



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 70 & 71 OF 2009

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

CHEMBE HOLDINGS LIMITED.....1ST DEFENDANT

MUSK DEER LIMITED.....2ND DEFENDANT

SAMMY KOMEN MWAITA.....3RD DEFENDANT

RULING

1. The Application for determination is the Notice of Motion dated 7th August, 2018 in which the Plaintiff/Applicant is seeking to vary or set aside the order of this court made on 17th October, 2017 which dismissed the suit for want of prosecution and for the suit to be reinstated. The grounds upon which the Application is premised briefly are that the Plaintiff's suit in Mombasa ELC No.70 of 2009, KACC –v- CHEMBE HOLDINGS LIMITED & 2 OTHERS was consolidated, with Mombasa ELC No. 71 of 2009, KACC –v- CHEMBE HOLDINGS LIMITED & 2 OTHERS on 14th June, 2012 whereby Mombasa ELC No. 70 of 2009 was identified as the lead files, and that it is regrettable and unfortunate that the Plaintiff's counsel on record then did not attend court on 17th October, 2017 when the matter came up for Notice to show cause. That the suit is partly heard and the Plaintiff is desirous to prosecute the same to its logical conclusion. That the defendants would not be prejudiced if the suit and the serious triable issues attendant therein are conclusively adjudicated on merit and that it is in the best interest of justice and public interest to reinstate the Plaintiff's suit. The Application is further supported by the affidavit of Francis O. Makori, advocate for the Plaintiff sworn on 7th August, 2018 in which he reiterated the grounds in support of the Application.

2. The Application is opposed by the 1st Defendant, who filed grounds of opposition dated 20th February, 2019. It is the 1st defendant's contention inter alia, that the no reason and/or explanation has been given by the Plaintiff for non-attendance on 17th October, 2017 and the delay of about 10 months in bringing the Application herein is inordinate and inexcusable and has not been explained.

3. The Application is also opposed by the 2nd Defendant through a replying affidavit sworn on 19th October, 2018 by Ashok Labhshanker Doshi in which he deponed inter alia, that the Application is baseless and no reasons have been given for grant of the orders sought, that the Application has been brought after an inordinate delay and that the 2nd defendant stands to suffer prejudice if the Application is allowed.

4. The Advocates for the Plaintiff and for the 1st and 2nd Defendants filed submissions in support of their opposing positions and also relied on decided cases.

5. I have considered the Application and the submissions made as well as the authorities cited. The record shows that the matter was consolidated with **ELC No. 71 of 2009** on 14th June 2012 and this matter (70 of 2009) was made the lead file. The record further shows that the matter is part-heard, the Plaintiff's first witness (PW1) having testified on 4th March 2014. The case was stood over to 28th July 2014 for cross-examination of PW1 and further hearing. The matter did not however proceed on 28th July 2014. However, it appears the matter came before court on 7th November, 2014 when the court directed that a convenient date for hearing be fixed in the registry. On 28th January, 2016, the parties representatives appeared in the registry and listed the matter for hearing on 22nd September, 2016. On 22nd September, 2017 the court (Komingoi J) fixed the matter for notice to show cause on 17th October, 2017 when none of the parties appeared in court and the suit was dismissed for want of prosecution, hence the filing of the present Application.

5. Order 17 Rule 2 of the Civil Procedure Rules allows the court to dismiss a suit for want of prosecution in a matter in which no Application has been made or step taken by wither party for one year. The court is vested with discretion to reinstate a suit that has been dismissed. Just as in all other discretion, the same must be applied judiciously. As was stated in the case of **Shah –V- Mbogoh (1967)EA 116**, the court has

discretion to reinstate a matter dismissed and such discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. The essence of justice is to allow each party to ventilate his/her case in full and courts ought to be slow to shut out a party from presenting his/her case. Where there is a good reason provided, the court generally ought to allow an Application to reinstate a suit.

6. In the case, I note that the case was consolidated with ELC No. 71 of 2009 and this file was identified as the lead file. I also note that the case is part-heard, the Plaintiff having called one witness who is yet to conclude testifying. The Plaintiff's said witness was to continue testifying and be cross-examined on 18th July 2014. However, on that material day, the matter could not proceed for the reason that the said witness was not available. Even though the matter was fixed for hearing on 10th November, 2014, the record shows it came up earlier on 7th November, 2014. As already stated, the parties appeared in the registry on 28th January 2016 and fixed the matter for hearing on 22nd September, 2016. Again, it is not clear from the court record what transpired on 22nd September, 2016 as the matter only came up before the court on 22nd September, 2017 when it was stood over to 17th October 2017 when none of the parties attended, hence the dismissal.

8. The Plaintiff has admitted that its advocate then on record failed to attend court on 17th October, 2017 for the hearing of the Notice to show cause. I also note that the defendants were not present in court. For the reasons that the matter was consolidated with **ELC No. 71 of 2009** and is part-heard, and because the Plaintiff took active steps on 28th January 2016 and fixed the matter for hearing on 22nd September, 2016 (though it is not clear what transpired on that day), I will exercise my discretion and give the Plaintiff the benefit of doubt. The overriding objective of the court would also come to the aid of the Plaintiff. The Defendants who themselves were also not present in court have not demonstrated that they will suffer prejudice if the orders sought are granted.

9. For the foregoing reasons, I am satisfied that the Plaintiff's Application dated 7th August, 2018 has merit. The Application is allowed. The order made herein on 17th October 2017 dismissing the suit is set aside and the case is reinstated for hearing on merit. Each party to bear own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 19th day of September 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Makori for plaintiff/applicant

Oduor Opalo holding brief for Ngaine for 1st Defendant

Mutugi holding brief for Oluga for the 2nd defendant

No appearance for defendant.

Yumna Court Assistant

C.K. YANO

JUDGE