



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 930 OF 2005

SUSAN NDUTA MBUGUA1ST PLAINTIFF/APPLICANT

JOEL GATHUMBI MBUGUA.....2ND PLAINTIFF/APPLICANT

(Suing as administrators of the estate of the Late Simon Mbugua Gakula Kamau Mbugua

, Mika Wambui Mbugua and Mary Njeri Mbugua)

-VERSUS-

VALENTINE GROWERS COMPANY LIMITED.....DEFENDANT/RESPONDENT

RULING

1) The plaintiffs herein took out the summons dated 1st December 2020, in which they applied to have the orders dismissing this suit for want of prosecution issued on 22nd September 2017 by Lady Justice Njuguna set aside and for this suit to be reinstated for hearing and determination.

2) The motion was served upon the defendant's advocate as evidenced in the affidavit of service of Boniface Kyalo. The same did not elicit any response hence the motion proceeded for hearing ex parte.

3) The plaintiffs averred that this suit was under test suit being

H.C.C.C no. 981 of 2004, Kiambaa Coffee Growers Cooperative Society Ltd =vs= Valentine Growers Company Ltd & Attorney General Interested Party.

4) The judgement on the test suit on liability was delivered on 7th May 2020 by Lady Justice Njuguna. The plaintiffs' advocate only discovered of the dismissal order on 9.11.2020 when he mapped the suit on the Judiciary E-filing platform for purposes of taking a mention date.

5) I have perused the record and it is apparent that this suit was placed before Hon. Mr. Justice Wakiaga on 27th February 2015 to deal with a notice to show cause why the suit should not be dismissed for want of prosecution. On the aforesaid date, no party appeared to answer to the notice to show cause. Mr. Justice Wakiaga noted that since there was no one to show cause, he proceeded to dismiss the suit for want of prosecution pursuant to the provisions of Order 17 rule 2(1) of the Civil Procedure Act.

6) On 28.11.2016, the file again was listed before Lady Justice Njuguna to deal with a notice to show cause. The learned advocates representing both the plaintiffs and the defendant appeared before Lady Justice Njuguna on 28.1.2016.

7) Mr. Arimi Kimathi who appeared on behalf of the plaintiffs informed the learned judge that this suit was pending awaiting the outcome of the test suit i.e **H.C.C.C no. 981 of 2004**.

8) It was also pointed out that the court file in respect of the test suit was missing. Mr. Muriuki learned advocate who appeared for the plaintiff in H.C.C.C. 981 of 2004 informed the court that he would file an application to reconstruct the file.

9) The learned judge granted him 21 days to formerly apply.

There was a lull in the matter until 22nd September 2017 when the file was placed before Lady Justice Njuguna to deal with a notice to show cause.

10) On the aforesaid date none of the parties appeared prompting the honourable judge to dismiss the suit for want of prosecution pursuant to the provisions of Order 17 rule 2(1) of the Civil Procedure Rules.

11) By the time Lady Justice Njuguna issued an order dismissing the suit for want of prosecution, the suit had already been dismissed by Mr. Justice Wakiaga on 27.02.2015. It is apparent that Lady Justice Njuguna was oblivious of the dismissal order given by Mr. Justice Wakiaga.

12) The instant motion seeks to set aside the dismissal order issued by Lady Justice Njuguna. The main reason advanced by the plaintiffs is that the suit was technically stayed to await the outcome of the test suit. This assertion has not been controverted.

13) The plaintiff attached to the instant summons, a copy of the judgment in respect of Nairobi H.C.C.C no. 981 of 2004 delivered by Lady Justice Njuguna on 7th May 2020.

14) The defendant in that suit which is also the defendant in this instant suit was found wholly liable for negligence. I find the motion to be with merits. The same is allowed. Consequently, the dismissal order made on 22nd September 2017 is reviewed and set aside.

15) I have already pointed out that Mr. Justice Wakiaga dismissed this suit on 27.2.2015 for want of prosecution pursuant to the provisions of Order 17 rule 2(1) of the Civil Procedure Rules. None of the parties were present at the time of making the order.

16) It would appear from the record that the parties are oblivious of the existence of the dismissal order. The plaintiffs are likely to seek for similar orders as those sought in the instant summons.

17) It is clear to this court that this suit could not proceed to hearing because the parties were awaiting the outcome of the test suit, therefore the plaintiff cannot be accused of delaying the conclusion of the suit.

18) In exercise of this court's discretionary power and to avoid further procrastination of this matter this court ex-debito justitiae issues an order to set aside the order of Mr. Justice Wakiaga made on 27.2.2015. Consequently, this suit is ordered reinstated and should therefore be listed for hearing on priority basis.

19) Each party to meet its own costs on the motion.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 16th day of December, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendant**