



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 927 OF 2004

DAVID KIMANI KONGO.....PLAINTIFF

-VERSUS-

THE HONOURABLE ATTORNEY GENERAL

(Sued on his behalf and on behalf of the Director

of Public Prosecutions and the Commissioner of Police.....DEFENDANT

RULING

1. A notice to show cause was issued to the parties on 5th February, 2019 pursuant to *Order 17, Rule 2* of the Civil Procedure Rules, requiring them to show cause why the suit should not be dismissed for want of prosecution.
2. In response, an affidavit was sworn by *Joseph Njenga Kiarie*, advocate for the plaintiff. Therein, he deponed that his firm was instructed to come on record for the plaintiff on 2nd August, 2018 and a notice of change of advocates prepared to that effect. The deponent went ahead to assert that attempts to file the notice of change were hampered by the fact that the court file went missing from the registry and it is not until 14th January, 2019 that the file was traced and the notice of change filed.
3. The deponent added that his firm subsequently wrote to the deputy registrar, requesting for a mention for directions on the matter; maintaining that the plaintiff is still keen on prosecuting his case and that the indolence of his former advocates should not be visited upon him.
4. I have considered the facts deponed to in the affidavit hereinabove. It is evident from the record that issuance of the notice to show cause was prompted by the fact that no steps had been taken to prosecute the suit since 28th September, 2017. The record also discloses that this is not the first time the matter is coming up for notice to show cause; a notice to show cause was issued sometime in 2015 and the court on 12th May, 2015 allowed the plaintiff to proceed with the suit conditionally.
5. Thereafter, the matter was listed for hearing on various occasions but did not proceed for one reason or another. On 28th September, 2017 when the parties last appeared in court, an adjournment was sought and allowed; however, the court gave clear orders that future dates be taken on priority basis.
6. That said, there is nothing on the record to ascertain the disappearance of the court file, save for the letter dated 7th February, 2019 addressed to the deputy registrar, and which letter it would seem did not elicit a response.
7. It also remains unclear why the plaintiff's advocate, after having filed the notice of change of advocates on 14th January, 2019, had to wait until service of the notice to show cause on 8th February, 2018 to act by seeking directions in the matter.
8. That notwithstanding, I am alive to the fact that there has been a change in representation for the plaintiff and the erstwhile advocates ought to have been diligent in prosecuting the suit on behalf of the plaintiff and especially given its age. At the end of the day, however, the suit belongs to the plaintiff and it was therefore upon him to follow up on its progress.
9. Be that as it may, I have considered the averment in the affidavit that the mistake or inaction of an advocate should not be visited upon a client; various authorities have reinforced this principle. I am therefore satisfied that sufficient cause has been shown by the plaintiff.
10. Consequently, the plaintiff is hereby granted a last opportunity to prosecute his suit. The suit shall be prosecuted within 90 days from

today failing which it shall stand dismissed.

Dated, signed and delivered at NAIROBI this 14th day of March, 2019

L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant