REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 692 OF 2009

NAPHTALI J. M. MUREITHI ……..…….... PLAINTIFF

- Versus –

GIRO COMMERCIAL BANK LIMITED ……...…… 1ST DEFENDANT

GARAM INVESTMENTS LIMITED ……. 2ND DEFENDANT

RULING

1. The application before this court is brought by the Plaintiff under the provisions of **Order 40 Rules 1, 2, 3,** and **9** of the *Civil Procedure Rules* as well as **section 3** and **3A** of the *Civil Procedure Act*. The application is dated 26th of June 2012 and is by way of Notice of Motion. By way of a bit of recent history concerning this matter, the suit was struck out for non--prosecution by my learned brother Justice Kimondo on 2 March 2012. At that hearing, Mr. Ibrahim appeared for the Defendant. There was no appearance for the Plaintiff. That hearing had come about as a result of this Court issuing a Notice for Dismissal of the suit for want of prosecution. This application before court dated 26th of June 2012 came before me under Certificate of Urgency on 27th June 2012. On that day, Mrs. Morara for its Plaintiff appeared ex parte. I noted that there appeared to be not one court file as regards this matter but three. I certified the matter as urgent, directed that the application to reinstate the suit should be heard as soon as possible and I fixed the application for hearing on 10th July 2012. Prior to that hearing date, on 5th July 2012, Ms. Ntali holding brief for Mrs. Morara, appeared before me seeking prayers under a fresh application dated 4 July 2012, which sought to restrain the 1st and 2nd Defendants from selling the Plaintiff's property being Nairobi/Block72/903 House No.112, Southlands Estate, Langata (hereinafter "the property"). I reminded Ms. Ntali that I could not hear that application because there was currently no suit in existence. I directed that the current application before court must be heard first, the suit reinstated before this court could reinstate interim orders.

2. At the hearing on the application before me on 10 July last, counsel for the Defendants noted that he had only been served with the application papers on 9th of July 2012. He had little time to file a Replying Affidavit to the application. He confirmed that the proposed sale of the Plaintiff\\\'s property was scheduled for 17 July 2012. I directed that despite Ms. Morara plea that the application of the 4 July 2012 be heard at the same time as the current application, the suit had to be reinstated first. I directed that the application of 26 June 2012 would be heard on 11th July 2012 in the afternoon. I gave leave to the Plaintiff to file a Further Affidavit is he so wished but I really did not see the necessity of such.

3. The application was supported by an affidavit sworn by the Plaintiff on 4 July 2012 and a Further Affidavit sworn by the Plaintiff on 10 July 2012. The application was opposed by the Replying Affidavit of the1st Defendant\\\'s manager of its Credit Department one Tilas Muringi dated 9 July 2012. The main

points detailed by the Plaintiff in his Affidavit in support of the application, was that he had moved to court sometime in the year 2009 when the Defendant herein purported to sell his house for what he called "a purported outstanding loan". That matter had been canvassed before Lady Justice Khaminwa who granted interim orders to stay the sale of the property on 29th of September 2010. The Plaintiff then stated that he fixed the matter hearing on 31st March 2011 and when he appeared in court the matter was conspicuously absent from the cause list. He maintained that from that date onwards, his advocates had been unable to trace the court file "despite our concerted efforts to have the file listed for hearing ". He noted that the suit had been dismissed as aforesaid by Hon. Justice Kimondo on 2nd March 2012 but he did not say how he had discovered this fact. He went on to say that he was ready and willing to have this matter heard and disposed of once the original court file can be traced at this court's Registry. He maintained that he had a prima facie case with high chances of success which had been observed by Justice Khaminwa while granting interim orders. He noted that unless the interim orders are reinstated and extended, he was likely to suffer irreparably as the property is a family house.

