



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 189 OF 2015**

**KENNEDY NYAUNDI .....PLAINTIFF/APPLICANT**

**VERSUS**

**THREVVY JAMES OYOMBRA.....DEFENDANT/RESPONDENT**

**RULING**

The plaintiff's suit was dismissed on 18<sup>th</sup> May, 2018 under Order 17 Rule 2 of the Civil Procedure Rules at the instance of the defendant herein. Before the said date, the Deputy Registrar had caused notices to be served upon both counsel requiring them to show cause why the case should not be dismissed for want of prosecution.

Whereas the notice to the counsel for the defendant bears a stamp dated 17<sup>th</sup> May, 2018 showing receipt of the said notice, the notice to the advocate for the plaintiff shows an endorsement possibly by the process server dated 10<sup>th</sup> May, 2018 with the word "vacated".

There is now before me an application by way of Notice of Motion under Section 3A of the Civil Procedure Act, Order 12 Rule 7, Order 17 Rule 2 (1) and Order 51 Rule 15 of the Civil Procedure Rules for orders that the dismissal order of this court issued on 18<sup>th</sup> May, 2018 together with all consequential orders be reviewed, varied and or set aside, that the suit be reinstated for expeditious hearing and determination and, in the alternative, the parties be provided the opportunity to show cause why the claim and counter claim should not be dismissed.

The application is supported by three affidavits sworn by the plaintiff, his advocate and an employee in the advocate's firm. This is in addition to the grounds set out on the face of the application. The application is opposed and there are grounds of opposition filed on behalf of the respondent. Both counsel for the parties made a brief highlight of their respective positions herein.

I note in passing that there is also an application dated 6th October, 2015 by the plaintiff seeking the dismissal and or sticking out of the defendant's counter claim, which application remains unheard to date.

I have considered the rival positions of the parties herein. The counsel for the plaintiff has explained the reason for the delay in lodging the application which is that the file could not be located in the registry to facilitate the said filing.

The reasons contained in the affidavit of the plaintiff's advocate to explain nonattendance on his part on the date the suit was listed for notice to show cause, are set out in paragraphs 5 and 6 of his affidavit. It is true that the defendant has a counter claim which was not brought to the notice of the court when the plaintiff's claim was dismissed on 18<sup>th</sup> May, 2018.

The advocate for the plaintiff has admitted that his client was not at fault at all, and states that if there is any fault for the failure to set down the suit for hearing, it should be squarely blamed on him.

The plaintiff on the other hand states that he is, and has always been keen on pursuing the suit and that the dismissal order was made without any fault on his part. The employee of the plaintiff's advocate has also sworn an affidavit explaining that no notice was received relating to the intended dismissal of the suit.

The grounds of opposition filed on behalf of the defendant advance the position that, the plaintiff has not shown sufficient cause to warrant the orders sought and therefore the application is without merit, misconceived and gross abuse of the court process. It is also submitted that the delay in prosecuting the suit shows gross indolence on the part of the plaintiff, and no evidence has been presented to show that the plaintiff's advocates were trying to look for the file. The application was also filed more than a year since the dismissal order was made and that delay is inordinate.

The orders sought by the plaintiff are discretionary which discretion shall be exercised judicially. It is true that this suit was filed in 2015

and pleadings closed after reply to defence was filed on 6<sup>th</sup> October, 2015. That is the same date that the plaintiff's advocate filed the application cited above to have the defendant's counter claim dismissed and or struck out.

From the material presented, notwithstanding the delay in the prosecution of this suit, it is clear the notice under Order 17 rule 2 (1) of the Civil Procedure Rules was not received by the advocate for the plaintiff. It is not surprising therefore that, when the suit was called out on 18<sup>th</sup> May, 2018 only the advocate for the defendant appeared.

Where a defendant files a defence and counter claim, he bears an equal duty like the plaintiff to have his counter claim prosecuted expeditiously. Delay in such a case should be attributed to both parties. This is because, where there is a counter claim the defendant is the plaintiff, and the plaintiff the defendant.

In the instant case therefore, both the plaintiff and the defendant are to blame for the delay in the determination of this suit. Having said so, it is always the policy of the courts to maintain a suit rather than dismissing it, where reasonable grounds are shown that every party should have their day in court. That is the position I take in this case.

Accordingly, I am persuaded that the dismissal order made on 18<sup>th</sup> May, 2018 should be set aside in its entirety and it is so ordered. The plaintiff's suit is hereby reinstated.

To ensure expeditious disposal of the suit, the parties herein shall comply with the provisions of Order 11 of the Civil Procedure Rules within 60 days from the date of this ruling (considering that there is a court vacation) in between. Upon compliance, the suit should be listed for hearing on priority basis. The costs shall be in the cause.

**Dated, signed and delivered at Nairobi this 30<sup>th</sup> Day of July, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**