



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 822 OF 2009

NETPLAN EAST AFRICA LIMITEDPLAINTIFF

-VERSUS -

INVESTMENT & MORTGAGES BANK LIMITEDDEFENDANT

RULING

1. The plaintiff filed this suit under a certificate of urgency on 11th November 2009. On the same date, the court certified the accompanying interlocutory application for injunction urgent. The Court declined to grant any further relief. The matter was allocated a date for *inter parties* hearing for 23rd November 2009. On the latter date, the plaintiff's counsel withdrew the interlocutory motion. No other step was taken to fix the main suit for hearing.
2. The court, *suo moto*, issued a notice for dismissal of the suit for want of prosecution. The notice was set for hearing on 2nd March 2012. The plaintiff's learned counsel Mrs. Obel appeared. She sought adjournment of the notice to 9th March 2012 to allow her to respond to it fully. She was granted the adjournment. She did nothing more. On 9th March 2012, neither she nor any representative of the plaintiff or the defendant appeared in court. The court, noting that the date was taken at the instance of the plaintiff, dismissed the suit for want of prosecution.
3. On 17th January 2013, nearly ten months later, the plaintiff has presented a motion to set aside that order and to reinstate the suit. The motion is anchored on sections 1A, 1B and 3A of the Civil Procedure Act and Orders 12 and 51 of the Civil Procedure Rules 2010. The application is supported by a deposition of Ligunya Biko, an advocate from the same law firm as Mrs. Obel. That affidavit states at paragraph 13 (which paragraph erroneously falls immediately after paragraph 2) that the suit was filed on 21st October 2009. That is clearly misleading as the plaint itself is dated 10th November 2009 and was filed, like I stated, on 11th November 2009. The affidavit at paragraphs 13, 14 and 15 then refers to non-existent proceedings over an interlocutory application resulting in a ruling dated 5th October 2010. There was no such ruling.
4. The record of the court shows that the interlocutory application dated 10th November 2009 was withdrawn by the plaintiff on 23rd November 2009. The plaintiff's learned counsel then deposes at paragraph 15 that the court file went missing and that his firm next heard of the matter when the notice for dismissal was issued by the court. There is no evidence to show the file was lost or misplaced or of any attempts by the plaintiff to reconstruct the court file. Such evidence would be in at a least a letter by the plaintiff's counsel to the court registry enquiring about the file. Fundamentally, there is not even one letter to the defendant inviting it to take any dates in the suit.

5. The High Court is a court of record. The record before me does not show that the *original* court file was missing. The replying affidavit of Benson Ngugi is also telling. It is deponed at paragraph 6 that summons to enter appearance were never extracted. That may be so because there are three copies of summons stamped by the court but unsigned. They clearly were never collected by the plaintiff. I have thus reached the inescapable conclusion that first, the *original* court file was never lost or misplaced, secondly, that summons to enter appearance have never been collected or served on the defendant, thirdly that the deposition of Mr. Ligunya Biko is misleading in material respects, and fourthly, that no *steps* were taken by the plaintiff to fix the suit for hearing since 23rd November 2009 when it withdrew the application for injunction.
6. Lastly, Mrs. Obel and Mr. Ligunya work for the same law firm. I think it is a red herring to shift blame to her for “*failing to inform [sic] of the pending hearing date and failing to attend court*”. If she did that, those are not ordinary mistakes. They are serious lapses or negligent conduct for which the plaintiff has other remedies. See Jaribu Credit Traders Limited Vs Mumias Sugar Company Limited Nairobi, High Court case 465 of 2009 (unreported).
7. In Fitzpatrick Vs Batger & Co. Ltd [1967] 2 ALL ER 657 Lord Denning, citing his decision in Reggentine Vs Beecholme Bakeries Ltd [1967] 111 Sol. Jo. 216, said as follows;

“It is the duty of the plaintiff’s advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition the delay is far beyond anything we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution”.

8. I find that delay in this matter has been established. When such delay is established, unless it is well explained, it becomes inexcusable. See Ivita Vs Kyumbu [1984] KLR 441, Allen Vs McAlpine [1968] 1 ALL ER 543, Ramuka Agencies Ltd Vs Esther Wanjira Maina and another Nairobi, High Court ELC 1187 of 2007 [2012] e KLR. From what I have stated earlier, the plaintiff has failed to offer any plausible reason for its failure to fix the suit for hearing since 23rd November 2009. The plaintiff, even after dismissal of the suit on 9th January 2009 did not file the present motion for reinstatement until ten months later on 17th January 2013. That is undue *laches*. A portrait emerges of a lethargic litigant completely disinterested in prosecution of its suit. Under such circumstances, the court was well entitled to dismiss the suit under order 17 rule 2 of the Civil Procedure Rules 2010 and the inherent powers of court. See Mukisa Biscuit Manufacturing Company Vs West End Distributors Limited [1969] E.A. 696.
9. In the totality of the evidence, the plaintiff has obstructed or delayed the course of justice. I am thus disinclined to exercise my discretion in its favour. See Maina Vs Mugiria [1983] KLR 78 Shah Vs Mbogo [1968] E A 93, Kimani Vs McConnel [1966] E A 547. The discretion was never intended to be exercised to assist a party who *has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice*. The obstruction in this case is on a four-strand: first by misleading averments in the deposition of Mr. Ligunya of a non-existent application and ruling; secondly, by false statements that the *original* court file was lost or misplaced and that the plaintiff had taken steps to fix the suit for hearing; and thirdly, in the futility of passing the buck between associates in the same law firm acting for the plaintiff. Fourthly, the plaintiff’s counsel, for no good reason, failed to appear in court to defend the notice to show cause on the date she had *herself* taken. I have dealt earlier, and in great detail with all those four aspects. The delay on the other hand is two-pronged: first, by the inexcusable failure to prosecute the suit since 23rd November 2009; and, secondly by presenting this motion for reinstatement of the suit a whole *ten* months from the date of dismissal.
10. For all those reasons the plaintiff’s notice of motion dated 16th January 2013 is devoid of merit. I hereby dismiss it with costs to the defendant.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 7th day of November 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

No appearance for the Defendant.

Mr. Collins Odhiambo, Court Clerk.