4. In his affidavit in reply Mr.Muringi maintained that the Plaintiff was not being candid in this matter and that he should not be granted the orders he sought because he had misled the court, gave false information and was swearing falsehoods. He stated that he had been aware that the plaintiff had been enjoying interim orders of injunction from 29th September 2010 until 25th June 2012 when the court declined to extend the same for the reason that the suit had been dismissed on 2nd March 2012. He was also aware that all efforts towards listing the case for hearing had been made by the 1st Defendant\\\'s advocates on record and he maintained that the Plaintiff\\\'s advocates had not been cooperative in that regard. He attached relevant correspondence marked "TM-1". He also noted that the hearing date of 31st of March 2011 (there is a typing mistake in paragraph 6 of the said Affidavit) was taken ex parte by the 1st Defendant\\\'s advocates after inviting the Plaintiff\\\'s advocates to attend the court Registry for fixing the matter by letter dated 15th November 2010. The deponent further stated that he had been advised by his advocates on record that the matter had been taken out of the Call over list for the month of March 2011 for the reason that the Plaintiff had not complied with pre-trial requirements to enable the matter to proceed to hearing. More importantly perhaps, the deponent maintained that the Plaintiff hearing did not merit the prayers being sought as he had not come to court with clean hands. He noted that the Plaintiff had totally failed and/or refused to repay the loan amount due after the orders of injunction had been issued. Mr. Muringi attached a copy of the statement of account with regard to the amount borrowed by the Plaintiff from the 1st Defendant which indicated that no payment had been made towards the loan since November 2007.

5. The Plaintiff\\\'s Further Affidavit dated 10th July 2012 did not add a lot to the facts already put before this court in the other two affidavits. For instance he detailed that his advocates had advised him that both parties to the suit had a duty to set it down for hearing and the fact that the Defendant's advocates had invited the Plaintiff\\\'s advocates to fix the matter for hearing does not cause any prejudice to the case. The Plaintiff also denied that his advocates had received a letter from the Defendant\\\'s advocates dated 29th March 2011 (again there is a typographical error in both the Replying Affidavit and the Further Affidavit) upon which his advocates had written: "NOTE. The matter will not proceed because the plaintiff is unwell". He also maintained that in response to paragraph 8 of the Replying Affidavit (again there is a typographical error in the Further Affidavit where the deponent refers to "Plaint" rather than "replying affidavit"), that his advocate Mrs. Morara had attended court on 31st March 2011, had met with Mr. Ibrahim at the High Court Registry and that both advocates confirmed that the matter was not listed for hearing and that the file could not be traced. The deponent swore to 2 further matters namely he believed and had been advised by his advocates on record, that the "trial court judge found that the plaintiff had a prima facie case with high chances of success and hence the grant of the interim orders of injunction of 29th September 2010 by Justice Khaminwa". Further, in response to the Defendant\\\'s statement in the Replying Affidavit that the interim orders have lapsed in accordance with the provisions of Order 40 Rule 6 of the Civil Procedure Rules, the Plaintiff maintained that the interim orders could not be extended beyond the period of one year as the court file had gone missing.

6. Mrs. Morara commenced her submissions before court on 11th July 2012 by saying that the Plaintiff

was seeking that this court should reinstate the suit dismissed on 2nd March 2012. The Plaintiff also sought to reinstate the injunction orders made earlier by Lady Justice Khaminwa. As regards the dismissal of the suit by Mr. Justice Kimondo, counsel maintained that the Plaintiff had never received been served with the Notice of Dismissal. She maintained that the last time according to the Plaintiff, that the matter was in court or supposedly in court was on 31 March 2011 but the case did not appear on the Cause List. Since then the Plaintiff\\\'s advocates had been trying to locate the court file which went missing. Counsel then noted that if the temporary injunction orders were not granted then the Plaintiff would be prejudiced in that the house will be sold which is a family home. She submitted that Lady Justice Khaminwa had given the interim orders based on the fact that the Plaintiff has established a prima facie case.

