REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 88 OF 2010

AUTOSTEEL & TILES LIMITED……….........………........PLAINTIFF

Versus

MOHAMED MOHAMOUD ABDI &

KHEIRA MAALIM MOHAMED T/A

SUNRISE SHOPPING MALL …………………..…….DEFENDANTS

RULING

Reinstatement of suit

[1] The Plaintiff has applied for the order made by Mutava J on 7th March 2012 to be set aside thereby effectively reinstating the suit for hearing on merit. He has applied through a Notice of Motion dated 12th February 2014. There are other consequential or administrative requests, to wit, that the Court be pleased to set down the suit for and that the file be kept under lock and key to avoid further mischief.

[2] The application is supported by the annexed affidavits of **BEN GICHAGUA KARIUKI Advocate,** sworn on the 12th day of February 2014. It is also based on the grounds set out in the application and others in the submissions filed by the Applicant. The Plaintiff gave a brief account of the facts. It instituted this suit through a Plaint dated 17th February 2010 claiming against the Defendants for **Kshs. 4,132,601.92**, interest at court rates, costs of the suit and any other relief the court may deem fit. The Defendants filed a Memorandum of Appearance dated 11th March 2010 and a Statement of Defence dated 17th March 2010 denying the claim brought by the Plaintiff and putting the Plaintiff to strict proof thereof. The Plaintiff then filed its reply to the statement of defence dated 21st April 2010, and, the pleadings to this suit closed. The Plaintiff moved to have the matter fixed for hearing by inviting the Defendants Advocate to avail their representative to attend court to fix the matter for hearing but the file could not be traced due to the movement of the registry from the old Milimani commercial courts to the new Milimani law courts and because the files were being arranged. The Plaintiff wrote letters to the deputy registrar to assist in tracing the file but no response was forthcoming from them.

[3] The Plaintiff avers that on several occasions it attempted to fix the matter for hearing and it is on only one occasion when the file was traced but the plaintiff was informed that no hearing date could be given as the pleadings were not complete and there was no compliance with order 11 of the

Civil Procedure Rules 2010. The Plaintiff filed the list of documents, list of witnesses and witness statements all dated 18th August 2013 and served the same upon the defendant on 20th August 2013, and thereafter invited the Defendants for fixing the hearing date but again the file could not be traced. The plaintiff's attended court on 15th November 2013 to fix the suit for hearing when the Plaintiff's Advocates clerk was informed upon perusal of the file by the court clerk, Mr. Adanje, that the suit had been dismissed on 7th March 2012. It is on this information of this dismissal that the plaintiff has moved this honorable court to have the suit reinstated.

[4] The Applicant argued that it has always been keen on prosecuting this suit as demonstrated by the great efforts it made by writing letters to court, inviting the other side to fix dates, made numerous visits to court registry and complied with Order 11 of the Civil Procedure Rules when the file was traced. On the other hand the defendant had not complied with the said order 11 of the Civil Procedure Rules 2010. The Defendants have engaged in deliberate delay. The Applicant was of the view that the application is an honest step towards having the matter heard on merit; it is not a waste of courts time, or misplaced, or bad in law or an abuse of the court process. The plaintiff failure to set down the matter for hearing was occasioned by factors beyond its control due to the misplacement of the file at the courts registry.

[5] The Plaintiff also stated that it was not served with Notice to Show Cause before the suit was dismissed as required by the rules of Natural Justice. Nothing in the file which shows the Notice to Show Cause was ever served. There is no affidavit of service to confirm service of the Notice to Show Cause. Therefore, the Plaintiff submitted it was not given an opportunity to represent its side of the story and it would have informed the Court of all the events in this file. The court should use its inherent powers to set aside the order of dismissal for want of prosecution and revive the Plaintiff's suit for hearing. See the case of in **Associated Warehouse Company Ltd (Krishnalal Pandya) Bhavna Pandya v Trust Bank Ltd (Under CBK Statutory Management) [2004] eKLR (HCCC 1266 of 2009)** wherein **justice F.Azangalala** stated

