



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 145 OF 2008**

**GEORGE NGURE KARIUKI.....PLAINTIFF/APPLICANT**

**- VERSUS -**

**EQUITY BANK LTD.....1ST DEFENDANT/RESPONDENT**

**UPSTATE KENYA AUCTIONEERS.....2ND DEFENDANT/RESPONDENT**

**RULING**

1. *George Ngure Kariuki*, the plaintiff, has filed a *Notice of Motion* dated **9th March 2018** seeking to set aside the dismissal of his case for want of prosecution. The dismissal was on **22nd February 2018**.

2. The main grounds proffered by the plaintiff in seeking to set aside that dismissal is that he and his counsel were not served with the notice of that dismissal; that there were ongoing negotiations between himself and Equity Bank Limited, the 1st defendant, with a view to settling this matter when the suit was dismissed; and that the plaintiff is eager to have this case set down for hearing. In his affidavit in support, the plaintiff stated that his former advocate had failed to forward his file, in this matter, to his now appointed advocate.

3. The application was opposed by the defendants. The defendants relied on the affidavit of *John Njenga*, the 1st defendant's legal officer. By that affidavit, the defendant stated that the meeting which had been scheduled for negotiations in this matter was for **August 2017** but that it did not take place because the plaintiff failed to confirm the meeting. That prior to dismissing the matter this case was last in Court on **12th October 2015**. That the defendant will suffer prejudice if the case is reinstated because it was filed more than 10 years ago.

4. I have considered the affidavit and submissions by the learned counsel. The dismissal for want of prosecution was premised of the **Order 17 Rule 2(1)(2) of the Civil Procedure Rules**. That rule provides as follows:

***“(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.***

***(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.”***

5. It is clear from that rule that service of notice before the dismissal of a suit for want of prosecution is a prerequisite. If it were not so, sub rule (1) and (2) would not have required cause to be shown why a suit should not be dismissed. In my view service is essential. In the case of **Craig Vs Kanssen [1943]1KB 256** the court considered where personal service should be effected in a process and held as follows:

***“failure to serve process where service of process is required renders null and void an order made against the party who should have been served. Failure to effect service was fatal. It could not even be cured by waiver because no waiver can give validity to a nullity” see the case of Oulton V Radcliff (187374) 9 LRC 189 at 193 per Keating J.”***

6. Since my perusal of this file confirms what was submitted by the plaintiff's learned counsel, that there was no service of the notice before the suit was dismissed for want of prosecution, the interests of justice require that the dismissal be set aside.

7. Accordingly these are the orders of the court:

a. The dismissal of this suit on **22nd February 2018** is hereby **set aside** and this suit is **hereby reinstated** on the following

conditions:

- i. The plaintiff and the defendants shall within 21 days file their witness statements and documents in compliance with the pre-trial process.***
- ii. If the plaintiff does not comply with (i) above, this suit shall stand as dismissed. If the defendants do not comply with (i) above their defence shall be struck out and the plaintiff shall proceed to formal proof his case.***
- iii. Unless this suit is heard by the 31st October 2018, it shall stand as dismissed.***

b. The costs of the ***Notice of Motion*** dated ***9th March 2018*** shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of May 2018.**

**MARY N. KASANGO**

**JUDGE**

**Ruling read in open court in the presence of**

.....for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant