



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 83 OF 2014

HARDWARE AND GENERAL STORES.....PLAINTIFF

VERSUS

JIHAN FREIGHTERS LIMITED.....DEFENDANT

RULING

1. The Application before Court is the Notice of Motion dated 8th January 2018 brought by the Plaintiff under Section 1A, 1B, 3A and 80 of the Civil Procedure Act, Order 12 Rule 17 and Order 45 (1) of the Civil Procedure Rules. The Plaintiff is asking the Court to review and/or set aside the order issued on 18th October, 2017 which this suit was dismissed for want of prosecution. The Application also prays for reinstatement of the suit.

2. The Application is premised on the grounds set out in the face of the motion and supported by the affidavit of Sanjit Singh Kuldip Suri sworn on 8th January 2018. It is the Plaintiffs contention that the suit was filed on 10th April 2014 when the court issued temporary injunctive orders against the defendant. That the defendant disobeyed the injunctive orders prompting the Plaintiff to file an application for contempt against the defendant's Director. The Application for contempt was heard and on 17th December 2014 the court found the defendant's Directors in contempt of Court and summoned him to attend court and show cause why he should not be committed to civil jail.

3. It is deponed that on 22nd December 2014 the defendant filed a Notice of Appeal and an Application for stay of execution of the court's ruling which Application was dismissed on 3rd June, 2015. That the Plaintiff set the suit for hearing on 29th September 2015 on which date the court directed that the Appeal filed be dispensed with first. In the meantime Kenya Railways Corporation filed an application dated 17th August 2016 seeking to be joined as a defendant in the suit.

4. It is further deponed that when the plaintiffs clerk attended court registry on 6th December 2017 to fix the matter for hearing and/or directions he found that the suit had been dismissed want of prosecution on 18th October, 2017. It is the Plaintiff's contention that their advocates on record were not served with any application or the notice to show cause or hearing notice requiring them to attend court on 18th October, 2017. The plaintiff contends that it stands to suffer irreparable loss and damage unless the orders sought are granted as it will lose the suit property.

5. The application is opposed by the defendant who filed grounds of opposition dated 12th February 2018 on the following grounds:

- 1. That the application is being made after an unreasonable delay.**
- 2. That the Plaintiff clearly had no interest in pursuing its case after obtaining ex-parte orders of injunction.**
- 3. That litigation must come to an end.**
- 4. That no reasonable explanation has been provided by the plaintiff as to why the suit remained dormant since inception.**
- 5. That the suit was listed by the court *suo moto* and notices posted at the court registry.**
- 6. That it is not true that the dismissal of the suit resulted in the plaintiff losing the suit property.**
- 7. That the plaintiff remains the owner of the suit property.**

8. **That the suit was for vacant possession and the plaintiff is at liberty to file another suit.**

6. I have considered the application and submissions filed. The question for determination is whether the court should set aside the order issued on 18th October, 2017 dismissing the suit herein and have the same reinstated.

7. When dealing with a similar application, **Gikonyo, J** in **Mwangi S. Kimenyi v- Attorney General & Another (2014)eKLR** stated as follows:

“I should think the question whether notice for dismissal of this suit was given under Order 17 Rule 2 of the Civil Procedure Rules (hereinafter CPR) is a matter of preliminary significance. First, there is no mandatory requirement under Order 17 Rule 2 of the CPR that a notice should be given to the plaintiff before a suit which offends the order is dismissed for want of prosecution. Equally order 17 rule 2 of the CPR used the word “give” and not “serve”. To give notice is not the same thing as to serve notice within the context of the Civil Procedure. The distinction between the two terms is important because both are legal as well as technical but bear different mechanisms, albeit, however, both are intended to bring notice or attention of the party to be affected by the proceeding. “Give” in the context of Order 17 rule 2 of the CPR denotes “to impart or confer by a formal” whereas “serve” in the legal sense denotes “to make legal delivery of the court process.” My own view, therefore, is that a notice under 17 rule 2 of the CPR is deemed to have been given by the court when it placed in the official website of the judiciary or in the cause list.”

8. I am persuaded by the above reasoning. In my view, notice for dismissal of this suit was given by the court through its website and the cause list for 18th October, 2017. What remains is for me to determine whether the delay herein is inordinate and unexplained.

9. According to the plaintiff, the delay was occasioned by the appeal filed by the defendant and the application made by Kenya Railways Corporation to be joined as a defendant in the case. Though the said appeal has been decided, the said application is pending. The plaintiff urges the court to invoke its inherent power in this case in the interest of substantive justice and reinstate the suit to allow it ventilate its case meritoriously.

10. The defendant on its part is of the view that the delay is inordinate. The defendant thinks the plaintiff was indolent and will not suffer any loss as it remains the registered owner and could still file another suit.

11. The major issue I should determine is whether the delay herein has been explained such that this suit ought to be reinstated for trial. I think there is no dispute that there was an application that was determined by the court vide its ruling dated 17th December 2014 that resulted in an appeal being filed by the defendant. That appeal was however determined on 30th October, 2015. There is also no dispute that there is an application dated 17th August 2016 filed by Kenya Railways Corporation seeking inter alia to be joined as a defendant in this suit or in the alternative to have this suit consolidated with **HCCC No.90 of 2011**.

12. In the case of **Mwangi S. Kimenyi (supra)** it was stated that ***“there is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject of the case; the nature of the case; explanation given for the delay; and so on and so forth.”*** The decision whether a suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. I hasten to add that dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. Any explanation for the delay which is given should be properly evaluated by the court to see whether it is reasonable. That notwithstanding, a court of law should not hesitate to dismiss a suit for want of prosecution where it strongly feels the sustenance of the suit will only breed extreme prejudice to the defendant. It must also weigh the prejudice the dismissal will cause the plaintiff.

13. Looking at the material before me and the explanation offered, the delay in prosecuting the suit is not inexcusable, or contumelious. I think the explanation given is reasonable. A further re-consideration of the circumstances of the case also reveals that the delay herein has not given rise to substantial risk to fair trial or resulted into grave injustice to the defendant. I admit it was necessary for the plaintiff to have taken steps to advance its case, including scrutinizing the cause list for 18th October, 2017 because the same was advertised in the judiciary website and the court’s notice board. That notwithstanding I am persuaded the circumstances of this case justifies giving the plaintiff another chance which is not only feasible but also the just thing to do. Filing of a fresh suit as suggested by the defendant would add to additional expenses and costs. I accept the explanation provided by the plaintiff to be reasonable explanation for the delay.

14. Accordingly I set aside the order issued on 18th October, 2017 dismissing this suit. The suit is reinstated. The plaintiff is the author of the state of affairs in this case and so it shall pay costs to the defendant. It is so ordered.

Dated, signed and delivered at Mombasa this 17th day of December, 2018.

C. K. YANO

JUDGE