



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 312 OF 2001

SHAH HIRJI MANEK LIMITED.....
.....**PLAINITFF**

VERSUS

RAMESH PREMCHAND SHAH.....**1ST**
DEFENDANT

SUNNY STYLE MANUFACTURERS LIMITED.....**2ND**
DEFENDANT

UKAY ESTATE LIMITED.....
.....**3RD DEFENDANT**

NAKUMATT HOLDINGS LIMITED.....**4TH**
DEFENDANT

RULING

1. The Plaintiff's Notice of Motion application dated 7th March 2012 has been brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21 Laws of Kenya), Order 12 Rule 7, Order 51 Rule 1, 15 & 16 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. It seeks the following orders:-
 - a. **THAT this Honourable Court be pleased to set aside the Order issued on 31st January 2011 dismissing the Applicant's application dated 9th May 2007 for non- attendance.**
 - b. **THAT the application dated 9th May 2007 be reinstated for hearing and determination or ruling based on the written submissions on record.**
 - c. **THAT costs of this Application be provided for.**

2. The grounds on which the Plaintiff relied on in support of its application are as follows:-
 - a. **THAT the said application was dismissed on 31st January 2011 for non- attendance by the Applicant's counsel.**
 - b. **THAT the non- attendance was due to a mistake on the part of the Applicant's counsel who failed to diarise the said date and thereupon attend court.**
 - c. **THAT the advocate's mistake of not attending court on 31st January 2012 is highly regretted**

and should not be visited upon the innocent client.

- d. **THAT it is in the interests of justice and fairness that the Applicant be granted an opportunity to ventilate its case in court.**
- e. **THAT this application has been timeously filed without undue delay.**
- f. **THAT the Respondent will suffer no prejudice by the reinstatement as all parties had already filed comprehensive written submissions.**

3. The Applicant's application was supported by the Supporting Affidavit of Hillary Mecheo Apima Orina, advocate sworn on 7th March 2012.
4. In the said affidavit, Mr Orina explained that on 28th November 2011, the court directed that parties attend court on 31st January 2012 for the highlighting of submissions in respect of the application dated 9th May 2007.
5. He stated that he forgot to diarise the date when he procured the 2012 diary and he only realised the said mistake about 20th February 2012.
6. He added that the court could probably have come to a different conclusion on the orders it issued on 31st January 2012 had the 3rd and 4th Respondent's counsel informed it that parties had filed written submissions and all that remained was highlighting of the same.
7. In opposing the said application, Atul Shah, a director of the 4th Respondent deposed that the Applicant's application herein was frivolous, mischievous and an abuse of the court process.
8. He was categorical that the date of 31st January 2012 was fixed by consent of the parties and that the Applicant had failed to show what steps it had taken from 31st November 2011 to 31st November 2011, which was a clear demonstration of the Applicant's disinterest in the matter.
9. Mr Atul further stated that the dismissed application was filed in 2007 and that if the Applicant had been serious about this matter, it would have fixed the matter for hearing rather than pursue reinstatement of an application that had been dismissed.
10. The 3rd and 4th Respondents thus prayed for the dismissal of the application.
11. The 3rd & 4th Respondents' List of Authorities and written submissions were dated and filed on 27th March 2012 and 4th May 2012 respectively.
12. When the matter came up for highlighting of the written submissions on 10th December 2012, both Mr Orina and Miss Mate, counsel for the Applicant and 3rd and 4th Respondents respectively requested that the court proceeds to give its ruling based on the said submissions without hearing any oral submissions on their part. Counsel for both parties relied on Order 51 Rule 16 of the Civil Procedure Rules Cap 21 (of the laws of Kenya) which provides as follows:-

“ The Court may, in its discretion, limit the time for oral submissions by the parties or their advocates or allow written submissions.”

13. The court allowed the counsels' application and hereby proceeds to give the ruling herein on the basis of written submissions in the court file. The 3rd & 4th Defendants submitted that the Plaintiff's application dated 9th May 2007 came up severally in court and parties unsuccessfully made attempts to resolve the matter out of court. They also submitted that the Plaintiff filed the present application more than a month after dismissal of the application of 9th May 2007 on 31st January 2012.
14. The 3rd & 4th Defendants argued that the delay disentitled the Plaintiff from the exercise of the discretion of this court and that the application was not merited. This is because the Plaintiff's counsel had not exhibited any proof to show what efforts he had made at the registry after he realised he had failed to attend court on 31st January 2012. It was their contention that the Plaintiff's advocate's realisation of his mistake on 20th February 2012 was a delay that was inexcusable.
15. The Defendants therefore contended that the Plaintiff was disentitled from enjoying the court's discretion because allowing the application dated 7th March 2012 would amount to condoning the Plaintiff's indolence.
16. Although the 3rd and 4th Defendant's relied on seven authorities in support of their opposition to

- the Plaintiff's application herein, they only highlighted four of the said authorities.
17. In **Kamunyi vs Macharia & Another [1990] KLR 470**, the court emphasised the duty of an applicant to show a proper reason for failing to attend court. In that case, the court observed thus:
- “Further the ground of illness was clearly an afterthought. There is no material to make me exercise my discretion in favour of vacating the order made on 8th May 1990. I disallow the application.”**
18. In the case of **Peter G.N. Ng'ang'a vs Standard Chartered Bank (K) Ltd & Anor [2004] eKLR**, the 3rd and 4th Defendants emphasised that :
- ”Fixing of matters is documented on the court record... When a firm of advocates takes over a matter, there is no requirement that they should be briefed of hearing dates.”**
19. In the case of **Waweru Kamau vs Joseph Mucheru Gichuki & Anor [2006] eKLR**, the 3rd and 4th Defendants argued that the court dismissed the Applicant's application seeking setting aside ex parte orders which were issued as a result of his advocates non- attendance in court.
20. In the last case cited in the 3rd & 4th Defendant's written submissions, **Playfair Enterprises Ltd vs Princely House Ltd [2006] eKLR**, the court has this to say:-
- “I consider this to be a matter where diligence was necessary but was not exercised. I have studied the application sought to be reinstated and do not consider it to be of a nature where prejudice can be presumed to follow my failure to exercise my discretion sought herein. Not being satisfied with the reasons given for non attendance on 13th June 2003, I decline to allow the application and dismiss the same with costs to the Respondent.”**
21. I have considered the cases of **Jadiel Muthike Njiru vs Njagi Kithinji [2005] eKLR**, **Kabue vs Sanitam Services Ltd (EA) Limited [1991] eKLR**, **HCCC Misc Application No 508 of 2000 Mary Wairimu Wangui Mwaura vs Joseph Muthini Wambua** (unreported) also relied on by the 3rd and 4th Defendants. I have noted that the import of those authorities was that the applicants therein did not satisfy the court of the need to exercise its discretion to reinstate matters that had been dismissed for non- attendance by advocates in the respective cases.
22. Having looked at the documentation filed herein, it is clear that the Plaintiff is calling upon this court to exercise its discretion to reinstate its application dated 9th May 2007 while the 3rd and 4th Defendants are arguing that this is not a proper case where such discretion should be exercised in favour of the Plaintiff herein.
23. 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.
24. 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.
25. The court's discretion is not an absolute one. It must be exercised judiciously on the basis of facts and legal principles. In determining whether the 3rd and 4th Defendants would suffer any prejudice if the court allowed the Plaintiff's application herein, it would be imperative that the court considers the history of this case and the nature of the application sought to be reinstated.
26. The suit herein was filed in 2001. The application seeking entry of judgment in favour of the Plaintiff against the Defendants was dated and filed on 9th May 2007. It was taken out of the cause list on 15th June 2007 due to shortage of judges. Notice to Show Cause why suit should not be dismissed was issued on 9th October 2009. This was over two (2) years from the time the said application was filed.
27. The Plaintiff successfully argued against the dismissal of the suit for want of prosecution and was directed to fix a hearing date. The matter was removed from the cause list on 26th July 2010 due to the heavy cause list on that day and was fixed for hearing on 28th October 2010.
28. The court records show that the parties appeared to have attempted out of court negotiations but

- the same did not bear fruit. There were several court attendances thereafter leading to the court's directions that parties file written submissions for highlighting.
29. In their Replying Affidavit, the 3rd and 4th Defendants averred that they had been condemned to live with the anxiety of a suit and an application that had been dismissed hanging over their heads from 2002 and 2007 respectively.
 30. The uncertainty of an end to a matter is apparent prejudice against the 3rd and 4th Defendants herein bearing in mind that it is now almost twelve (12) years since the suit herein was filed against them.
 31. Although an applicant should not be made to suffer as a result of its advocates omissions or commissions, the court must be satisfied that such an applicant would suffer prejudice if the court did not exercise its discretion to reinstate an application which has been dismissed for want of prosecution.
 32. The Plaintiff has not shown this court what prejudice it would suffer if the said application dated 9th May 2012 was not reinstated.
 33. I am satisfied that the 3rd and 4th Defendants will be prejudiced if I allowed the reinstatement of the Plaintiff's application dated 9th May 2007. This is because the Plaintiff can ventilate its prayer for judgment against the 3rd and 4th Defendants during the main hearing of the case. It is therefore important that this matter is listed for full hearing and a final determination thereof made as has been ably argued by the 3rd and 4th Defendants.
 34. Section 1A(1) of the Civil Procedure Act Cap 21 (laws of Kenya) provides that:

“The overriding objective of this Act and rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes...”
 35. 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. In this regard, the court must be very cautious in denying a party such opportunity which must only be done as a last resort.
 36. I have noted the Plaintiff's counsel brought this application immediately he realised his failure to attend court. Though the period of two (2) months was inordinate, it may well have been that he only remembered the matter as he deposed in his Supporting Affidavit.
 37. However, the sword of justice must cut both ways. No party should suffer prejudice as a result of a right being given to the other party.
 38. Bearing in mind the aforesaid guiding principles, I do not find this to be a case which merits the exercise of my discretion in favour of the Plaintiff herein. I concur with the 3rd and 4th Defendants' counsel that the Defendants have suffered as a result of the delays by the Plaintiff prosecuting the application dated 9th May 2007. In deed at one point, the 3rd and 4th Defendants' advocates attempted to fix the Plaintiff's said application for hearing. I find that the effect of my refusal would not be one to prejudice the Plaintiff.
 39. There does not appear to have been in the court record, any List of Authorities or written submissions by the Plaintiff herein. I am not sure whether this was an oversight on the part of the Plaintiff or it was intended that I should rely on the Supporting Affidavit by Mr Orina only. Be that as it may, I wish to point out that even if the said List of Authorities and written submissions were in the court record, I would not have arrived at a different conclusion as far as the exercise of my discretion was concerned in view of the circumstances of the case.
 40. Accordingly, the upshot of my ruling is that the Plaintiff's Notice of Motion application dated 7th March 2012 is not merited and for that reason, the same is hereby dismissed with costs to the 3rd and 4th Defendants. I direct that parties take steps to prepare for trial of the main suit within the next forty five (45) days.
 41. Orders accordingly.

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

J. KAMAU

JUDGE