



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 177 OF 2010**

**MOHAMOUD ALI MOHAMMED.....PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL**

**& 2 OTHERS.....DEFENDANTS**

**RULING**

The plaintiff's suit was dismissed on 15<sup>th</sup> February, 2019 under Order 17 Rule 2 of the Civil Procedure Rules. Aggrieved by the said order he moved the court by way of Notice of Motion dated 16<sup>th</sup> January 2020, under Sections 1A,1B and 3A of the Civil Procedure Act and Article 159(2) of the Constitution for the substantive orders that the dismissal order be set aside and the suit reinstated for hearing on merit.

The grounds in support of the motion are set out on the face of the application and the supporting affidavit of Andrew Wandabwa, Advocate, sworn on 16<sup>th</sup> January, 2020. The application is opposed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who filed replying affidavits through Karen Muthee, Advocate. Subsequently, parties filed submissions and cited some authorities which I have on record.

Order 17 Rule 2 of the Civil Procedure rules provides as follows,

**“2. (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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”**

The application of the above provision calls for the discretion of the court. See Maina Karanja vs. Maina Karanja (2014) eKLR. Dismissal, therefore, is not mandatory and the rule can be said to be permissive. Courts have been called upon to address the subject of **service of a notice** and the **giving of a notice** as contemplated by this provision. In the case of Fran Investment Limited vs. G4s Security Services Limited (2015) e KLR Gikonyo J stated as follows,

**“[9] Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word “give notice”. The court may give notice of dismissal through its official website or through the cause-list. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2 (1) of the Civil Procedure Rules. But nothing precludes the court from serving the notice as per Order 5 of the Civil Procedure Rules.”**

The other considerations to be given effect is whether or not the delay in the prosecution of the case has been inordinate and inexcusable. Such considerations however, will come into play after it is confirmed that the court had given notice in writing to the parties.

I have perused the court file and noted that the court indeed drew notices under Order 17 Rule 2 aforesaid. I have confirmed that the notices were dated 4<sup>th</sup> February, 2019 and addressed to counsel and the parties herein. There is an acknowledgement by the office of the Director of Public Prosecutions dated 6<sup>th</sup> February, 2019. There is also an acknowledgement by the Office of the Attorney General dated 5<sup>th</sup> February, 2019. However, there is no acknowledgement by the plaintiff or his counsel of the said notice.

It can be concluded therefore that no notice was given to the plaintiff. Indeed on the date the suit was dismissed, only counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants appeared while there was no appearance for the plaintiff. It is the practise of courts to endeavour to sustain the suits brought before them where the ends of justice so require rather than dismissing the same. The record before me justifies the sustenance of the suit notwithstanding the slight delay on the part of the plaintiff which, going by the record, is just about one year and three months from the last time the case was before the court.

The application dated 16<sup>th</sup> January, 2020 is therefore allowed as drawn. The parties shall endeavour to comply with Order 11 of the Civil

Procedure Rules within 60 days from the date of this ruling, and thereafter have the suit prosecuted within 60 days from the date it is certified ready for hearing, making a total of 120 days to dispose of this matter. The costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

In the presence of:

Mr. Otieno for Mr. Wandabwa Plaintiff

Ms. Kamau for 2<sup>nd</sup> & 3<sup>rd</sup> the Defendants