



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

CIVIL SUIT NO 94 OF 2007

MEA LIMITED.....PLAINTIFF

VERSUS

ECHUKA FARM LTD.....1ST DEFENDANT

NATIONAL INDUSTRIAL CREDIT BANK LIMITED.....2ND DEFENDANT

IMPERIAL BANK LIMITED.....3RD DEFENDANT

RULING

1. Before the Court was the application by the Plaintiff dated 27th March 2014. The application was brought pursuant to the provisions of Order 45 Rule 1, Order 12 Rule 7 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. The Plaintiff sought the following orders inter alia;

1. Spent

2. Spent

3. THAT upon hearing interpartes, the orders of this Court made on 29.01.2014 requiring the Plaintiff to pay costs inclusive of getting up fees be varied, reviewed and/or set aside.

4. THAT the costs of this application be provided for.

2. The application was predicated upon the grounds as set out; that the orders issued on 29th January 2014 though discretionary in nature were erroneous and punitive on its face, that its was unjust to burden the Plaintiff with costs for an excusable error or mistake and that there was sufficient and plausible explanation for the absence of the Plaintiff's counsel to warrant an adjournment without punitive orders.

3. The application was further supported by the affidavit of Njuguna Paul Chuchu sworn on 27th March 2014. In reiterating the grounds as adduced in the application, the deponent further contended that Plaintiff stood to suffer great loss in the event that the taxation proceeded as scheduled, and that there have been previous events in which adjournments had been granted in favour of the Defendants without any drastic or punitive orders being made against them.

4. In opposing the application, the 1st Defendant filed its Replying affidavit sworn on 15th May 2014 and

deponed by one Albert Thuo Cege. Therein, it was deponed to that the Plaintiff had previously been granted adjournments by the Court, and that there was in existence, an injunction order that the Plaintiff has been enjoying since 2007. Further, it was averred that the Plaintiff was aware of the hearing date of 29th January 2014, having been served with a letter dated 27th September 2013 inviting them to fix a date for hearing on 10th October 2013 and a hearing notice dated 10th October 2013. It was deponed to that the Plaintiff failed to give plausible and sufficient explanation for the adjournment, and that the Court properly exercised its discretion and took into consideration all the circumstances pertaining to the application, including the conduct of the Plaintiff.

5. The application was further opposed by the 3rd Defendant in its affidavit sworn on 28th April 2014 and deponed by Mary Wanjiru, the 3rd Defendant's Legal Officer. It was deponed to that the 3rd Defendant had never sought for an adjournment of the matter as reiterated by the Plaintiff, and that further, it would be detrimental to the 3rd Defendant if the orders issued on 29th January 2014 were set aside and/or reviewed as the Plaintiff has since 2007 enjoyed injunctive orders. Further, it was deponed to that the Plaintiff has failed to show any justifiable reasons for grant of orders for review as prayed for, and that the 3rd Defendant does not owe the Plaintiff any costs, and if so, the same were not a bar to taxing the instant costs.

6. The Plaintiff in its submissions dated 19th June 2014 set out in detail the chronology of events, the provisions of the law that it relied upon, including Section 80 of the Civil Procedure Act, as well as Order 45 Rule 1 of the Civil Procedure Rules. Further, the Plaintiff relied upon the cases of **Joseph Njuguna Muinu v Medicino Giovanni, Court of Appeal Civil Appeal No 216 of 1997**, **Shah v Mbogo (1967) EA 116, Official Receiver & Provisional Liquidator Nyayo Bus Service Corporation v Firestone EA (1969) Ltd Court of Appeal Civil Appeal No 172 of 1998**, **Kitts Mbatimukonyole v Levi Ndombi Mukonyole Court of Appeal Civil Application No 15 of 2013**, **Phillip Keipto Chemwolo & Another v Augustine Kubende (1982) 1 KAR** and **Stephen Ndichu v Monty Wines & Spirits Ltd Civil Case No 149 of 2002**.

7. In its submissions dated 16th June 2014, the 3rd Defendant contended that the Plaintiff had not shown any plausible reason why the Court should review its orders, and further, relied upon the case of **Nancy Wanjeri & Others v Michael Mungai (2014) eKLR**.

