



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 218 OF 1997

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

STEPHEN KIPLETING METTO.....DEFENDANT

RULING

1. The plaintiff's suit was dismissed on 20th February 2015 for non-attendance. The plaintiff presented a notice of motion on 24th February 2015 praying that the suit be reinstated. The pith of the motion is that the plaintiff was ready to proceed with the suit on 12th February 2015. On that day, the court was not in session. The plaintiff avers that the matter was mentioned on 20th February 2015 in its absence and dismissed. The plaintiff blames its counsel for the inadvertence.

2. The plaintiff contends it is keen on prosecuting the suit. I was implored not to visit the sins of counsel on his client. Those matters are buttressed in an affidavit of Juliet Adhiambo sworn on 24th February 2015; and, a further deposition sworn on 30th April 2015. She concedes that the suit was filed way back in 1997 and has never taken off. She avers that the plaintiff was hampered by lack of witnesses on the dates the matter was scheduled for hearing. She insists that on the original hearing date of 12th February 2015, she had a witness who was prepared to testify in the matter.

3. On 30th September 2015, the application was listed for hearing *interparties*. Learned counsel for the defendant, Ms. Kimaru attended court in the morning. She prayed that the matter be placed aside to ten o'clock. She never returned as promised. Learned counsel for the plaintiff relied on the two depositions. He urged the court to exercise its discretion in favour of the plaintiff.

4. I have considered the notice of motion, the depositions and submissions.

5. Under Order 12 Rule 3 of the Civil Procedure Rules 2010, the court may *dismiss* a matter for *non-attendance* by the plaintiff. The aggrieved party is at liberty to move the court to set aside the order under Rule 7. The present motion is anchored under the latter rule. The legal principles in a matter of this nature are well settled. This court has wide and unfettered discretion to set aside an *ex-parte* order. As stated in *Shah v Mbogo (No. 1)* [1967] E.A 116, the discretion "*is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice*". That decision by Harris J was upheld by the Court of Appeal in *Mbogo and another v Shah* [1968] E.A 93. See also *Kimani v Mc Connell* [1966] E.A 547.

6. There is no dispute that this suit was lodged in court way back on 17th June 1997; that is nearly

eighteen years ago. It has never taken off. It is thus clear beyond peradventure that there has been substantial delay in prosecuting the suit. The blame for the delays rest entirely with the plaintiff. Its counsel conceded freely in the deposition that the bank could not procure a suitable witness.

7. The suit was slated for hearing on 12th February 2015. I cannot begrudge the plaintiff when it says it had a witness on that date. The averment has *not* been controverted. On that date, the court was not sitting. The Deputy Registrar of the court posted a notice to all counsel and litigants that the matters would be adjourned to the 20th February 2015.

8. The plaintiff's learned counsel concedes at paragraph 5 of the supporting affidavit that she was *informed* on 12th February 2015 that the cases taken out of the cause list on that day would be "*mentioned*" on 20th February 2015. I think she is less than candid. The truth is that the notice stated the matters would be *heard* on 20th February 2015. She did not appear on the latter date. She says she assumed the matter would be mentioned before the Deputy Registrar. She learnt later the matter had proceeded and the plaintiff's case dismissed.

9. It is thus evident that failure to attend to the hearing resulted from *inadvertence* or negligence of counsel. I am prepared to give her the benefit of doubt and not visit her sins upon her client. But the defendant is obviously *prejudiced* by the lethargy of the plaintiff in failing to prosecute its case with diligence all those *eighteen years*. The defendant can however be adequately *compensated* by thrown-away costs.

10. This court is now enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Stephen Boro Gititha v Family Finance Bank & 3 others*. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR. In a synopsis, the present legal regime frowns upon technical justice.

11. I will exercise my discretion in favour of the plaintiff. The upshot is that the *ex parte* order made on 20th February 2015 is hereby set aside *but* upon the plaintiff meeting two *conditions*. The plaintiff shall pay the defendant *thrown away* costs of Kshs 15,000 within the next *thirty* days. The plaintiff shall also set down the case for hearing within *one hundred and twenty days* of today's date. If the plaintiff fails to meet *any* of the two conditions within the set *time*, the suit shall stand dismissed.

It is so ordered.

DATED and DELIVERED at ELDORET this 13th day of October 2015

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mr. Miyienda for Mr. Mutei for the plaintiff.

Ms. Kimaru for the defendant.

Mr. J. Kemboi, Court Clerk.