



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 678 OF 2010

HEADWAYS INVESTMENTS LIMITED PLAINTIFF

Versus

ABISHEK INVESTMENTS LIMITED.....1ST DEFENDANT

AJAY SHAH2ND DEFENDANT

R U L I N G

[1] I have before me, a Motion dated 1st November, 2013 filed by Guram & Company Advocates for the 1st and 2nd Defendants. The application is expressed to be brought under Article 50(1) of the Constitution of Kenya, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 & Order 12 Rule 7 of the Civil Procedure Rules, 2010 and is seeking for the following orders:-

- 1). That this Honourable court be pleased and set aside the orders made on 30th October, 2013 dismissing the application dated 31st July, 2013.
- 2). That upon Order No. 1, herein being granted, the Notice of Motion application presented in Court on 1st August, 2013 be heard on merit.
- 3). That any other order or relief be given as this Honourable Court may deem just and fit to grant in the interest of justice.
- 4). That costs be provided for.

[2] The Application is based on the following grounds, that:-

- i. The 1st and 2nd defendants/applicant's reason for nonattendance in Court as scheduled was not intentional, deliberate nor designed to delay its expedient prosecution;
- ii. The failure to attend court is highly regretted and the 1st and 2nd Defendants/Applicants' counsel takes this early opportunity to apologize to the Honourable court;
- iii. That the reason for nonattendance by the Counsel for the 1st and 2nd Defendants/applicants are genuine and reasonable, in the circumstances;
- iv. The Plaintiff and or it's advocates on record, after presenting the suit, have not moved their case in court positively and the continued existence of the suit will cause the Defendants

- prejudice of losing their intended witnesses who may not be available at the time the Plaintiff deems it right to set down the suit for hearing;**
- v. **This application has been presented in Court expeditiously in the circumstances**
- vi. **In the interest of justice, this application ought to be granted as prayed herein**

[3] The application was further supported by the Affidavits of Wycliffe Ojore and M. Billing, Advocate's for the 1st and 2nd Respondent, respectively.

COURT'S RENDITION

[4] The Defendants are asking the court to re-instate an application they had made for dismissal of this suit for want of prosecution but had also been dismissed for want of prosecution. In effect, the Defendants desire to press on with their quest for dismissal of this suit for want of prosecution. My discretion on the matter will depend on the facts of the case. I have perused the file and confirm that steps have been taken by the Plaintiff towards progressing this case; It has filed; 1) list of witnesses and witness statement; 2) list of documents; and 3) a statement of issues. Although this application may have prompted the action by the Plaintiff in filing the necessary documents, in legal terms, those steps taken have not violated any peremptory order of the court or of the law. There was nothing which really or legally could have prevented the plaintiff from taking those steps in furtherance of the case towards trial. I, therefore, do not see what practical purpose the revival of the application to dismiss this suit will serve or the benefit it will confer on the administration of justice in this case. Ordinarily, such applications for dismissal assist the court to remove any proceeding which is offensive or is a source of prejudice to the Defendant or the course of justice. The draconian act of dismissing a suit should be administered in those cases whose circumstances hopelessly beg for dismissal; where there has been an inordinate, intentional and contumelious delay which has not been explained yet it occasions substantial risk to fair trial or serious prejudice to the Defendant. Therefore, court's discretion should lean toward sustaining rather than summary rejection of a suit. See a work of this court in the case of **NBI HCCC NO UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS v NIC BANK & ANOTHER [2014] eKLR** where a great number of cases relevant to this subject were analyzed. In the circumstances of this case, it cannot be said any substantial risk to fair trial or serious prejudice to the Defendant will occur. The present application intends to re-instate an application which had been dismissed for non-prosecution by the Defendants. I wish it was an application for dismissal where a much more substantive judicial debate would have been possible. But it suffices to state that, the steps taken by the Plaintiff herein to progress the case does not justify drawing of the proverbial "Sword of Damocles" on the head of the Plaintiff. I am also not prepared, as a court of law, to issue orders in vain and which may well be met with indomitable defence that action has been taken in the matter which prevents dismissal of the suit. Accordingly, the upshot is that the application dated 1st November, 2013 is dismissed with costs to the Plaintiff.

[5] Meanwhile, in the interest of justice, I make the following orders:

- 1) The Plaintiff shall file and serve a properly bound, indexed and paginated bundle of documents within fourteen (14) days of today.
- 2) On such service, the Defendants shall file and serve a properly bound, indexed and paginated bundle of documents within fourteen (14) days thereof.

Dated and signed at Nairobi this 4th day of July, 2014

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 4th day of July, 2014

J. KAMAU

JUDGE