7. The plaintiff's counsel maintained that the disappearance of the court file cannot be blamed on the Plaintiff or his advocates. She detailed that the Plaintiff is willing to have the matter disposed of once and for all, if the court was able to give a date. Counsel drew attention to the contents of the Defendant\\\'s Replying Affidavit dated 9th July 2012 which led to the filing of a Further Affidavit by the Plaintiff on 10th July 2012. The Plaintiff maintained that what the Defendant had averred to in the Replying Affidavit was not true. However, it was correct that it was the Defendant\\\'s advocates who had invited the Plaintiff\\\'s advocates to fix the hearing date for 31 March 2011. However the Plaintiff's advocates did not have the letter referred to in the Replying Affidavit, they had another letter from the Defendant\\\'s advocates dated the 20th March 2011. Counsel noted that she had attended court and together with the Defendant\\\'s advocates, on perusal of the Cause List, they had both established that the matter was not listed. Counsel admitted that the plaintiff had not set down the suit for hearing within one year after the issue of the temporary injunctive orders as required

8. by **Order 40 Rule 7** of the *Civil Procedure Rules*. She referred this court to the list of authorities filed by the Plaintiff, more particularly the case of **Ferhan Mohamed Chaudri v Beatrice Chepchumba Boit & Ors** *HCCC No. 546 of 2003*. She also referred this court to the Ruling per Kimaru J. In *HCCC No. 207 of 2008* – **Nyanjugu Ltd v Barclays Bank of Kenya Ltd &Ors**, in which the learned judge found that service of the Notice of Dismissal is essential before the court can make the dismissal order. The court was also referred to the case of City Council of Nairobi v University of *Nairobi HCCC No. 359 of 2008* as per Mugo J. In which guidelines to be followed for a suit may be dismissed was set out in the Ruling.

9. In his turn, Mr. Ibrahim replying on behalf of the Defendant, pointed to the Replying Affidavit of the said Tilas Muringi, adopting the contents of the same. He then went on to say that he had not heard the Plaintiff\\\'s Counsel telling the court as to what steps had been taken to set the matter down for hearing since the interim orders of injunction were issued on 29 September 2010. He detailed that the whole objective of the *Civil Procedure Act* is the expeditious disposal of suits. He maintained that the Plaintiff was only plodding along and using the resources of the Judiciary to delay matters. Where a plaintiff is seeking interlocutory orders, it must come to court with clean hands. He noted that since the issue of the injunctive orders on 29th of September 2010, the Plaintiff had not paid a single shilling towards his debt owed to the Defendant. Counsel maintained that the Plaintiff should have demonstrated good faith by making payments towards his loan, which he had admitted to in the Plaint. As regards the hearing of the suit set down for 31st of March 2011, it was the Defendant\\\'s advocates who had invited the Plaintiff\\\'s advocates to fix a hearing date which, however, was taken ex parte. The hearing notice was sent on 24 November 2010. He noted that the first letter dated 22nd of March 2011 to the Plaintiff\\\'s advocates was begging compliance with Order 11. The statement of issues forwarded under cover of that letter was never returned and the suit was taken out of the hearing list at the call-over. Counsel also referred the court to the annexure "TM 3" of the Replying Affidavit, more specifically the note at the bottom of the letter which read: *"the matter will not proceed because the plaintiff is unwell"*.

10. Referring to the Affidavit in support of the application, the Defendant\\\'s Counsel detailed that the Plaintiff had made certain falsehoods including that he was the one that fixed the matter for hearing (see paragraph 4). It also said that that the Plaintiff attended Court. Counsel commented that a mere sighting in the court corridor cannot be considered as attendance before court. He also commented that the normal practice undergone, when the court file is lost, was to write to the Deputy Registrar requesting for a skeleton file to be opened. No written evidence had been shown to the court of any attempt by the

Plaintiff to trace the court file. Counsel detailed that on 2nd March 2012 the court file was in court when the matter was dismissed. There had been no attendance for the Plaintiff and Mr. Justice Kimondo had explained that it was the court who took the initiative to dismiss the suit not the Defendant\\\'s advocates. Counsel submitted that the burden is on the Plaintiff to show that he has set the suit down for hearing. He pointed out that since filing the suit in 2009, the Plaintiff has made no effort to do so. The court has powers under **Order 17 Rule 2** to dismiss the suit which it did on 2nd March 2012. Counsel said that the Plaintiff had been informed of the dismissal of the suit but he had delayed in seeking restitution of the same. Finally, Counsel noted that the Plaintiff has not paid the loan back to the 1st Defendant or the interest thereon. Although the security given to the 1st Defendant was a family house, it had been given as security by the Plaintiff to the Defendant for the loan. The Plaintiff has failed to repay the loan and Counsel saw no reason why his client should not realize its security. Counsel referred the court to the Defendant\\\'s list of authorities which he said spoke for themselves.

