



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 302 OF 2015

TOTAL KENYA LTD.....PLAINTIFF

VERSUS

DANSON G. NDITO & 23 OTHERS.....DEFENDANTS

RULING

1. By a notice of motion dated 24th July 2017 and amended on 2nd November 2017 brought under the provisions of **sections 1A, 1B & 3(A) of the Civil Procedure Act, Order 12 Rules 3 and 7, Order 51 Rule 1 of the Civil Procedure Rules, Article 159 of the Constitution of Kenya** and all other **enabling provisions of the law**, the Plaintiff applied for setting aside of the order made on 12th July 2017 dismissing the suit for want of prosecution.
2. The said application was based upon the following grounds;
 - a. The suit was dismissed for want of prosecution on a date it was scheduled for hearing.
 - b. The advocates for both the Plaintiff and the Defendants had consented to have the suit adjourned on 12th July 2017.
 - c. The failure by the Plaintiff's witnesses to attend court was not deliberate.
 - d. The Plaintiff was not issued with a notice to show cause under **Order 17 Rule 2 of the Civil Procedure Rules** prior to dismissal of the suit.
 - e. The Plaintiff stood to suffer irreparable prejudice unless the suit was reinstated.
 - f. The Defendant would not suffer any prejudice which could not be compensated in costs.
3. The said application was supported by an affidavit sworn by Stephen Atinya on 2nd November 2017. The gist of the said affidavit was that the advocates for the parties had consented to adjourn the suit on 12th July 2017 and notified the Deputy Registrar of that wish in writing. Mr Atinya confirmed that the Plaintiff was aware of the hearing date but did not avail witnesses because of the said agreement between the advocates on record.
4. The Defendants filed a replying affidavit sworn by Stephen Ndegwa Mwangi on 8th January 2018 in opposition to the said application. It was stated that most of the Defendants were deceased even at the time of filing suit and that the Plaintiff had failed to undertake substitution for several years. It was further stated that the Plaintiff had not been diligent in the prosecution of the suit hence the Defendants had taken the initiative in fixing hearing dates on several occasions. It was contended that no prejudice would befall the Plaintiff if the orders sought were denied.
5. When the said application was listed for hearing on 12th March 2018, the Plaintiff's counsel prosecuted the said application while the Defendants' counsel opposed the same on the basis of the replying affidavit on record. The Plaintiff's counsel relied upon the case of **Wangulu Enterprises Ltd Vs Abdalla Said Kugotwa & 6 Others [2015] eKLR** in support of the said application whereas the Defendants' counsel did not cite any authority.
6. The court has considered the Plaintiff's said amended application for setting aside the dismissal order made on 12th July 2017. The main question for consideration is whether the Plaintiff has made out a case for setting aside of the dismissal order. The court is aware that it has a wide discretion to set aside a dismissal order such as the one the subject of the instant application. However, like all judicial discretion, it

must be exercised judicially and upon reason. It cannot be exercised upon caprice, whim or sympathy. See **CMC Holdings Ltd Vs James Mumo Nzioki [2004] eKLR**.

7. The court has noted from the court file that the suit was filed on 20th February 2009. There was considerable delay in prosecuting the suit between the date of filing and date of dismissal on 12th July 2017. When the suit first came before me on 9th May 2017, the Plaintiff's counsel was not ready to proceed even though the Defendants' advocate was ready to proceed. The suit was consequently adjourned to 12th July 2017 for hearing and the Plaintiff ordered to pay court adjournment fees and the Defendants' costs of Kshs 6000/- as well as the costs of Kshs 4,000/- previously ordered on 11th May 2016 by Hon Justice Boaz Olao.

8. When the suit was listed for hearing on 12th July 2017, the advocates on record for the parties sent other counsels to hold their brief and inform the court that they had consented to adjourn the suit. The advocates on record had written to the court communicating their consent to adjourn the suit.

9. The court was not satisfied that any further adjournment was deserved. Upon perusal of the record, it became clear that the suit was adjourned on 11th May 2016 before Hon Justice Boaz Olao because the Plaintiff's counsel intended to apply for substitution of the deceased defendants. That was the same reason given by Mr Andande, the advocate who was holding brief the Mr Rukioya for the Plaintiff. The Defendants' advocate was said to be held up in Chuka Law Courts in Chuka Succession Cause No. 726 of 2015.

10. Upon the court declining to adjourn the suit on 12th July 2017, Mr Andande informed the court that he had no further instructions or evidence to offer. In those circumstances, the court dismissed the Plaintiff's suit for want of prosecution.

11. The court has noted from the exhibits to the Plaintiff's application that the Plaintiff's advocate had difficulties holding pre-trial meeting because its witness (a staff member) was said to be on leave and was due to resume on the morning on 12th July 2017. The court has also considered the explanation rendered by the Plaintiff that the advocates had agreed amongst themselves to adjourn the suit without regard to the age of the suit or the sanction of the court.

12. The court is not satisfied that a reasonable explanation has been given by the Plaintiff and its advocates on record on why they were not prepared for the hearing on 12th July 2017. Unlike the case of **Wangulu Enterprises Ltd Vs Abdalla Said Kugotwa & 6 Others (supra)**, the Plaintiff and its advocates were fully aware of the hearing date. The Plaintiff's advocates knew, or ought to have known, that they were not at liberty to short-circuit the court process by making an agreement to adjourn a suit which had been pending for over 8 years.

13. The court, therefore, finds that no good reasons have been advanced by the Plaintiff to justify the exercise of judicial discretion in its favour. The record also shows that the Plaintiff has not been diligent in the prosecution of the suit over the years. No explanation was given for such a lengthy delay.

14. Before I conclude the ruling, I would like to advert to the issue of the notice to show cause which was raised by the Plaintiff. It was submitted that the dismissal of the suit was erroneous because no notice to show cause had been served under **Order 17 Rule 2 of the Civil Procedure Rules**. In my understanding, a notice under the said rule is issued by the court only when a suit has been dormant for the stipulated period and the court invites the parties to show cause why it should not be dismissed for want of prosecution. It does not apply to a situation where the matter has been listed for hearing and the Plaintiff has failed to prosecute the suit. It would not have made any sense for the court to issue a notice on 12th July 2017 for the parties to show cause on another date when the advocates were represented in court. They could have offered the explanation or showed cause on 12th July 2017.

15. In the premises, the court finds no merit in the Plaintiff's notice of motion dated 24th July 2017 and amended on 2nd November 2017. The same is consequently dismissed with costs to the Defendants.

16. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 11th day of OCTOBER, 2018.

In the presence of Mr. Momanyi holding brief for Mr Macharia for the Plaintiff and in the absence of the Defendants' Advocates V.E. Muguku Muriu & Co.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

11.10.18