



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 125 OF 2009

LAWRENCE MUTWIRI MURUNGE.....PLAINTIFF

VERSUS

JULIUS MBALE MURUNGI.....1STDEFENDANT

ZACHARIA MURIUKI GILBERT.....2ND DEFENDANT

JESSIKAY ENTERPRISES.....3RD DEFENDANT

RULING

1. The application is dated 26/11/2018 and is premised under the provisions of Order 17 Rules (1) and (2) of the Civil Procedure Code; the applicant seeks for the following orders;

- (i) That this court sets aside the orders of the 30th July, 2018 dismissing the suit for want of prosecution; and
- (ii) The costs of the application be provided for.

2. The applicant relied on the grounds on the face of the application and on the Supporting Affidavit made by the counsel for the plaintiff which is dated the 26/11/2018;

3. At the hearing hereof only counsel for the applicant was in attendance; the 3rd respondent filed grounds of opposition but despite being served with a hearing notice neither counsel nor the 3rd respondent were in attendance; hereunder is a summary of the oral submissions made on the applicant's behalf;

APPLICANT'S CASE

4. The applicant contends he was never served with the Notice for Dismissal of the suit for want of prosecution; and did not deliberately delay in prosecuting this matter but was only obeying the High Court order that had placed a moratorium on all the matters filed against Blue Shield Insurance Company Limited; that this order was in place at the time of dismissal of this suit;

5. The motor vehicle in this matter was insured by Blue Shield Insurance Company Limited; and prays that the suit be re-instated as he stands to suffer great prejudice whereas no prejudice will be occasioned to the respondents;

RESPONDENTS CASE

6. The 3rd respondent relied on its Grounds of Opposition dated 18/03/2019 and contended that the application was incompetent, bad in law, frivolous, vexatious and otherwise an abuse of the court process;

7. That the applicant had come to court with unclean hands as he had failed to prosecute his suit; that the instant application was an afterthought with the intention of delaying the execution of the matter; and prayed that the application be dismissed with costs.

ISSUES FOR DETERMINATION

8. Taking into consideration the above submissions this court has framed the following issues;

(i) Whether the explanation given to re-instate the suit is satisfactory; whether this case is a suitable one for this court to exercise its discretion.

ANALYSIS

9. The applicants suit was dismissed under the provisions of Order 17 Rule 2(1) which allows for dismissal where no application has been made or step taken by either party for one year; the explanation given by the applicant is that no notice of the intended dismissal was ever served upon him; and only got to know about the dismissal when attempting to fix the matter for hearing; the applicant also avers that he was also unable to prosecute the matter as there was a court order that had placed a moratorium over all matters filed against the 3rd respondent;

10. The applicable law for Notice is also found under the provisions of Order 17 Rule 2(1) which requires that before any dismissal order is made that notice be given to the parties to appear before the court to show cause why the suit should not be dismissed;

11. The rules of natural justice also require that before any adverse order is made a party must be notified and allowed to make representations;

12. Upon carefully perusing the court record this court notes that there is indeed a Notice to Show Cause dated the 29/06/2018 signed by the Deputy Registrar; but there is nothing to support or indicate that service of the Notice had been effected upon the applicant or the advocates on record;

13. In this instance the applicant has demonstrated to this court that no Notice was effected upon either himself or his counsel; the fact that neither the applicant nor his advocate knew of the date for dismissal is not in dispute; and the court record speaks for itself; and this court is satisfied with the explanation given by the applicant;

14. Looking at the injuries pleaded in the Complaint it is apparent that the applicant sustained severe injuries as a result of the accident and this court is satisfied that he will be unduly prejudiced if not given a chance to prosecute his case; whereas if the orders sought are granted the respondents will not be unduly prejudiced as they will be accorded an opportunity to defend their case;

FINDINGS & DETERMINATION

15. For the forgoing reasons the court finds that this is a suitable case for it to exercise its discretion in granting the orders sought as the explanation given is found to be satisfactory.

16. The application for the re-instatement of the suit is found to be meritorious and is hereby allowed; the applicant to ensure that the suit is fixed for hearing within sixty (60) days from the date hereof;

17. The costs of the application shall be in the Cause;

Orders Accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 11th day of February, 2021.

HON.A. MSHILA

JUDGE