> ***"Rule 2(1) of Order 16 presupposes service before dismissal. It is also clear under this rule that even where cause is not shown, dismissal is not mandatory as the rule is permissive. In this case the Plaintiffs were not given a chance to Show Cause why their suit should not be dismissed... This reason for delay in prosecuting this suit may be unsatisfactory, but I will not hold it against the Plaintiffs. In any event the Defendant has not demonstrated the prejudice it will suffer."***

[6] They also relied on the case of **CMC Motors Group Limited v Dimken (K) Limited & Another [2012]Eklr (HCCC No. 611 of 2009)** where the Honourable Justice A. Mabeya stated:

> ***"A close scrutiny of this rule shows that the Court has discretion when it comes to dismissing a suit for want of prosecution. The rule stated that the court*** **"may give notice in writing"** ***requiring the parties to show cause why the suit should not be dismissed. The question that arises is whether in this case there was a notice to show cause that was issued in writing to the Plaintiff before the suit was dismissed. It is the submission of the Plaintiff that none was given. I have scrutinized the documents on record and I agree with the Plaintiff's assertions. There is nothing on record to show that a Notice to show cause was ever issued by the Court. Ordinarily, once a notice to show cause is issued by the Court, the same should be served upon the parties. In the present case however, none seems to have been issued in writing or at all. At the time this Court gave the Order dismissing the Plaintiff's suit for want of prosecution, the issue of whether a Notice to Show Cause was issued or served to both parties was not delved into. In the case of Nairobi*** **HCCC No. 1266 of 1999 Associated Warehouse Company Ltd & Others –vs-Trust Bank Limited** ***Azangalala J, as he then was, held that:-***
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> ***"The Plaintiff's state that they did not receive the Notice to show cause why their suit should not be dismissed. Their Advocates were also not served with the***

Notice…………..the dismissal order was therefore made without the knowledge of the Plaintiffs or their agents. There is no affidavit of service. The ex-parte dismissal of the suit is irregular. Rule 2 (1) of order 16 presupposes service before dismissal"

It should be noted that Order 16 Rule 2(1) referred to above is now Order 17 Rule 2(1) of the current Civil Procedure Rules. I am persuaded by the sentiments of Azangalala, J in the above case. It is clear that the process of our judicial system requires that all parties before the Court should be given an opportunity to remedy their defaults before any adverse orders are made against them hence the proviso in Order 17 Rule 2 (1). In this case, the Plaintiff was not given the opportunity to show cause why its case should not be dismissed. The issuance and service of a Notice to Show Cause to the Plaintiff is of paramount importance for justice to be seen to have been done. This is so because once a suit is dismissed, the Plaintiff is forever barred from agitating its case." (Emphasis ours)

[7] It was then submitted that, as Notice had not been issued to the Plaintiff, the dismissal order was improper. The Defendants will not suffer any prejudice and have not shown they will suffer any at all. But, the Plaintiff is bound to suffer irreparable loss if this suit is not reinstated since the defendants owe them a colossal amount of money as evidenced in the pleadings. The Plaintiff relied on **Associated Warehouse Company Ltd (Krishnalal Pandya) Bhavna Pandya Vs Trust Bank Ltd (Under CBK Statutory Management) [2004] eKLR, (supra).** The claim is genuine and unassailable as the Respondent even issued the cheques Numbers 500009,500056, and 000012 which were all dishonoured and had not been stopped as alleged by the respondent. The dismissal order made on 7th March 2012 should be set aside and the suit be reinstated for hearing. The Applicant distinguished the cases cited the Defendants.

The defendants: suit should not be resurrected

[8] The Defendants submitted that the suit should not be resurrected. They filed Grounds of Opposition dated 27th February, 2014 to exemplify this position. The defendants argued that in breach of an oral agreement sometime in the month of February, 2006, to offer tiling services, the plaintiff offered shoddy and unsatisfactory work by providing weak and unstable tiles that got destroyed barely a week after they were laid down. After a dispute arose out of this breach, parties agreed that the Plaintiff would provide alternative and replacement tiles which they have failed to do to date. Subsequently, the Defendants were forced to make fresh orders from a different company for the same work and incurred huge losses and seek indemnity from the Plaintiff. The Defendants had indeed issues three cheques to the Plaintiff to wit; Cheque No. 500009 dated 30th October, 2006 for Kshs.500,000; Cheque No. 500056 dated 15th May, 2007 for K shs.650,000; and Cheque No. 000012 dated 31st December, 2008 for Kshs.300,000. The Defendants stopped the above mentioned cheques when it became apparent that the plaintiff was not ready to offer the replacement tiles. In December, 2008, the Defendants paid a sum of Kshs. 800,000 on account of Sunrise shopping Mall together with a total of Kshs. 1,100,000. That is when the plaintiff filed this suit and then slept for over two years without taking any action to prosecute the suit. The question is whether the orders made by the Honourable Court, dismissing the suit should be set aside, and the suit reinstated for hearing, given that the plaintiff did not have a legitimate claim for money.

[9] The orders made on 7th March, 2012 dismissing this suit for want of prosecution were issued after the court was guided by facts and the law relevant thereto. A Court of Law cannot set aside its orders on the basis of conjecture as there is no iota of new of evidence in support of the Plaintiff's application. See the case of **BENSON MUCHIRI MUTHOKA & ANOTHER V KELLEN WAITHRERO GICHIMU (2006) eKLR,** where it was held that;

"…the application lacks merit and in my view is a backdoor attempt by the defendant to re-argue an application which this court had rendered its decision. The said

application is therefore dismissed with costs to the plaintiffs."

In PATEL VS E.A CARGO HANDLING SERVICES LIMITED (`1974) E.A 75 the Court of appeal held as follows, at page 76

> ***"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment, as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits."***

[10] According to the Defendants, the Plaintiff's application is a waste of the Court's valuable time as the Plaintiff was never keen on prosecuting the mater. The Defendants complied with the mandatory provisions of the law by entering appearance on 11th March, 2010, filing their Statement of Defence on 17th March, 2010 and duly serving the same upon the plaintiff. Therefore, the suit was dismissed as the only course on an indolent plaintiff. The pendency of the suit was a bother to the defendants. The plaintiff had clearly not complied with the requirements of Order 11 of the Civil Procedure Rules 2010 more than Two (2) year after filing the suit. This shows that they were not interested in prosecuting the matter. They are guilty of Laches and a Court of Equity does not aid the indolent. The Plaintiff's allegations that the file had been lost are completely false and are made to mask the truth. They slept on their rights in prosecuting this suit. The application is misplaced, bad in law and an abuse of the court process, and as such should be struck out forthwith. Litigation must come to an end, however bitter the end may be. The application should be dismissed.

DETERMINATION

[11] This suit is already dismissed and its revival will require a complete persuasion on constitutional front of serving substantive justice. A long narrative of efforts made by the Plaintiff alone will not suffice. Much more is needed to show the efforts are bona fide steps taken by the Plaintiff in the normal course of things as opposed to steps taken to with stealth intention to justify the delay at a later date. The other crucial point I should determine is on notice under Order 17 rule 2.

[12] The Applicant argued it had made great efforts to prosecute this matter and annexed numerous letters which it had sent to the defendants' advocate inviting them to attend the registry and fix a suitable date for hearing of the suit. It also made numerous attendances at the court registry when the file was not traced. Even when the file was traced and was informed to comply with order 11 of the Civil Procedure Rules 2010, it did so by filing the necessary documents and again invited the defendant to fix the matter for hearing. But attempts to fix the suit for hearing before compliance with Order 11 of the Civil Procedure Rules may not be entirely bona fide steps in the course of things. It is a pretentious act. Consider also that the Plaintiff filed the list of documents, list of witnesses and witness statements all dated 18th August 2013 and served the same upon the defendant on 20th August 2013, and thereafter invited the Defendants for fixing the hearing date but again the file could not be traced. The plaintiff alleges its advocate's clerk attended court on 15th November 2013 to fix the suit for hearing only to be informed by the court clerk, Mr. Adanje, that the suit had been dismissed on 7th March 2012. The Plaintiff does not tell the Court whether the court file was available when it filed the documents and witness' statements. Again, the vigilance which the Plaintiff claims to have should have enjoined it to move with speed after realizing the dismissal. The information on dismissal reached the advocates for the Plaintiff on 15th November, 2013 but the Plaintiff only moved the court for the setting aside of the order for dismissal of suit on 12th February 2014. That is after a period which is slightly shy from three months by only two days. That delay has not even been explained at all. I am not convinced the Plaintiff was keen enough to prosecute its case. But despite the inertia on the part of the Plaintiff, the other issue on notice to show cause is more fundamental and the ultimate decision may just turn on it.

