



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 449 of 2011

SAMUEL EUSTACE WACHIRA MURAGE.....1ST PLAINTIFF

A.G. THURANIRA.....2ND PLAINTIFF

VERSUS

DELPHIS BANK LIMITED.....DEFENDANT

RULING

1. The Plaintiffs' Notice of Motion application dated 28th November 2012 has been brought under the provisions of Section 3A of the Civil Procedure Act Cap 21 (Laws of Kenya), Order 12 Rule 7 and Order 45 Rule 1 (i)(a) of the Civil Procedure Rules, 2010 and all enabling provisions of the law. It seeks the following orders:-

2.

3. a. **THAT the Order of the Court made on the 29th day of November 2011 dismissing the Plaintiffs' suit for want of prosecution for non- attendance by the Plaintiffs' counsel be set aside.**

b. THAT the Plaintiff's suit so dismissed be reinstated and set down for hearing on merit.

1. The grounds on which the Plaintiffs relied on in support of the application are as follows:-

a. **THAT the Applicants/ Plaintiffs should not be made to suffer for the failure of their counsel to attend court.**

b. **THAT the non- attendance on the part of the Applicant/Plaintiff together with their counsel was not deliberate but due to circumstances**

beyond their control as explained in their separate Supporting Affidavits.

c. **THAT Counsel for the Plaintiffs/Applicants Mr John Ndungu Njoroge who was aware that the suit was listed as number two (2) on the cause list for hearing on 29th November 2011 before Honourable Justice Musinga appeared in court at 9 am ready to proceed but after he noticed that the two Plaintiffs were not inside the court room he went out briefly to look for them in the court corridors.**

d. THAT the Plaintiffs' counsel did not trace the two Plaintiffs/Applicants until five minutes later and upon return to the court found the case having been called out and disposed of.

e. THAT the suit that is now being sought to be reinstated was listed number two (2) in the cause list before the Honourable Justice Musinga, and counsel for the Applicants did not anticipate that he could have traced the applicants in good time so as to be in court by the time the same was called out and therefore failed to instruct another counsel to hold his brief.

f. THAT the Applicants have waited patiently and consistently for over sixteen (16) years to have the case heard on merit but the dismissal has occasioned them great hardship yet they were present in court room immediately after the case was called out because of circumstances beyond their control.

g. THAT the suit was dismissed for want of prosecution even though the Defendant's counsel had not made such an application.

h. THAT the Defendant's counsel had earlier notified the Plaintiffs' counsel by way of a letter copied to the Deputy Registrar of the Court that the Defendant would make an application to adjourn the case on the hearing (i.e. on 29/11/2011) as the Defendant's main witness was bereaved.

i. THAT no prejudice will be suffered by the Defendant by reinstatement of the case to hearing because the Defendant would still have adjourned the case as the Defendant was not ready to proceed.

j. THAT the suit would still have been adjourned on the application of the Plaintiffs because neither the Plaintiffs nor the Defendant had filed their Statement of Claim in accordance with the Civil Procedure Act 2010.

k. THAT the Plaintiffs stand to suffer great prejudice, financial hardship and exposure to unnecessary detriment, a denial of access to justice and their right to have this dispute that can be resolved by allowing the reinstatement of the suit for purposes of hearing being heard on merit.

1. The Plaintiffs' application was supported by the Affidavits of Mr Albert Gaturu Thakura, Mr Samuel Eustace Wachira Murage and Mr John Ndungu Njoroge, advocate all sworn on 28th November 2012.
2. In his Supporting Affidavit, Mr John Ndungu Njoroge apologised for his failure to be in court when the matter was called out a second time, the same having been placed aside to enable him trace the Plaintiffs. He contended that the mistakes of an advocate should never be visited upon a client.
3. As stated in the aforesaid grounds, the advocate deposed that he assumed the matter was adjourned as the Defendant's counsel had written to his firm indicating that the latter would be seeking an adjournment during the hearing on 29th November 2011 and that neither of the parties had complied with Order 11 of the Civil Procedure Rules 2010. A letter from M/S Kale Maina & Bundotich dated 25th November 2011 to the firm of M/S Mutitho (sic) Thiong'o & Co Advocates was annexed as an exhibit as proof thereof.
4. The Plaintiffs' Supporting Affidavits depose the same facts. They both stated that they had come to court for a period of over sixteen (16) years but the matter never took off for one reason or the other. The prosecution of the matter was also delayed because their previous advocate passed away leading to the appointment of M/S Mutitu Thiong'o & Co Advocates who are the Plaintiffs' advocates currently on record.
5. The Plaintiffs' further stated that although their advocate had informed them that the Defendant would apply for an adjournment, they nonetheless came to court. They got lost in the court corridors as it was their first time at the Milimani Law Courts having only been familiar with the Supreme Court building which previously housed the High Court of Kenya.
6. The Plaintiffs also averred that the matter would not have proceeded on the said hearing date as the Defendant had indicated that they were seeking an adjournment. They annexed copies of

mention notices in support of their Affidavits.

7. All the three deponents deposed that it was in the interests of justice if the Plaintiffs were allowed to prosecute the case.
8. In his submissions, Mr Mutitu for the Plaintiffs reiterated the contents of the three (3) Supporting Affidavits. He added that the court had the discretion to reinstate the suit so that it could be heard on merit and emphasised that the mistakes of an advocate ought not be visited upon his clients. He was categorical that the said Supporting Affidavits explained the circumstances leading to the dismissal of the Plaintiffs' suit.
9. The Plaintiffs asked this court to exercise its discretion and reinstate their suit.
10. The Defendant argued that this was not a proper case where such discretion could be exercised in the Plaintiffs' favour. It prayed for dismissal of the Plaintiffs' application with costs. Its Grounds of Opposition dated 13th December 2012 and filed on 14th December 2012 particularised the following grounds:-

a. THAT the application is misconceived, frivolous and vexatious.

b. THAT the Application is fatally defective and bad in law and the Orders sought are incapable of being granted under the legal provisions that have been relied upon.

c. THAT the Applicant's application is incompetent and devoid of merit.

d. THAT the application is an abuse of the Court process and lacks substantive grounds.

1. Miss Sang for the Defendant stated that it was the duty of an advocate to attend court to protect his client's interests. She submitted that the Plaintiffs' application was incompetent and devoid of merit. She also added that the grounds adduced by the Plaintiffs were not substantial.
 2. In relying on aforesaid Grounds of Opposition, the Defendant was obliged to ventilate the legal issues emanating therefrom. The Defendant's Counsel did not provide this court with any and/or sufficient legal arguments to show how the Plaintiffs' application was misconceived, frivolous, vexatious, fatally defective, bad in law, incompetent, devoid of merit, an abuse of the court process and lacking in substantive grounds. From the submissions adduced by its counsel, it then appears that this application may very well have been uncontested.
 3. This court cannot assume or presume that the Defendant had or would suffer prejudice without the Defendant demonstrating the same. If the court were to do so on behalf of the Defendant, it would mean that the court would be descending into the arena in support of one party when it is expected to be the neutral arbiter.
 4. I must point out that this is one of the cases that I would have declined to exercise my discretion to set aside the orders dismissing the suit for want of prosecution due to the laches by the Plaintiffs in bringing this application for reinstatement of the suit.
-
1. The Plaintiffs did not proffer sufficient explanation as to why they took almost a year to bring the present application to court. This was inordinate delay by any standards.
 2. I have also looked at the Defendant's advocates' letter to the Plaintiffs' advocates indicating that they would seek an adjournment in respect of the Defence case. I do not find the letter to have been of any assistance to the Plaintiffs as their case could have proceeded on that day and that of the Defendant on another date. In the circumstances, I will not attach any weight to it in support of the Plaintiffs' case.
 3. Having said the above, it must be borne in mind that refusal by a court to allow a party to ventilate its case especially where its legal representative has done and/or omitted to do something to its detriment is a very drastic action. It is trite law that a party must be given a fair and reasonable opportunity to present its case and should not be penalised for the omissions or commissions of its legal representative.
 4. The court must be very cautious in denying a party such opportunity, which in any event must only be done as a last resort. It is therefore incumbent upon me to consider all the mitigating factors that would afford a party another opportunity to prosecute its case.
 5. The court's discretion is not an absolute one. It must be exercised judiciously on the basis of facts

and legal principles. In allowing a party to ventilate its case which has been negatively compromised due to its legal representative's omissions or commission, a court must consider what prejudice the other party would suffer if it exercised its discretion in favour of an applying party.

6. Accordingly, in determining if I should exercise my discretion in favour of the Plaintiffs herein, I must establish what prejudice the Defendant would suffer if I was to allow the said application.
7. It is evident from the records before me that the Defendant did not demonstrate to this court what prejudice it would suffer or had suffered if the said suit was reinstated at this stage.
8. I have looked at the court record and noted that the Plaintiffs were generally represented in court whenever there was a court attendance. This suit appears not to have taken off for one reason or the other and the same does not appear to have been as a result of the Plaintiffs' fault.
9. Bearing in mind that the court records show that the Plaintiffs' counsel was present in court when the matter was first called out was and an explanation of what transpired after the matter was called out given by way of the aforementioned Supporting Affidavits, I will exercise my discretion and set aside the order of 29th November 2011 dismissing the Plaintiffs' suit for want of prosecution and order that the suit be reinstated.
10. I also order that the Plaintiffs do pay the Defendant/Respondent thrown away costs in the sum of
Kshs 30,000/= within 45 days from
today.
1. I note that this is an old matter and in this regard I direct that parties take all necessary steps for preparation of trial to facilitate the expeditious disposal of this matter.
2. Accordingly, the upshot of my ruling is that the Plaintiff's Notice of Motion application dated 28th November 2012 is hereby allowed as prayed.
3. Orders accordingly.

DATED and DELIVERED at NAIROBI this 7th day of March 2013

J. KAMAU
JUDGE