



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 703 OF 2009

DAVID GITHINJI NJUGUNA.....1ST PLAINTIFF

JANE WAIRIMU GITHINJI.....2ND PLAINTIFF

- V E R S U S -

RASHID AMIR TRANSPORTERS.....1ST DEFENDANT

JAMES MBASHU KILO.....2ND DEFENDANT

RULING

1) The 1st and 2nd plaintiffs herein took out the motion dated 10th October 2017 in which they sought for the following orders:

- 1. THAT this matter be certified as extremely urgent and be dispensed with on a priority basis.***
- 2. THAT this honourable court be pleased vary and/or set aside its orders to dismiss this suit for want of prosecution.***
- 3. THAT this honourable court be pleased to make orders of reinstatement of the suit.***
- 4. THAT this honourable court be pleased to have this matter transferred to the Principal Magistrate's Court at Makindu Law Courts for hearing and disposal.***
- 5. THAT the respondents to bear costs of this application.***
- 6. THAT this honourable court be pleased to give any further directions as this honourable court may deem fit to give.***

2) The motion is supported by the affidavit of Jane Wairimu Githinji. When served with the motion, the defendants filed the affidavit of Judith Nduku Matata, their learned advocate, to oppose the motion.

3) When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the application disposed of by written submissions. I have considered the grounds stated on the face of the motion plus the facts deposed in the affidavits filed in support and against the motion. The plaintiffs are basically seeking for two substantivel orders. First, is an order to set aside the order dismissing the suit for want of prosecution made on 15.7.2017 and for the suit to be reinstated. Secondly, an order to transfer the suit to the principal Magistrate's Court Makindu for hearing and determination.

4) The plaintiffs beseeched this court to exercise its discretion in their favour on the basis that they were let down by their previous advocates. They claimed that they were kept in the dark over the position of their case until they learnt of the dismissal of their case thus forcing them to withdraw instructions from the firm of Tim Okwaro Associates to Mwendwa Mwinzi & Associates. They urged this court not to visit upon them mistakes of their erstwhile advocate.

5) The defendants on the other hand are of the view that the plaintiffs have not offered any excusable reason to enable this court exercise its discretion in their favour.

6) Having considered the rival submissions, I am convinced that the plaintiffs were thoroughly let down by their previous advocate. There is no evidence showing that the appellants connived with their erstwhile advocate to delay the conclusion of the matter. I am convinced that the reasons advanced is plausible therefore the mistakes of the advocate should not be visited upon the plaintiffs. There is a request to have the suit transferred to Makindu Law Courts for hearing. I am not convinced that this suit should be transferred. The plaint shows that the cause of action arose on 29th December 2006 about twelve (12) years ago. If the order is granted a further delay may arise. Consequently a fair order to issue is to decline the request for transfer and instead direct that the matter be given priority.

7) In the end, I allow the motion dated 10.10.2017 by setting aside the dismissal order issued on 15.7.2017 and order that the suit be reinstated. The suit to be heard on priority basis. In the circumstances of this case I think the defendants are entitled to throw away costs. Consequently the defendants should be paid throw away costs assessed at ksh.10,000/=.

Dated, Signed and Delivered in open court this 25th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant