



REPUBLIC OF KENYA



**Mungafu v Mombasa Maize Millers Limited & another (Civil Suit
123 of 2008) [2022] KEHC 16804 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 123 OF 2008
RN NYAKUNDI, J
DECEMBER 23, 2022**

BETWEEN

STEPHEN KAVOGI MUNGAFU PLAINTIFF

AND

MOMBASA MAIZE MILLERS LIMITED 1ST RESPONDENT

THOMAS AVULALA KIDIAVAI 2ND RESPONDENT

RULING

1. The applicant approached this court vide a Notice of Motion dated October 28, 2021 seeking the following orders;
 1. The order dismissing the Plaintiffs case under order 17 rule 2(1) of the *Civil Procedure Rules* issued on July 8, 2015 be and is hereby set aside.
 2. This Honourable Court be pleased to reinstate the Plaintiff/Applicant matter.
 3. This Honourable Court be pleased to Order for transfer of this file to the Chief Magistrate's Court.
 4. Costs of this application be provided for.
2. The application is premised on the grounds set out therein and the contents of the affidavit in support of the same.
3. The Applicant contends that the matter was dismissed on July 8, 2015 under Order 17 Rule 2(1) of the *Civil Procedure Rules*. He was not served with a Notice to Show Cause why the suit should not be dismissed.
4. On June 22, 2016 the matter was scheduled for hearing however it did not proceed since the court was not sitting. The matter was rescheduled for hearing on March 1, 2017 but the same did not proceed to



date. Upon perusing the court file, he discovered that the matter had been dismissed under Order 17 Rules 2(1) of the *Civil Procedure Rules* on July 8, 2015.

5. The Applicant's case is that the matter was dismissed due to the inadvertence of the Applicants' advocate. Further, that the Applicant should not be punished for the mistake of counsel and the delay in discovery was not deliberate or intended to obstruct or delay the course of justice.

Analysis And Determination

6. The Applicant seeks, in a nutshell, orders for reinstatement of the suit. I have perused the record of the court and I note that the matter was in court for mention on September 19, 2013 where the matter was listed for mention to confirm filing of submissions on October 23, 2013. I also note that the matter was awaiting confirmation of filing of submissions in order for a judgment date to issue. It was then dismissed on July 8, 2015 for failure to show Notice as to why it should not be dismissed under Order 17 Rule 2(1) of the *Civil Procedure Rules*. Order 17 Rule 2(1) of the *Civil Procedure Rules* provides;
 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.
 5. A suit stands dismissed after two years where no step has been undertaken.
 6. A party may apply to court after dismissal of a suit under this Order.
7. Whereas the provisions do not require that the court serve notice, it is imperative that the court exercise its discretion carefully when dismissing a suit. In *Richard Ncharpi Leiyagu v IEBC & 2 others* CA 18/2013, the Court of Appeal held;

The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality." (emphasis added)

8. In the case of *Mwangi S Kimenyi v Attorney General & another* (2014) eKLR, as cited in *Gerald Mwirigi M'Mbui v Stanley Mworio Muthaura* (2019) eKLR Gikonyo, J stated that:-

"But Courts of law are courts of justice to all the parties. And as I stated earlier, 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." (Emphasis added)



9. I have considered that the matter was nearing its logical conclusion and therefore it would not be justiciable to allow the dismissal of the suit. The plaintiff was clearly unaware of the notice to show cause as to why the suit should not be dismissed.
10. In the premises, I hereby set aside the order of July 8, 2015 and reinstate the suit. The file is to be transferred to the Chief Magistrate's court and placed before a Magistrate to proceed to its logical conclusion. Costs will be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ELDORET THIS 23TH DAY OF DECEMBER, 2022

.....

R. NYAKUNDI

JUDGE

