



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 908 OF 2012

MURPHY CHEMICALS E.A LIMITED.....PLAINTIFF

VERSUS

HASBAH COMPANY LIMITED.....1ST DEFENDANT

ABDULLA SAID AHMED.....2ND DEFENDANT

EVANS MBOGO.....3RD DEFENDANT

ABDIRAHMAN MUHAMED ABDI.....4TH DEFENDANT

AINU SHAMSI AUTOMOBILE AND HARDWARE LIMITED.....5TH DEFENDANT

COMMISSIONER OF LANDS.....6TH DEFENDANT

PRINCIPAL REGISTRAR OF TITLES.....7TH DEFENDANT

DIRECTOR OF SURVEYS.....8TH DEFENDANT

RULING

There are two applications for determination before this court. The application dated 20/03/2019 was brought by the Plaintiff seeking reinstatement of the suit which was dismissed on 19/3/2019. The second application dated 10/05/2019, was filed by the 1st and 5th Defendants seeking to have the order made on 19/3/2019 dismissing the suit reviewed and replaced by an order stating that the Plaintiff's suit was dismissed for failure to produce evidence and cause the attendance of its witnesses.

The Plaintiff's application dated 20/03/2019 was made on the grounds set out on the face of it and was supported by the affidavit of Lourine L. Ochogo sworn on 20/03/2019. The Plaintiff's advocate deponed that on 19/03/2019 the court dismissed this suit *suo moto* for lack of witnesses on the part of the Plaintiff. She deponed that on that day, she gave Mr. Muchoki instructions to hold her brief and Mr. Muchoki indicated to the court that she was ready to proceed with the hearing and that she would be calling three witnesses. It appears that Ms. Ochogo disputes that what Mr. Muchoki told the court were her instructions, and now urges that the mistake of counsel holding brief should not be visited upon the Plaintiff. She gave a chronology of the events of what transpired on that day and added that most adjournments in the case have been granted at the instance of the Defendants, and that the Plaintiff has always been ready to proceed with the matter to its full conclusion. In addition she deponed that Mr. Mwenesi advocate for the 1st and 5th Defendants had written to her on 15/3/2019 indicating that he would not be ready to proceed with the hearing on 19/3/2019. Looking at that letter, Mr. Mwenesi pointed out that the matter would have to be adjourned when it came up for hearing on 19/3/2019 due to the Plaintiff's failure to comply with the court's directions.

Mr. Kimani Mathu swore a further affidavit on 20/03/2019 in support of the Plaintiff's application. He deponed that he was called on 15/03/2019 by his advocate's secretary who informed him that this case would be heard on 19/03/2019 and that he was required to be in court by 9.00 a.m. While on his way to court, he was caught up in a traffic snarl up along Thika Road that lasted an hour and a half and that unfortunately his phone went off hence he was not able to communicate his predicament to his advocate. By the time he got to Milimani Law Courts, it was past midday and his case had been dismissed. He also deponed that he was ready and willing to prosecute this suit as soon as the court directs.

The 1st and 5th Respondents opposed the Plaintiff's application through the replying affidavit of Stephen Musalia Mwenesi, sworn on 10/05/2019. He deponed that all parties were present in court on 19/03/2019 and that the Plaintiff had not complied with the court's

directions given on 27/11/2018 directing it to prepare the bundle of documents for use at the trial containing pleadings, witness statements and documents with an index. He averred that Mr. Peter Muchoki held brief for the Plaintiff's counsel at 9.a.m and informed the court that the Plaintiff's advocate was ready to proceed with the hearing and would be calling three witnesses, only for the Plaintiff's advocate to seek an adjournment at 11.a.m when the hearing was scheduled to proceed on the ground that she could not reach her witness via phone. He urged the court to dismiss the Plaintiff's application as it did not give sufficient explanation for the Plaintiff's failure to attend court on the day the matter was dismissed.

The 4th Defendant opposed the application through the affidavit of Millicent Ogutu advocate. She deponed that the application had not satisfied the grounds for review as provided under order 45 Rule 1 of the Civil Procedure Rules. Ms. Ogutu pointed out the contradictions in the Plaintiff's application and the facts in support of the application, which she concluded were not sincere and intended to mislead the court.

Parties filed submissions on both applications which the court has considered.

The Plaintiff submitted that it had satisfied the principles governing the reinstatement of a suit. The Plaintiff submitted that it has always been diligent in prosecuting this suit and has not sought to obstruct or delay the course of justice. It added that the Defendants had not demonstrated what prejudice they would suffer if the suit were reinstated.

