



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO.59 OF 2008

MIIRA BUILDING & CIVIL ENGINEERING CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

NYAYO TEA ZONE DEVELOPMENT CORPORATION LIMITED.....DEFENDANT

RULING

1. On 21st February, 2012, this suit was dismissed for want of prosecution as no cause had been shown as to why it should not be dismissed. Before then, the suit had last been in court on 6th June, 2008 when the Defendant was granted leave to amend its Defence, file and serve the same upon the Plaintiff. On 20th June, 2008 the Defendant filed its Amended Defence.
2. On 27th September, 2013, about eighteen (18) months after the order of dismissal, the Plaintiff took out a motion on notice to set aside that order and to have the suit reinstated. The motion was anchored on Sections 3A and 80 of the Civil Procedure Act and Orders 45 Rule 1 of the Civil Procedure Rules, 2010. The application was supported by the grounds on the face of the application and the affidavit of Julius Wainaina Miira.
3. The Plaintiff contended that it had been going through extreme financial crises and as a consequence, its Managing Director one Julius Wainaina Miira, (hereinafter "Mr. Miira") had been forced to sell his prime properties to settle the Plaintiff's Bank Loan facility with Equity Bank to avert the sale of a block of flats known as LR NO.36/111/83 belonging to the Plaintiff. That the main tenant to the aforesaid flats, the Kenya Police Department, vacated the same without notice prompting Mr. Miira to sue them for rent arrears, loss and damage to property. That as a consequence of the misfortunes aforesaid, Mr. Miira was on the verge of depression and has since been advised to seek professional help. That due to this distress and anguish, Mr. Miira had been unable to facilitate the Advocates on record in the preparation of the case in readiness for trial. It was further contended that the Plaintiff was not served with the Notice to Show Cause why the suit should not be dismissed for want of prosecution. That it was only when the Plaintiff's Advocate invited the Advocates for the Defendant to fix a date for hearing of the suit vide a letter dated 9th September, 2013 that the Defendant's Advocate replied that the matter had since been dismissed.
4. Mr. Kangatta, learned counsel for the Plaintiff submitted that the Plaintiff had presented sufficient reasons to explain what had caused the delay of fixing the matter for hearing. That as such, the court should reinstate the suit and allow the same to be prosecuted on merit.
5. In opposition to the Application, the Defendant filed Grounds of Opposition dated 30th October, 2013 and the Replying Affidavit of William Kipkogei Togom sworn on 18th November, 2013. The Defendant contended that the instant application was incurably defective. That the matters

- deponed to in the Affidavit of Julius Wainaina Miira did not come to the aid of the Plaintiff's application as the same did not provide the court with sufficient grounds to reinstate the suit. In addition, the Defendant contended that the orders sought would greatly prejudice the Defendant as most of the officers involved in the preparation of the tender documents that are central to the dispute between the parties had since left employment and it was impossible to avail them at the trial.
6. Mr. Kimondo, Learned Counsel for the Defendant submitted that the application was incurably defective as the same had been presented as an application for review instead of an application for reinstatement of the suit. In addition, it was argued that there had been inordinate delay in the matter hence the dismissal on 21st February, 2012. Counsel further submitted that the application had been brought 18 months after the dismissal of the case and that such delay had not been sufficiently explained even though the Notice to Show cause had not been served on the parties. On the illness of Mr. Miira, it was submitted that no medical report of certificate had been produced in support of that allegation. It was Mr. Kimondo's submission that arising from the inordinate delay, the Defendant was greatly prejudiced given that material witnesses had since left its employment and it would therefore be difficult to trace such witnesses and procure their attendance in Court. That in view thereof, setting aside the dismissal order would be prejudicial to the Defendant. Counsel relied on the case of **Mwangi Maina -v- Mwangi Magu [2013] eKLR** and **Martin Mugambi & Another -v- Njeru Nyaga [2009] eKLR** in support of his submissions. Counsel urged the court to dismiss the application with costs.
 7. I have considered the Affidavits on record. I have also considered the oral submissions of learned counsel and the authorities cited. The principles applicable in an application to set aside an order of dismissal of a suit for want of prosecution are, the length of the delay, if the delay is inordinate whether the delay has been explained. Further, it has to be considered whether the delay has caused any prejudice to the Defendant.
 8. The first issue that was raised by the Defendant was that the instant application was defective as the same was brought under Order 45 Rule 1 which applies to review of Court orders or judgments. No doubt the appropriate provision under which the application should have been brought under is Order 12 Rule 7. The said provision provides that where judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just. I do not think that that is a technicality. The principles applicable under the provisions of law cited are completely different from those under Order 12 Rule 7. The application to that is untenable. This is so notwithstanding that the court is aware that it is now settled that the court is enjoined by Article 159 (2) (d) of the Constitution of Kenya Sections 1A and 1B of the Civil Procedure Act to dispense substantive justice without undue regard to technicalities. This is not a technicality. Once a wrong provision is cited and not amended at the hearing, the opposing party is bound to prepare his case along the principles applicable under the wrong provision of law and thereby be prejudiced. To that extent the application fails.
 9. Be that as it may, is the application merited? The first issue is that the Plaintiff was not served with a Notice to issue. It is not in contest that no Notice To show Cause was served upon the parties by the court. Upon perusal of the Court file, it is clear that all the the four copies of the Notice to Show Cause why the suit should not be dismissed dated 21st January, 2012 are still lying therein. There is no indication that the court process server served the same on the parties. The Court is thus satisfied that the parties had not been dully served with the Notice to Show Cause. This would explain why no party appeared during the hearing of the same on 21st February, 2012, thus prompting the court to dismiss the suit ex-parte.
 10. That notwithstanding however, the court is still enjoined to consider the question of whether if the Plaintiff was served and attended court would he have shown cause? Firstly, the period in question is between 6th June, 2008 and 21st February, 2012, approximately three (3) years and eight (8) months. To my mind that is inordinate delay. When such delay is established, unless it is well explained, it becomes inexcusable. See **Ivita vs Kyumbu [1984] KLR 441** and **Allen vs McAlpine [1968] 1 ALL ER 543**. Having held the delay to be inordinate, has the same been explained?

