



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 829 OF 2007

PAMPHIL SIMON MWASHEGHWA MAWORA

(Suing as the administrator ad litem of the estate of

CHRISTINE SAMBA MWASHEGHWA-Deceased).....PLAINTIFF/APPLICANT

-VERSUS-

THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant has taken out the Notice of Motion dated 25th July, 2019. The Motion stands supported by the grounds set out on its face and the facts deponed to, in the sworn affidavit of *Leah Gikonyo*. The following are the orders being sought therein:

i) Spent.

ii) THAT an order do issue reinstating the suit.

iii) THAT an order do issue reviewing and/or setting aside the order of 7th March, 2019 deeming the suit dismissed for want of prosecution 120 days after the order.

iv) THAT an order do issue for such directions as to the further conduct and hearing of the suit.

v) THAT the costs of the application be in the cause.

2. Leah Gikonyo in her aforementioned affidavit stated that on 7th March, 2019 this court made an order reinstating the applicant's suit on the condition that the same be prosecuted within 120 days therefrom, failing which the suit would be dismissed.

3. She went on to depone that upon delivering the above ruling, this court fixed the suit for hearing on 14th May, 2019 but when the matter came up on the said date, this court was not sitting and the parties were directed to take fresh dates in the registry.

4. The deponent explained that the applicant through his advocate visited the registry on the said 14th of May, 2019 only to be informed that the earliest possible date on which the matter could be slotted for hearing was 22nd July, 2019 which fell outside of the 120 days ordered and hence, the matter did not appear on the cause list for 22nd July, 2019. In the premises, the deponent maintained that the delay in prosecuting the suit was through no fault of the applicant or his advocate.

5. The defendant/respondent did not put in any response despite there being evidence of service of the application by way of the affidavit of service filed on 28th August, 2019.

6. When the Motion came up for hearing on 18th September, 2019 *Miss Gikonyo* learned advocate for the applicant indicated that she would be relying on both the grounds presented on the face of the Motion and the facts deponed to in her affidavit in support thereof.

7. In that case, I have considered the abovementioned grounds and the affidavit supporting the Motion and noted that the same stands unopposed.

8. In view of the fact that this is essentially an application for review of my earlier order, I place reliance on **Order 45** of the **Civil Procedure Rules** which sets out the principles/conditions that will guide the court in determining whether or not to grant an order for review in the following order:

- a) the discovery of new and important matter or evidence; or*
- b) on account of some mistake or error apparent on the face of the record; or*
- c) for any other sufficient reason.*

9. From my reading of the Motion, it would appear the applicant is riding on the third condition set out hereinabove. I recall delivering my ruling on 7th March, 2019 in which I set aside the dismissal order made on 3rd December, 2018 and granted the applicant 120 days within which to prosecute his suit from the date of delivery of the ruling.

10. The applicant attached to the supporting affidavit a copy of the cause list for 14th May, 2019 which I have looked at and ascertained that the suit was indeed listed before me on that date but I was on leave at the time. I have similarly perused the record and confirmed the applicant's position that his advocate attended the registry and was issued with a hearing date for 22nd July, 2019. The applicant explained that the suit did not proceed on that date since it was noted as having exceeded the 120 days.

11. I have taken the above sequence of events into account and appreciated the presence of evidence to show that the applicant took active steps to ensure prosecution of his suit within the timelines set by this court and that the suit was not heard for reasons beyond his control. In the premises, I am satisfied that the applicant has offered sufficient reason as to why I should exercise my discretion in his favour.

12. Resultantly, the application is allowed in terms of orders ii), iii) and iv), and the following orders are made:

- a) The order made by this court on 7th March, 2019 deeming the suit dismissed within 120 days of want of prosecution following the said order is hereby set aside upon review and the suit is reinstated.*
- b) The plaintiff/applicant is granted a last opportunity to prosecute his suit within 120 days from this day failure to which the suit shall stand dismissed.*
- c) Costs shall abide the outcome of the suit.*

Dated, signed and delivered at NAIROBI this 31st day of October, 2019.

.....

L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff/Applicant

.....for the Defendant/Respondent