REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 3008 OF 1989

HARTWELL J.M. MWAZIGHE.....PLAINTIFF/APPLICANT

-VERSUS-

THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant has brought the Notice of Motion dated 8th February, 2019 and the same is supported by the facts set out in the body thereof and in the affidavit sworn by the applicant. The plaintiff is seeking reinstatement of the suit together with costs of the said Motion.

2. The applicant deponed that on 10th May, 2018, this court agreed to reinstate his suit on condition that the same be prosecuted within 120 days from the date thereof.

3. The plaintiff also stated that it was not until 22nd August, 2018 that he managed to obtain a hearing date at the registry and the same was scheduled for 20th September, 2018 which fell outside the 120 days, but that his advocate had understood the order of 10th May, 2018 to read that the suit ought to be prosecuted within a reasonable time rather than within 120 days.

4. The defendant/respondent filed Grounds of Opposition to the Motion, arguing that the applicant's explanation is unacceptable and made out of ignorance, and that the applicant has been indolent in complying with the court order made on 10th May, 2018.

5. Parties argued the application orally through their respective advocates. *Mr. Nyachoti* counsel for the applicant in his submissions admitted that he misunderstood the order of 10th May, 2018 and in addition argued that he was unable to obtain a date within the set timelines.

6. Mr. Nyachoti also argued that the applicant is keen on prosecuting his suit and the respondent does not stand to suffer any prejudice should the suit be reinstated.

7. *Mr. Ngumbi* advocate for the respondent in his brief submissions simply contended that the applicant did not comply with the relevant court order and that court orders should not be made in vain; to which Mr. Nyachoti responded by submitting that he was under the honest belief that the court meant that the applicant should take reasonable steps to prosecute his case.

8. I have considered the assertions rendered in the Motion, the Grounds of Opposition and the rival oral arguments by the respective counsels. It is well appreciated that this is majorly a question of reinstatement of the suit.

9. As I may well recall, the suit had been dismissed previously but that this court had granted the applicant an opportunity of prosecuting the same within 120 days from the 10th of May, 2018 and which order the applicant's counsel has admitted was not complied with for the simple reason that he did not realize that specific timelines had been set.

10. In my reasoned opinion and with close reference to the record, I delivered my said ruling in the absence of both parties. That notwithstanding, a typed copy of the same was made available to the parties, which causes me to wonder how it is that the applicant's counsel overlooked the strict timelines.

11. Needless to say, I am able to confirm that the applicant's said counsel attended the registry on 22nd August, 2018 and fixed the matter ex parte for hearing on 20th September, 2018. While I find that the reason given by the applicant for non-compliance to be absurd at the very least, it cannot be refuted that some effort was made to have the matter set down for hearing within a reasonable time-period, albeit the date obtained fell outside the ordered timelines.

12. In any event, it is obvious that the blunder was on the part of the applicant's advocate who misconstrued my order and it would not do

justice for the applicant to be made to suffer solely on this basis. The court in ***Phillip Chemwolo & Another v Augustine Kubede [1982-88] KLR 103*** took this into account in its following analysis:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit"***

13. At this point in time, I deem it necessary to remind the parties that whether or not to reinstate a suit lies purely with the court's discretion and is not an automatic right. That being the case, I must add that whereas it cannot be emphasized enough that parties ought to take the initiative in ensuring prosecution of their suits, courts are not only charged with upholding the law but promoting justice as well.

14. In any case, where it is clear that justice can be achieved notwithstanding the delay in prosecuting the matter and the defendant will not be prejudiced in the process, the court will be inclined to grant a plaintiff the opportunity of prosecuting his or her suit. This was rightly acknowledged in the renowned case of ***Mwangi S. Kimenyi v Attorney General & another [2014] eKLR*** in this manner:

> ***"I admit that a party should always take steps to progress his case to logical conclusion…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. That notwithstanding, a court of law should not hesitate to dismiss a suit for want of prosecution where it strongly feels the sustenance of the suit will only breed extreme prejudice to the Defendant. But in ascertaining prejudice to the Defendant it must also weigh the prejudice the dismissal will cause to the Plaintiff..."***

15. In the present instance, the respondent did not demonstrate the prejudice that will befall it. That being the case, I am aware that this is a claim for malicious prosecution which goes to show that the applicant is likely to suffer a greater degree of prejudice if the order sought is denied. On the flip side, it cannot be taken for granted that this is a very old matter that ought to have been long concluded. However, the interest of justice leads me to believe that the applicant should be given a last chance.

16. The upshot is that the Motion is allowed and the applicant granted a final opportunity to prosecute his suit within **90 days** from the date hereof, failure to which the same shall stand dismissed.

Dated, signed and delivered at NAIROBI this 28th day of March, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

…… for the Plaintiff/Applicant

……. for the Defendant/Respondent