8. The Court has considered the application, the supporting affidavit thereto, the affidavits in opposition thereof and the submissions made by the Plaintiff and the 3rd Defendant. In an application for review, the Court is guided by the substantive law as provided under Section 80 of the Civil Procedure Act, with the procedural provisions being Order 45 Rule 1 of the Civil Procedure Rules. In exercise of its discretion as provided under these provisions, the Court has to consider whether; (a) there was any new material or evidence that was previously unavailable to the Plaintiff, (b) there was an error apparent on the face of the record and (c) there are any other sufficient reasons that would compel the Court to warrant such order for review. In its application, the Plaintiff contended that there was an error apparent in the order issued by the Court, although the error was not precisely or explicitly pointed out. In reiterating such error, the Plaintiff stated that it was under the misapprehension that the matter was coming up for mention on 29th January 2014, and that it was the advocates honest belief that the same would not proceed to hearing.

9. However, on 29th January 2014 when the Plaintiff sought an adjournment through Mr Waweru on instruction from Mr Njuguna for the Plaintiff, it was admitted that they were aware of the hearing date, and that they had been served with the hearing notice. Further, in the Plaintiff's affidavits at paras. (xviii) & (xix), it was deponed to that they were indeed aware of the hearing date, although they had inadvertently diarized the same as coming up for hearing on 29th January 2014. Also, Mr Njuguna who was counsel dealing with the matter, had instructed other counsel to hold his brief in the matter, without considering the implication of his absence in the matter yet the same had been set down for hearing, and of which hearing date they have admitted they were aware of. No explanation was given as to the nature of the personal business that counsel had to attend to, that was so dire as to fail to avail himself for the hearing of the Plaintiff's case.

10. It has also been observed from the record that the Plaintiff has severally adjourned the matter ever since 2007 when they obtained injunctive orders against the Defendants. This conduct was observed by Gikonyo, J as he was rendering his ruling on the application for adjournment made by the Plaintiff. In his ruling, the learned Judge observed inter alia;

“In line with the practice in an adversarial system such as ours, the Plaintiff as ordinarily expected to take effective steps to ensure his case advances and eventually determined. But I observe that the Plaintiff’s conduct runs contrary to that expectation.”

11. Further, in accordance with the provisions of Section 80 of the Civil Procedure Act, as read together with Order 45 Rule 1 of the Civil Procedure Rules, no conceivable reason has been adduced by the Plaintiff with regards to the review application, and as such the Court would not be compelled to review its earlier orders if no such cogent reasons are advanced. More importantly, pursuant to the provisions of the Advocates Remuneration Order (1997), and particularly Schedule VI (2) thereof, it is provided that;

2. FEES FOR GETTING UP OR PREPARING FOR TRIAL

In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall not be less than one third of the instruction fee allowed on taxations:

Provided that –

i. This fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;

ii. No fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15 per cent of the instruction fee allowed on taxation may, if the judge so directs, be allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;

iii. In every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.

12. The matter had been set down for hearing on 29th January 2014, and as such has been confirmed for hearing. The requisite notices had been issued and it was for the parties to attend to Court on the specified date to proceed with the hearing. The Plaintiff had not intimated that it was not ready to proceed with the matter on such specified date, and as such, it could be reasonably presumed that they were also ready to proceed with the matter. It was observed in **Civil Case No 1475 of 2000 Iraru Holdings Limited V Canadian Foodcrains Bank & 2 Others; [2013]eKLR** that;

“I see no good reason and none has been given by the Plaintiff to change that Order by way of review. I find that the Plaintiff’s expostulation as to the case not being ready for hearing, not having been confirmed at the Call-over, the Plaintiff’s outstanding interlocutory application dated 28 November 2007 and the third Defendant’s List of Documents filed on 19 November 2007, all as a mere smokescreen in an attempt to justify good reason for me to review my learned brother’s said Order of 5 December 2007.”

13. In dismissing the application for review in the aforementioned case, Havelock, J (as he then was) applied the case of **Omari v Otundo Kisumu Civil Appeal No. 195 of 2001 (unreported)** where it was held *inter alia*;

“The third, that is, ‘any other sufficient reason’ which is not analogous to or ejusdem generis

with the first, in the circumstances, is not available to the appellants as they did not show such a reason. The absence of their advocates at the hearing on 28th June, 1990 is not in our view a sufficient reason to enable the court to review its orders when the absence amounted to taking the court for granted.”

14. For the Plaintiff to come before Court and state that they had the inclination that the matter would not proceed and yet they had confirmed and indeed been served with the hearing notice, it would not leave doubt in the mind of the Court that the Plaintiff is merely taking the Court for granted and is rather being lackadaisical in its approach at executing its case. No justifiable or plausible reason has been presented before the Court to warrant its exercise of its discretion for review. As a result therefore, the application by the Plaintiff is unfounded and unmeritorious and the same is dismissed with costs to the Defendants.

Dated, Signed and Delivered in Court at Nairobi this 3rd day of December, 2015.

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C. KARIUKI

JUDGE