The Defendants submitted that the Plaintiff had failed to satisfy the court that it is deserving of the orders it seeks to have the suit reinstated and relied on the contradictory statements in the Plaintiff's affidavits on what actually transpired on 19/3/2019. They urged the court to dismiss the application.

The court has a discretionary power to reinstate suits under Order 12 Rule 7 of the Civil Procedure Rules. The issue for determination is whether the Plaintiff has demonstrated reasonable grounds for the reinstatement of the suit and whether the Defendants will suffer prejudice if the suit is reinstated. The court's main concern is to do justice and the court exercises the discretion judiciously to avoid injustice resulting from accident, inadvertence or excusable mistake or error. The exercise of the discretion is not designed to assist a person who has deliberately sought to obstruct the course of justice.

The court has looked at its record. The Plaintiff's advocate sought an adjournment on 22/2/2017. The adjournment granted on 3/4/2017 was at the instance of the 2nd Defendant. On 5/4/2018 the court was informed that the Plaintiff's advocate was not ready to proceed as she had a sick relative at Nairobi Hospital while Mr. Mwenesi had just been instructed by the 1st and 5th Defendants. Mr. Mwenesi sought leave to file a defence and counterclaim when the suit came up for hearing on 10/5/2018. Parties confirmed on 27/11/2018 that the case was ready for hearing and the court fixed the case for hearing on 19/3/2019.

The court agrees with the Defendants that the Plaintiff has given a contradictory account of why its witness was not in court on 19/3/2019 when the suit came up for hearing. The Defendants have not shown what prejudice except to urge that this is an old matter filed more than seven years ago.

In the interest of justice, the court reinstates the suit on condition that it is fixed for hearing within six months of the date of the delivery of this ruling. The Plaintiff will pay the Defendants costs of the application to be assessed by the taxing master.

Turning to the 1st and 5th Defendants' application dated 10/5/2019, they urged the court to review the order vide which the suit was dismissed and replace it with an order that the Plaintiff's suit was dismissed for failure to produce evidence and cause the attendance of its witnesses. Having reinstated the suit, the application for review of the Order under which the suit was dismissed has in the court's view been overtaken by events.

The court has nevertheless considered the submissions filed by parties. The application was brought under Order 17 Rule 4 and Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules. It was supported by Mr. Mwenesi's affidavit. The application was made on the grounds that the court ought to have exercised its jurisdiction under Order 17 Rule 4 of the Civil Procedure Rules but not Order 12 of the Civil Procedure Rules as it did. Mr. Mwenesi averred that according to the law, since all parties were present in court, the suit ought to have been dismissed under Order 17 Rule 4. He added that the court failed to specify the mode of dismissal under Order 12. Order 12 is titled "Hearing and consequence of non-attendance". The reference to Plaintiff and Defendant in this Order applies to the Plaintiff and Defendant as parties to the suit but not their advocates as Mr. Mwenesi contended (see the case of **James A. Mohol v Kenya Breweries Limited**). Rule 3 provides that if on the hearing only the Defendant attends and admits no part of the claim, the case shall be dismissed except for good cause to be recorded by the court. If the Defendant admits part of the claim then the court will enter judgment for that part admitted. If there is a counterclaim then a Defendant may prove his counterclaim based on his burden of proof. Rule 7 gives the court discretion to set aside or vary judgment entered or orders for dismissal of the suit made under Order 12.

Order 17 deals with prosecution of suits. Rule 3 provides that the court may proceed to dispose of the suit in any of the modes directed by Order 12 where on any day to which the hearing is adjourned the parties or any of them fail to appear. In the court's view nothing much turns on whether a suit is dismissed under Order 12 or Order 17 of the Civil Procedure Rules where the Plaintiff fails to appear in court and call evidence since Order 17 Rule 3 brings the scenario under Order 12 within the ambit of Order 17. The court declines to grant the orders sought in the application dated 10/05/2019.

Dated and delivered at Nairobi this 13th day of November 2019

K.BOR

JUDGE

In the presence of:-

Mr. Rono holding brief for Mr. W. Gatonye for the Plaintiff

Ms. C. Guya holding brief for Mr. Mwenesi for the 1st and 5th Defendants

Ms. Z. Ahmed holding brief for Mr. K. Akida for for the 2nd Defendant

Mr. Ken Gichuhi for the 4th Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 3rd, and 6th to 8th Defendants