11. Mrs. Morara in a brief reply stated that the Defence Counsel had not shown to this court a copy of the Notice for the Dismissal of the suit. She reiterated that the Plaintiff had not been served with such Notice. She noted that when the Plaintiff appeared before Mr. Justice Mabeya, the court had been operating on a skeleton file. She commented that the main court file had not been produced in court until the hearing of the application on 25th of June 2012. I must confess to have some doubts as to the accuracy of the Plaintiff\\\'s Counsel\\\'s submission in that regard because on perusing the court record on both the main file and the skeleton file, I don\\\'t see the matter ever having been before Mr. Justice Mabeya. Indeed, a close perusal of the skeleton file shows that it was opened on 27th September 2010 and that on the next day the matter came before Mr. Justice Muga Apondi. On the day after, 29th of September 2010, the file was placed before Lady Justice Khaminwa who had been dealing with the matter as regards the application for interim injunctive orders.

12. The Plaintiff laid before court the useful authority of **Chaudhri v Boit & Ors.** (Supra) from which I gained considerable guidance from the words of Kneller J (as he then was) in the case of the **E. T. Monks and Co Ltd v Evans** (1985) KL R 584 when he stated as follows:

"The court when pondering over an application to dismiss a suit for want of prosecution should among other things asked whether the delay was lengthy, as it made a fair trial impossible and was it inexcusable. Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances….. If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part ensure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendant but against its own advocates. Should the trial proceed despite a prolonged delay the plaintiff may not succeed because it cannot after such a long time establish liability and then it has no remedy against anyone else. If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself….. The court may consider the matter of limitation and whether or not the plaintiff might probably succeed in the action of negligence against its lawyers and might prefer to be slow in deciding to dismiss for want of prosecution, but looking at the matter as a whole may order the application be dismissed and the award the defendants the costs of the suit and of the application…. It is the duty of the plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position. A plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy…. If the court is satisfied that there will be prejudice to the defendant as a result of a delay of 10 years if the case proceeds and it would be impossible to have a fair trial then the suit is dismissed for want of prosecution."

The case of the **City Council of Nairobi** (supra) was useful from the point of view that the learned Judge who dealt with the matter was faced with submissions that the delay had been caused by the disappearance of the court file. In that suit Lady Justice Mugo felt that there was justification and did not dismiss the suit for want of prosecution. However the facts therein detailed that the Plaintiff had made

some, albeit half-hearted attempts, to set matter down for hearing but is that the case here?

Regretfully as regards the **Njanjugu Ltd.** case (again supra) I found no assistance in relation to the application before this court. As regards the final case quoted to me by the Plaintiff being **Kiptoon & Another.v Dullo& 2 Others.** *HCCC No. 4 (Nakuru) of 2005*, that involved the setting aside of an ex parte judgment and I saw no bearing whatsoever between the facts and content thereof in relation to the matter before me.

13. The Plaintiff detailed before court some eight authorities which it considered pertinent to the application before me. The first 2 were contained in Halsbury\\\'s Laws of England volumes 37 and 16. At paragraph 448 on page 337 volume 37, the learned author detailed three interesting passages relating to dismissal for want of prosecution under inherent jurisdiction. The first read as follows:

"… The court has the inherent jurisdiction to dismiss an action for want of prosecution where there has been prolonged or inordinate and inexcusable delay in the prosecution of the action causing or likely to cause serious prejudice to the defendant or giving rise to a substantial risk that a fair trial would not be possible. The principle is that it is the duty of the plaintiff\\\'s advisers to "get on" with the case, since public policy demands that the business of the courts should be conducted with expedition. This is a general principle and applies to all stages of an action before trial….".