11. It is clear from the record that after the pleadings closed on 20th June, 2008, no step was undertaken between 2008 and 2012. The Plaintiff only attempted to fix the matter for hearing in September, 2013 when its Advocate invited the Defendant's advocate to fix the matter for hearing through a letter dated 6th September, 2013, about seven months after the suit had been dismissed. Further, the instant application was filed on 27th September, 2013, which was over 18 months after the dismissal.

12. The reasons for the delay in prosecuting the matter, according to the Plaintiff, was due to the financial constraints it faced together with Mr. Miira. In paragraph 12 of the Supporting Affidavit of Mr. Miira, it was deponed that due to the various problems bedevilling both the Plaintiff Company and its Managing Director, Mr. Miira suffered from a mental paralysis and was therefore not able to concentrate and attend to matters that required his attention. Such matters included the instant suit. However, this contention fell from the Managing Director's lips and not from evidence presented by an independent medical professional. To that extent, I agree with the submission of Mr. Kimondo that if the Plaintiff company sought to rely on the illness of its Managing Director as the cause for the delay, a medical report to that effect should have been produced to support the allegation.

13. Further, with regard to the various pending litigations involving the Plaintiff's Managing director, I am of the view that these assertions do not aid the Plaintiff's case as the same do not sufficiently explain the issue of delay. It is obvious that the Plaintiff's Managing Director had the time and resources to institute another suit, that is, **Nairobi HCCC NO.247 of 2013 Julius Wainaina Miira -v- AG**, which was a dispute between Mr. Miira and his former tenants. It would seem therefore that the Plaintiff neglected to prosecute the instant case until 6th September, 2013. It is the Court's view that the Plaintiff was a lethargic litigant completely disinterested in the prosecution of its suit. The explanation offered in my view is not plausible as a Plaintiff should have been vigilant in matters it has instituted in Court. Further, the Plaintiff is an independent entity from its directors and shareholders being a corporate entity. If its Managing Director was medically unfit to handle issues pertaining to the case before Court for which no evidence was adduced, I do not see why another legal representative could not have been appointed to handle the instant suit. It is my opinion that the Plaintiff has not availed genuine reasons to enable the Court to exercise its discretion in its favour. No doubt it was the duty of the Plaintiff and its advocate to list the suit for trial and this burden cannot be shifted to the Defendant. Under the circumstances, the court was entitled to dismiss the suit under Order 17 rule 2 of the Civil Procedure Rules 2010 as it did. See **Mukisa Biscuit manufacturing Company vs West end distributors Limited [1969] E.A 696**. Based on the material presented by the Plaintiff, the court is thus disinclined to exercise its discretion in favour of the Plaintiff. The Court's discretion was never intended to be exercised to assist an indolent party who has deliberately sought, whether by evasion or otherwise, to delay the course of justice.

14. In conclusion, the Defendant contended that it shall be greatly prejudiced if the order for dismissal is vacated as it would be difficult to access its two main witnesses Engineer Ogada and Otieno Odongo who have since left its employ. In the case of **Ivita -vs- Kyumbu [1984] KLR 441**, it was held that the Court should consider the issue of prejudice as well as the excuse for the delay. From the backdrop of the facts before me, I find that due to the delay of almost four years, which was not sufficiently explained, reinstating the suit would indeed be prejudicial to the Defendant. I am convinced that even if the Notice to Show Cause had been properly served upon to the Plaintiff, the Plaintiff could have attended Court on the date of dismissal and would have given the present explanation which would have been unconvincing as it is presently.

15. For the foregoing reasons, I find that the Notice of Motion dated 27th September, 2013 is devoid of merit. The same is hereby dismissed with costs to the Defendant.

DATED and SIGNED at Bungoma this 23rd day of January, 2014.

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A. MABEYA

JUDGE

Dated and delivered at Nairobi this 11th day of February, 2014.

J. B. HAVELOCK

JUDGE