



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 518 OF 2006**

**WESTERN PUMPS SERVICES LIMITED.....PLAINTIFF**

**VERSUS**

**UPPER HILL SPRINGS RESTAURANT .....1<sup>ST</sup> DEFENDANT**

**PYRAMID AUCTIONEERS .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me for determination are two motions. The first one dated 12<sup>th</sup> March, 2012 by the Plaintiff seeks to re-instate this suit which was dismissed on 3<sup>rd</sup> February, 2012, for hearing on merit. The second application dated 3<sup>rd</sup> February, 2012 is by the Defendant seeking directions on the disbursement of a sum of Kshs.1,200,000/- deposited by the Plaintiff in a joint account in the names of the Ojiambo & Company and Gaita and Company. I propose to start with the Plaintiff's motion dated 12<sup>th</sup> March, 2012.
2. It was submitted for the Plaintiff that the Plaintiff was filed on 14<sup>th</sup> September, 2006 seeking a mandatory injunction for orders of reinstatement to the demised premises, the Plaintiff also sought the return of certain chattels that were removed from the said premises on alleged arrears of rent. That at the time, there was an order restraining the landlord from evicting the Plaintiff from the premises which had been made by the Business premises Rent Tribunal in BPRT No.309 of 2006. That pursuant to an injunction application in these proceedings, a sum of Kshs.1.2.million was deposited in a joint account in December, 2010. That the Plaintiff had complied with the order of 23<sup>rd</sup> September, 2009. That the Plaintiff's suit was dismissed for want of prosecution on 3<sup>rd</sup> February, 2012 yet no notice to show cause was served upon the Plaintiff or its Advocates, that the Plaintiff was unaware that the suit had been dismissed on 3<sup>rd</sup> February, 2012. That the Plaintiff could not list its suit for prosecution for the reason that all preliminaries had not been undertaken and that the filing of an application dated 21/01/2010 by the Defendant to dismiss the suit for want of prosecution had contributed to the delay in the prosecution of the suit. Finally, that the Plaintiff will suffer extreme prejudice unless the suit is reinstated as its claim as per the Plaintiff has not been determined on merit.

3. In opposition to the application, the Defendant filed a Replying Affidavit of Aldrin Ojiambo sworn on 16<sup>th</sup> March, 2012 and submissions dated 2<sup>nd</sup> May, 2012. The Affidavit and submissions gave the history of the suit as well as on the issue of the deposit of Kshs.1.2million. It was submitted that the Plaintiff had shown very little interest and/or effort to prosecute the matter, that because the Plaintiff had not deposited the sum of Kshs.1.2million agreed between the parties and subsequently ordered by the court within time it was not entitled to the orders sought. It was further argued that because the order by consent of 23/09/2009 had not been complied with the suit stood dismissed 60 days after 23/09/2009, that the Plaintiff had not been vigilant in prosecuting the suit and that the suit is an abuse of the court process.
4. I have carefully considered the application, the Affidavit in support and the submissions of Counsel. I think in considering an application such as the one before me the court has to consider the reasons for the dismissal of the suit, the explanation given for the failure to attend court on the material date, reasons for the delay in prosecuting the suit, whether the delay in the prosecution of the suit is inordinate and if so, whether the delay has been explained and the prejudice the delay may have caused the Defendant and generally the administration of justice.
5. From the Supporting Affidavit and submissions, it is clear that neither the Plaintiff nor his advocates were served with the notice to show cause why the suit should not be dismissed for want of prosecution. I agree with Counsel for the Plaintiff that it is a cardinal principle of our law that none should be condemned unheard, that Order 17 Rule 2 provides that a notice may be issued to the parties to show cause why suit should not be dismissed. Although the provision is not in mandatory terms, I think it is good practice that the notice be issued to the parties. I also agree with the Plaintiff's Counsel that listing of the matter on the cause list for the day alone is not enough, some sort of notice to the Plaintiff is required before a suit is dismissed. The Plaintiff having not been given any notice, I think its complaint may have some basis.
6. Be that as it may, the question that arise is, if the Plaintiff had been given notice and had attended court on 3<sup>rd</sup> February, 2012, would it have shown cause why the suit should not be dismissed? I have considered both the supporting and Supplementary Affidavit of Chege Wainaina together with the submissions. The Plaintiff has not attempted to show that had it attended court on 3<sup>rd</sup> February, 2012, it would have shown cause why the suit should not be dismissed for want of prosecution. From the record, the last time a step was taken in the matter was 10<sup>th</sup> February, 2010 when the Defendants application dated 21/1/2010 to dismiss the suit for want of prosecution was listed for hearing on 25<sup>th</sup> March, 2010. As at the time the court dismissed the suit, no step had been taken for two (2) years less seven (7) days. The law requires one year only before dismissing a suit for want of prosecution. The Plaintiff has not explained the delay between 10<sup>th</sup> February, 2010 and 3<sup>rd</sup> February, 2012. It is only in paragraphs 8 and 9 of the Supporting Affidavit that a resemblance of explanation is attempted. It was contended that the Defendant's motion dated 10<sup>th</sup> January, 2010 was taken out of the list of 25<sup>th</sup> March, 2010, that around February, 2012 when the Plaintiff was attempting to list that application for hearing, it received a letter from the Defendant dated 3<sup>rd</sup> February, 2012 advising that the suit had been dismissed. The Plaintiff has not stated what it was doing between 25<sup>th</sup> March, 2010 and February, 2012.
7. From the foregoing, it is clear that there was inordinate delay. That delay was not explained. That being the case, I do not think that even if the Plaintiff was given notice, it could have shown cause why the suit should not be dismissed for want of prosecution. It has attempted in its application to do so, but I am not convinced that it has succeeded to do so. Setting aside the dismissal in the circumstances would be an exercise in futility. That in my view is unnecessary when the Plaintiff has failed to advance any reasons at this stage which may persuade the court to retain this suit in its register of active cases. In any event, although the suit was filed in 2006, there are no concrete steps that can be said to have been undertaken to have it determined on merit. I think it will be prejudicial to the Defendants to reinstate such a suit and leave it to hover over the head of the Defendants as a sword of Damocles.
8. The other reason which persuades this court that the Plaintiff is not keen in prosecuting the suit is its conduct. There had been an application to dismiss the suit for want of prosecution which was pending since 10<sup>th</sup> January, 2010. On 3<sup>rd</sup> February, 2012, the Plaintiff was advised that the suit had been dismissed for want of prosecution. The Plaintiff was in no hurry to take any action until

13<sup>th</sup> March, 2012, which was over a month later, to file the application for reinstatement. Can that be said to be a conduct of a vigilant litigant? I think not. In my view therefore, I think allowing the application will be contrary to the spirit of Sections 1A and 1B of the Civil Procedure Act which require expeditious and proportionate disposal of disputes.

9. In view of the foregoing, I decline the application dated 12<sup>th</sup> March, 2012 and hereby dismiss the same with costs.
10. As regards the application dated 3<sup>rd</sup> February, 2012, the same was opposed by the Plaintiff on the grounds that the order of 15<sup>th</sup> February, 2007 and the consent order of 17<sup>th</sup> July, 2009 did not mention that the funds would be released to the Defendant's upon the dismissal of the Plaintiff's suit. That oral evidence should be called upon to establish to whom the money is to be paid and that there is no basis for the release of the money as sought.
11. I have considered the Affidavits and submissions. I have also perused the record. On 15<sup>th</sup> February, 2007 the parties recorded a consent in the following terms:-

**“ORDER BY CONSENT-**

1. ***The Plaintiff do pay into a joint account in the names of all the three advocates for the parties the sum of Kshs.1million (towards mesne profits) and a further sum of Kshs.200,000/- (towards auctioneers charges) pending the hearing and determination of the suit.***
2. ***The Plaintiff do pay storage charges to LEAKEY STORAGE LIMITED and G.K. SONS LTD***
3. ***Upon the payments the Plaintiff's goods held at Leakey Storage Limited and G.K & sons Ltd, be released to the Plaintiffs forthwith.***
4. ***The Plaintiff's Notice of Motion dated 15/11/06 and the Notice of Motion dated 06/02/07 be and are hereby marked withdrawn with costs to the Defendants.”***

12. I have seen the Plaintiff's applications dated 15<sup>th</sup> November, 2006 and 6<sup>th</sup> February, 2007, respectively. Those applications sought to restrain the Defendants from levying distress upon the Plaintiff's assets for alleged rent arrears and for release of the distressed items. The said order of 15<sup>th</sup> February, 2007 determined the said two applications. What were those funds of Kshs.1.2million for? Were they not being deposited so that as the Plaintiff prosecutes its case against the Defendants, distressed items be released to the Plaintiff? Were the monies not being deposited because they were being claimed by the Defendants as mesne profits (rent arrears) and auctioneers costs? I think so. That being the case and the suit having been dismissed, I think the only logical conclusion is that the Defendant's claim (by way of distress) against the Plaintiff succeeds. I do not think that it required a counterclaim for the Defendants to be entitled to the said monies. The monies were deposited to give the Plaintiff the opportunity to prove its case against the Defendants which it has failed to.

13. For the foregoing reason, I am of the view that the opposition to the Defendants application is not well founded. I accordingly, allow the application as prayed.

14. Orders accordingly.

**DATED and DELIVERED at Nairobi this 12<sup>th</sup> day of April, 2013.**

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**A. MABEYA**

**JUDGE**