Lack of Notice

[13] As a matter of natural justice and which is now fully expressed as a constitutional principle, where the action to be taken by the court is one which will summarily dismiss a party's suit, such party must always be given an opportunity to be heard. The rationale behind this practice is because the act of dismissal is draconian one whose effect is to drive away the plaintiff from the seat of judgment without being heard. His case will be lost forever. This downright bludgeon-blow of the right of the plaintiff explains why Order 17 rule 2 of the Civil Procedure Rules requires notice to be given before a suit is dismissed for want of prosecution. I have perused the record and I have not seen anything which shows that notice was given to the Plaintiff or its counsel to show-cause why the suit should not be dismissed. And this being a court of record, I will give the benefit of the doubt to the plaintiff and exercise my wide discretion in their favour. See **Shah v Mbogo** on the exercise of discretion. But I should say here that where notices are given under Order 17 rule 2 of the Civil Procedure Rules, the notice and the manner in which it was given or served should be properly fastened in the file, and a batter practice would be to make an appropriate endorsement thereof in the file. I say this fully aware that under Order 17 rule 2 of the Civil Procedure Rules, there is no strict requirement of service of the notice and other modes like cause-list or posting in the official judiciary website of the notice are sufficient notice under the said order. On this see the case of **Profesor Mwangi Kaimenyi v AG & Another [2014] eKLR** that:-

> ***A preliminary issue***
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> ***[2] I should think the question whether notice for dismissal of this suit was given under Order 17 rule 2 of the Civil Procedure Rules (hereafter CPR) is a matter of preliminary significance. First, there is no mandatory requirement under Order 17 rule 2 of the Civil Procedure Rules that a notice should be given to the plaintiff before a suit which offends the order is dismissed for want of prosecution. Equally, Order 17 rule 2 of the CPR uses the word ''give'' and not ''serve''. To give notice is not the same thing as to serve notice within the context of the civil procedure. The distinction between the two terms is important because both are legal as well as technical but bear different meanings and entail different mechanisms albeit, however, both are intended to bring the matter at hand to the notice or attention of the party to be affected by the proceeding. ''Give'' in the context of Order 17 rule 2 of the Civil Procedure Rules denotes ''to impart or confer by a formal act'' whereas ''serve'' in the legal sense denotes ''to make legal delivery of the court process''. See Black's Law Dictionary, Ninth Edition on this. My own view, therefore, is that a notice under Order 17 rule 2 of the Civil Procedure Rules is deemed to have been given by the Court when it is placed in the official website of the Judiciary or in the cause list. Accordingly, notice for dismissal of this suit was given by the court through its website and the cause list for 29th February, 2012. See also the decision by Kimaru J in the case of JASON MUNGAI KAMAU v JANE KAMAU & 4 OTHERS [2008] eKLR.***

[14] Before I close, let me say something in passing, that in an application for reinstatement of suit, the court will not concern itself with the merits of the case unless by simply looking at the pleading itself it is a complete demurer and eye-sore to the court's sight. The upshot of my analysis of the matter is that I allow the application dated 13th February 2014 save costs is awarded to the Defendant. I also direct that the plaintiff shall set the suit down for hearing within the next 30 days and in default the suit stands dismissed with no necessity to apply formally in that behalf. It is so ordered.

Dated, signed and delivered in court at Nairobi this 7th day of November, 2014

F. GIKONYO

JUDGE

In the presence of:-

Alex court clerk

M/s Nyaga for Kariuki for plaintiff/applicant

Omolo for Gachie for defendant