Further, the learned authors of Halsbury's detailed:

"A plaintiff\\\'s solicitor who does not "get on" with his case will be at risk of having the plaintiff\\\'s action dismissed for want of prosecution and himself rendered liable for negligence to the plaintiff as his former client."

Finally and as a general rule the learned authors stated:

"On an application to dismiss for want of prosecution the court will take into account all the circumstances of the case, including the nature of the delay and the extent to which this has prejudiced the defendant, as well as the conduct of all the parties and their lawyers."

14. As regards the maxim: "He who comes into equity must come with clean hands" paragraph 751 of Volume 16 of Halsbury\\\'s Laws of England detailed:

"that a court of equity will refuse relief to a plaintiff's misconduct in regard to the subject matter of the litigation it has been improper……. This principle is to be applied no less flexibly than its common law counterparts; and it requires the court to undertake a balancing exercise and to consider whether or not it would be an affront to the public conscience to grant the relief sought having regard to the conduct of the person seeking it."

To my mind, the above quotations from Halsbury\\\'s Laws of England probably lay down the correct principles in relation to striking out for want of prosecution on the one hand and the behaviour of a dilatory plaintiff on the other. However I also note the remarks of my learned brother **Kimaru J** in the case of **Alice M. Nganga v Danson Nganga and Naivasha Municipal Counsel (2006) e KLR** when he observed:

"I have carefully considered the said argument advanced by the applicant in support of her case to have the same order of dismissal set aside. This Court has unfettered discretion to set aside any order which was entered ex parte. This discretion however, has to be exercised judicially. The applicant must satisfy this court that she has good reasons why she failed to attend court when the said application for dismissal was heard and determined in her absence. In the present case, I\\\'m not satisfied that the applicant has advanced sufficient reasons to enable this court to exercise discretion in her favour. In the first place, she cannot blame her counsel who was then on record for failing to attend court when the said application was listed for hearing. This court has ruled in several cases that a civil case once filed, is owned by a litigant and not his advocate. It behoves the

litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not, per se, make this court exercise its discretion in favour of an aggrieved litigant. This court will exercise its discretion in favour of such a litigant after taking into consideration all the factors that are applicable in the case."

The learned judge then went on to quote the finding of the **Court of Appeal (Waki JA)** in **Peter Kihumba v Gladys W. Migwi& Anor.** *Civil Case No.29 of 2006 (Nyeri)*(unreported) as follows:

"With respect, I think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea that they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation. It is for the reason that it was a land matter that it should have been handled with the sensitivity and diligence that entails such matters. Instead the applicant and his advisers exhibited undesirable nonchalance, which am not inclined to countenance."

15. The Defendant\\\'s then quoted to this court the case of **Hotwax Hotels Ltd v Nairobi City Council (2005) e KLR** but that was an authority dealing with the circumstances in which a court of appeal should upset the exercise of a discretion of a trial judge which I found to be of little assistance. Neither did I get much help from the case of **Safina Ltd v Jamnadas (K) Ltd (2006) e KLR**. However, in taking account of the principles to be applied when considering applications brought in the Court of Appeal as to dismissal for want of prosecution of an appeal under **Rule 4** of the Court of Appeal Rules(which are similar as to the principles for striking out a case for want of prosecution in this court). I found some assistance in the Court of Appeal finding in **Kissi Petroleum Products Ltd v Kobil Petroleum Ltd & 2 Ors (2006) e KLR** as follows in relation to **Lakha, JA's** observation in the case of **Major Joseph M. Igwate v Muhura M'Ethare& Anor.** *Civil Application No. Nai. 8 of 2000*(unreported):

"The application made under rule 4 of the Rules is to be viewed by reference to the underlying principles of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini-appeal) the effect of the delay on public administration, the importance of the compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance to them."

