REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

HCC No. 150 OF 2012

NDIBITHI FARMERS CO. LTD.....PLAINTIFF

VERSUS

MWANA MWIRERI RIRONI & NAIVASHA FARMERS CO. LTD....DEFENDANT

RULING

1. Through Notice of Motion dated 11th March 2016, the plaintiff seeks the following orders:

> ***1. Spent.***
>
> ***2. That this honourable court be pleased to set aside the orders issued herein on the 7th day of July 2015 dismissing the plaintiff's suit for want of prosecution by the plaintiff.***
>
> ***3. That subsequent to prayer (2) above, the honourable court be pleased to order that the plaintiff's suit be reinstated and the same be listed for hearing in the normal manner or in such a manner as may be ordered by this honourable court.***
>
> ***4. Costs of the application be provided for.***

2. The application is supported by an affidavit sworn by Charles Kimani Ngethe, a director of the plaintiff company. He deposed that on 4th March 2016, the defendants showed to the plaintiff an order to the effect that this suit was dismissed on 7th July 2015. Prior to the said service, the plaintiff was not aware that the suit had been dismissed and that the plaintiff's advocate on record was not served with notice to show cause prior to the dismissal. He added that the plaintiff wanted to comply with the orders of 18th September 2014 but was hold back by "a myriad of cases".

3. The defendant opposed the application through a replying affidavit sworn by Naomi Wangui Wambugu, its chairlady. She deposed that the plaintiff had failed to comply with the orders made by the court on 18th September 2014 and that no explanation has been offered for such failure.

4. The application was argued by way of written submissions. The applicant's submissions were filed on 19th October 2016 while the respondent's were filed on 20th June 2017. I have considered the application, the affidavits filed the submissions as well as the authorities cited. In an application seeking setting aside, the court is called upon to exercise discretion pursuant to the principles laid down in **Mbogoh & Another v. Shah [1968] EA 93** which were more recently reiterated as follows in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR:**

> ***From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).***

5. The record shows that on 30th June 2015, the court issued a Notice of show cause why this suit should not be dismissed under Order 17 Rule 2. The rule provides:

2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.

6. The Notice was addressed to M/s Kaka Kamau & Co. Advocates who were and still are on record for the plaintiff and to Kaburu Miriti & Co. Advocates for the defendant. Though the deponent of the supporting affidavit stated that the plaintiff was informed by its advocates on record that the advocates were never served with the Notice to show Cause, the advocates have themselves not sworn any affidavit herein denying service.

7. I also note that through application dated 16th August 2013, the defendant had sought dismissal of the suit on the ground that the plaintiff had failed/refused to serve summons to enter appearance upon the defendant for a period of over one year from the date of filing, among other reasons. The application was heard by M. J. Anyara Emukule J. who stated as follows in a ruling dated 18th September 2014:

However, I find that the plaintiff has been acting in bad faith with an intention to abuse the court process. It ought to have petitioned the court to set aside the dismissal order upon giving reason on why it had shown laxity in prosecuting its claim and satisfying the court that it was ready to have the matter determined expeditiously. Instead, the plaintiff filed a fresh suit in this court which was accompanied with an application for interlocutory injunction barring the defendant from interfering with its quiet use or possession of the land or otherwise dealing, surveying the land pending the hearing and determination of the suit.

After this application was disallowed by this court on 12th October 2012, no further step was taken in this suit by the plaintiff until the defendant filed the present application on 16th August 2013. The plaintiff has demonstrated that its intention is to abuse the court process by keeping the respondent in litigation.

8. The court nevertheless granted the plaintiff a chance to prosecute its case and ordered the plaintiff to set down the suit for hearing within 12 months from the date of the ruling failure to which the suit would stand dismissed. Parties were equally ordered to comply with Order 11 of the Civil Procedure Rules. I have perused the record and I note that besides filing Notice of Change of Advocates on 24th February 2015, Reply to Defence on 24th February 2015 and the application currently before the court, the plaintiff did not take any other step in the matter.

9. On the other hand, the defendant filed statement of defence as well as other compliance documents which are required under Order 11 on 1st October 2014. In view of the history of the matter which included M. J. Anyara Emukule J.'s finding that the plaintiff intended to abuse the court process by keeping the respondent in litigation, the plaintiff had a duty to show the court that it had made extra effort to get the matter ready for hearing. I do not see any evidence of any such effort. Instead, the plaintiff has yet again approached the court seeking to be indulged and be given a chance to prosecute the case.

10. One of the consideration in determining an application such as the present one is that where there is evidence of service, the court has discretion to grant setting aside. From the material placed before the court, there is ample evidence that the Notice to show cause was served upon the applicants advocates at the address of service provided. In the absence of an affidavit sworn by the advocates specifically denying service, I find and hold that service was effected.

11. Discretion in an application for setting aside ought to be exercised so as to do justice as between the parties. It should not be exercised so as to assist a party who has shown clear signs of abusing the court's process. In view of the applicant's failure to timeously take steps to prepare the suit for hearing and further considering the applicant's past conduct which the court found to be intended to abuse court process by keeping the respondent in litigation, I am persuaded that exercising discretion in favour of the applicant would be tantamount to a gross failure to do justice as between the parties.

12. Further, I take into account that pursuant to the order made by M. J. Anyara Emukule J. on 19th September 2014, the suit would have stood dismissed on 18th September 2015 owing to failure to set it down for hearing. Despite being aware of the said orders, the plaintiff did not take any step in the matter until 14th March 2016 when the application currently before the court was filed. By then the suit would have been dismissed about six (6) months back.

13. From the foregoing discussion, it is abundantly clear that Notice of Motion dated 11th March 2016 cannot succeed. It is hereby dismissed with costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 19th day of June 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Kaka for the plaintiff/applicant

No appearance for the defendant/respondent

Court Assistants: Gichaba & Lotkomoi