilst at the registry, the agent was informed that the suit had been dismissed by Githinji J. on 16th June 2015.
5. The plaintiffs said that they were never notified by their advocate, Mr. Timothy Bryant, about the Notice To Show Cause which was scheduled for hearing on 16th June 2015. If he had been aware of the date, the 2nd plaintiff says that he would have definitely attended court, to show cause why the suit should not have been dismissed.
6. Meanwhile, the plaintiffs conceded that they did not know whether or not their advocate had been served with the Notice To Show Cause.

7. However, the plaintiffs expressed doubt about any such service upon their advocate, because the said advocate had been in the process of relocating permanently from Mombasa since the year 2013.
8. It was the evidence of the 2nd plaintiff that Mr. Timothy Bryant used to stay outside the country for between 4 and 6 months every year. Finally, in December 2015, the advocate notified the plaintiffs that he had relocated permanently to Britain.
9. As the plaintiffs were unable to accept the terms proposed by the advocate whom Mr. Bryant had introduced to them, the 2nd plaintiff decided to represent himself. He therefore filed a Notice of his intention to act in person, on 17th December 2015.
10. The 2nd plaintiff then prepared the application dated 28th March 2016, which was filed in court on 30th March 2016.
11. As the plaintiffs were not personally served, they feel that the dismissal of the suit amounted to a condemnation without having been afforded an opportunity to be heard.
12. The plaintiffs also explained that they believed that they still had an arguable case, even after the suit property had been sold.
13. The plaintiffs pointed out that 7th May 2010, Kimaru J. had expressly stated that the sale of the suit property did not render the plaint otiose. The learned Judge had hinted at the possibility that the plaint could still be amended, so as to enable the plaintiffs take issue with the defendants concerning the value of the suit property vis-à-vis the sum for which it was sold.
14. On the strength of those views, the plaintiffs say that they then went about conducting a forensic audit.
15. The plaintiffs explained that the process of conducting the forensic audit was tedious and time-consuming, considering that the 1st, 3rd and 4th defendants were not forthcoming with answers to questions raised by the plaintiffs.
16. It was further explained that the Kenya Revenue Authority was also very slow in responding to queries raised by the plaintiffs.
17. In the result, the plaintiffs said that it was not until 12th November 2015 that they obtained a Forensic Audit Report from Francis Kieti & Associates.
18. In response to the application the 1st defendant's Manger – Legal Affairs swore an affidavit. She pointed out that the suit was last in court on 26th September 2012. Therefore, by the time the suit was dismissed on 16th June 2015, it had been inactive for 2 years and 9 months.
19. In the circumstances, the bank was of the view that the court was right to have dismissed the suit “*sou moto under and in accordance with the provisions of Order 17 Rule 1 of the Civil Procedure Rules?*”.
20. The bank also said that the court had only taken action after it had widely publicized the “*Judiciary Service Week*” which had been christened “*Justice at last!*”
21. In the circumstances, the bank was of the view that there was a delay in bringing this application.
22. The bank also submitted that the plaintiffs ought to have been vigilant, considering that by an application dated 18th December 2009, the defendants had already sought to terminate this suit.
23. And as regards the comments of Kimaru J. concerning the possibility or desirability of amending the

plaint, the bank noted that the plaintiffs did not take action in that respect, for 6 years.

24. In the result, the bank backed the court's dismissal of the suit because it had been effected long after the lapse of 1 year since the last step was taken in the proceedings on 26th September 2012.

25. The bank submitted that the delay in this case was unconscionable, unexplained, unreasonable and inexcusable.

26. The court was reminded that Public Interest dictates that litigation must come to an end, in the interest of justice.

27. I was invited to take judicial notice of the sufficiency of the public advertisements about the intended dismissals;

“including this file...”

28. The bank said that it had closed its file after the suit was dismissed in June 2015.

29. The reinstatement of the suit would be prejudicial to the defendants, as the defendants consider the availability of their witnesses and the memories of such witnesses to be a troubling factor: that is what the defendants said.

30. In my considered opinion, the plaintiffs cannot be said to have failed to offer explanations for the delay between June 2012 and June 2015. The plaintiffs offered several explanations. The only question would be as to whether or not the said explanations were plausible and justified in explaining the delay.