As regards the equitable maximas quoted above, the Defendant cited the case of **Silas Koome Maingi v Michael Murithi (2006) eKLR** but I found little assistance from this authority. However quoting the case of **Ichatha v Housing Finance Company of Kenya Ltd.,** *Civil Application No. 108 of 2005,*the authority cited by the Defendant of **Mugambi v Housing Finance Company of Kenya Ltd (2006) eKLR, Ochieng J** detailed:

"A plaintiff should not be granted an injunction if he does not have clean hands, and no Court of equity will allow man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or give an advantage by virtue of his own refusal to make repayment to the Defendant/Respondent a debt which he expressly undertook to pay."

16. Such then would seem to be the law and the principles by which this court should be guided in the application before it. I have carefully perused the record of this court since Lady Justice Khaminwa granted injunctive orders in relation to the Plaintiff\\\'s property on 29 September 2010. On 23 November

in that year the advocates for the defendant fixed the hearing date for the suit ex parte for the 31st March 2011. On 25th February 2011 at the call over before S. A. Okato, Deputy Registrar, Mrs. Sirani appeared holding brief for Mr. Ibrahim for the Defendant. The matter was taken out of the hearing list. The next time that this file appeared before court was on 2 March 2012 when my learned brother Kimondo J. dismissed the suit and said:

"No case in the circumstances has been shown. I hereby dismiss the suit. As the NTSC was taken out *suo moto* **by court I shall not order any costs. Order accordingly."**

What the court record shows is that no effort was made by the Plaintiff or his advocates to set down the suit for hearing once the injunctive orders were in place. The Plaintiff was happy to sit on his hands with the knowledge that injunctive orders were in place until the hearing of the suit. He and/or his advocates thus took no action whatsoever to bring this suit to trial – no documents filed, no witness statements filed and no statement of issues forwarded to the other side for approval. Indeed it was the Defendant\\\'s advocates who sent a draft statement of issues to the Plaintiff\\\'s advocates when they knew that the suit was coming for hearing on the 31st March 2011.

17. Nowhere in the Affidavit in support of the Application has the Plaintiff detailed that he was going to pay back the loan he took from the 1st Defendant. In the Plaint he has admitted securing a loan facility in December 2004. Indeed in paragraph 7 of the Plaint he admits paying some installments but requested of the Defendant in writing that he be allowed to make further installments by the end of February 2009. To my mind the plaintiff, even when he came to court, knew full well that he owed monies to the 1st Defendant. Further, the Plaint itself concentrated in its main prayer in asking for a permanent injunction to be issued to restrain the 1st Defendant from selling or disposing of the property. In a secondary prayer, the Plaintiff requested for the taking of accounts. To make matters worse, the Supporting Affidavit to the Notice of Motion sworn by the Plaintiff on 26 June 2012 contains inaccuracies. Firstly, in paragraph 2 the Plaintiff having admitted loan money is borrowed from the 1st Defendant now details that it is "a purported outstanding loan". As far as this court is concerned from a reading of the Affidavits the Plaintiff still owes money to the 1st Defendant. At paragraph 4 of the Supporting Affidavit, the opponent states that after the grant of interim orders "we fixed a matter for hearing on 31st March 2011". This is simply not the case, it was the Defendant\\\'s advocates who fixed the hearing date of 31st March 2011 ex parte. At paragraph 5 of the Supporting Affidavit the deponent says: "that on the 31st March 2011 when we appeared in court the matter was conspicuously absent from the cause list." Again this is simply not true as the case had not been confirmed at the Call-over at the end of February 2011. To my mind, the Plaintiff was doing all he could to avoid this matter coming for hearing.

18. The outcome of all the above is that I am not prepared to grant the orders sought to set aside and/or vary the order of dismissal of this suit made by this court on 2nd March 2012. In any event for me to do so would be as if I were sitting on appeal as regards the orders made by my brother Mr. Justice Kimondo. Although the said Notice of Dismissal may not have been served upon the Plaintiff's advocates, I sincerely doubt that this would have made any difference to the learned Judge's decision. Further, having confirmed the dismissal of this suit I am not in a position to grant prayer 3 of the Application as requested by the Plaintiff. The Defendants will have the costs of this Application in any event.

DATED and delivered at Nairobi this 16th day of July 2012.

J. B. HAVELOCK
JUDGE