



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL SUIT NO. 19 OF 2017

(CORAM: F.M. GIKONYO J.)

THE MONARCH INSURANCE COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

BETHUEL MBUGUA MBAKI.....DEFENDANT/RESPONDENT

RULING

Reinstatement of suit

[1] The significant orders sought in the Notice of Motion dated 24th February, 2021 are;

- i. The order made on 16th July 2020 dismissing the suit filed herein for want of prosecution and non-compliance be set aside.***
- ii. The suit filed herein on 27th November 2017 be reinstated; and***
- iii. The costs of this application be provided for.***

[2] The said application is supported by the supporting affidavit of Leah Muithiraniah as well as grounds argued in the submissions filed herein.

Covid-19 dilemmas

[3] It was the plaintiff's submission that they have been meticulous in setting the matter down for hearing and attending court for purposes of prosecuting this suit. They should not, therefore, be locked out. According to them, due to the hardship, lockdowns and confusion brought about by the COVID 19 pandemic, counsel for the plaintiff was not able to attend the mention on 16/07/2020 when the suit was dismissed.

[4] The plaintiff appealed to the court's powers to set aside orders on dismissal of suits.

[5] The plaintiff submitted further that the application dated 24th February 2021 is unopposed, and therefore, should be allowed.

[6] The plaintiff has relied on the following authorities; **James Mwangi Gathara & Another V Officer Commanding Station Loitoktok & 2 Others [2018] Eklr, Gold Lida Limited V Nic Bank Limited & 2 Others [2018] Eklr**

[7] The respondent did not file any Replying affidavit or submissions despite court's directions on 29/4/2021 that;

‘Application dated 24/2/2021 shall be canvassed by way of written submissions. The applicant to file and serve submissions in 30 days. Upon service, respondents to file and serve submissions within 30 days thereof. Mention on 22/7/2021. This order and notice be served.’

[8] The plaintiff filed an affidavit of service on 12/08/2021 sworn by **Erick Kirimi Muriuki** as evidence of service of the ruling notice upon the firm of Lawrence Mwangi.

ANALYSIS AND DETERMINATION

[9] Is there sufficient reason to reinstate this suit?

[10] A party seeking reinstatement of a suit that has been dismissed for want of prosecution must demonstrate good faith, bring the application without unreasonable delay and show that reinstatement of the suit will not prejudice the defendant. In **Simion Waiti Kimani & Three others vs Equity Building Society (2010) eKLR** Koome J in Paragraphs 4 and 5, held thus;

“The courts have discretion generally to reinstate a suit which is dismissed for non-attendance but in all matters involving the exercise of the courts discretion, it must be exercised judiciously based on facts and law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay.”

[11] Good faith spawns from the conduct of the plaintiff in the prosecution of the case. I do not find anything so offensive to justice in the manner the plaintiff progressed this suit. Notably too is the impediments and confusion caused by the COVID-19 pandemic on the movement of people as well as the general operations on institutions.

[12] A perusal of the record reveals that the suit was dismissed on 16.07.2020, and the present application was filed thereafter on 24.02.2021 which is a period of 6 months and 6 days. This period constitutes a delay. I would however not consider the delay as unreasonable or inexcusable in view of the circumstances surrounding this case.

[13] Courts should always strive to serve substantive justice by hearing cases on merit rather than dismissing them summarily. The latter deprives a party the right to be heard on the merits of his case. This principle recognizes the fundamental rights, and obligation of court of law to do substantive justice between the parties.

[14] Upon careful evaluation of the major cause of delay in this case, I am inclined to find that this application was made in good faith.

[15] In the circumstances the application dated 24.02.2021 is allowed, this suit is reinstated and each party to bear their own costs of the application. However, should the plaintiff fail to set down the suit for hearing within 45 days, the suit shall stand dismissed. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 23RD DAY OF SEPTEMBER, 2021

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F. GIKONYO M.

JUDGE

In the Presence of:

1. Mrs. Karia holding brief for M/s Muli for Plaintiff
2. Lawrence Mwangi for defendants - absent
3. Mr. Kasaso CA

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F. GIKONYO M.

JUDGE