31. Under the former Order 16 Rule 2 of the Civil Procedure Rules it was stipulated that;

“(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit”.

32. Similar wordings are now in Order 17 rule 2 (1).

33. In other words, if the court was to dismiss a suit for want of prosecution, under the old Order 16 Rule 2 (1), it had to *“give notice in writing”*; and the said notice had to be given to the parties.

34. Under the current rules, the position remains the same.

35. Under the old rule 6, there was no requirement of any notice being given to any party, prior to the dismissal of a suit. But the said rule 6 was only applicable when no application had been made or no step had been taken for a period of 3 years.

36. The new rules did not incorporate the equivalent of the old rule 6.

37. Therefore, it does appear that a conscious decision was made, that prior to the dismissal of a suit, the court should give notice to the parties, regardless of the length of time during which the suit had remained inactive.

38. In my considered view, it might be necessary to consider re-amending the rules so that when the delay is beyond a specified duration, the court would not need to spend time and money in giving notices to the parties.

39. If such a provision was reintroduced, any party who had remained inactive for longer than the period prescribed would be deemed to know that the case could be dismissed, without notice.

40. In this case, I have been invited by the defendants to take judicial notice of the sufficiency of public advertisements of intended dismissals, including this file. The said public advertisements were said to have included this file. However, the defendants did not make available to the court any such public advertisements, so as to enable the court verify whether or not this case was included in the advertisements. I therefore cannot take judicial notice of the alleged public advertisements.

41. In Kenya, the Evidence Act makes provision for the documents about which the court shall make presumptions. For example, section 85 of the Evidence Act stipulates that the contents of the Gazette shall be *prima facie* evidence.

42. I do not think that the law has yet elevated advertisements in the local dailies as constituting notices to either all persons or to such persons as the notices cite.

43. I take note of the fact that even if a party wishes to effect service through publication in a newspaper, the party must first obtain leave of the court to effect such substituted service.

44. I am aware that Order 17 rule 2 (1) of the Civil Procedure Rules does not make reference to service. It talks about “*giving notice*”.

45. As the defendants have not demonstrated to the court exactly how notice had been given in this case, I am unable to conclude that notice was indeed given to the parties.

46. I note that on 16th June 2015, neither the plaintiffs nor the defendants attended court. I would have imagined that if the defendants received notice of the Notice To Show Cause, they would have attended court on 16th June 2015, to try and impress upon the court why the suit should be dismissed for want of prosecution.

47. The absence of both sides in court is more probably due to the fact that none of them was aware that the case was coming up in court on that date.

48. I appreciate the defendants’ contention that the plaintiffs should have been on the alert, when it is considered that the defendants had previously sought the termination of the suit.

49. But I also find that the defendants have not challenged the plaintiffs’ contention that the defendants failed to provide the plaintiffs with information which were needed to facilitate the forensic audit.

50. In effect, the decision by the defendants, to withhold requisite documentation to the plaintiffs contributed to the delay in the forensic audit.

51. Finally, I note that when dismissing the suit, the learned Judge stated as follows;

“After the inordinate delay of 3 years since the last step was taken on 26/9/2012 with a view to proceeding with the suit, and service of Notice having been effected to show cause why this suit should not be dismissed, and there being no satisfactory response, the Court in exercise of the powers conferred upon it by Order 17 Rule 2 of the Civil Procedure Rules hereby orders this suit dismissed/closed”.

52. Clearly, the Judge did not make reference to Notice having been given. He was satisfied that notice had been served.

53. I find that there is serious doubt about the service of Notice upon the plaintiffs. Therefore, the basis upon which the learned Judge dismissed the suit is not sustainable.

54. Accordingly, I find merit in the application dated 1st April 2016. The order dismissing the suit is vacated, and the suit is reinstated.

55. The costs of the application shall be in the cause.

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

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the 1st Plaintiff

2nd Plaintiff in person for the 2nd Plaintiff

Odongo for Maweu for the 1st Defendant

Odongo for Maweu for the 2nd Defendant

Odongo for Maweu for the 3rd Defendant

Odongo for Maweu for the 4th Defendant

Collins Odhiambo – Court clerk.