



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO.348 OF 2010

EUNICE SOKO MLAGULI.....PLAINTIFF

VERSUS

SURESH PARMAR.....1ST DEFENDANT

P.C. PATEL & PRAMOD PATEL (ADMINISTRATORS OF THE

ESTATE OF RAJINDER K. PATEL)2ND DEFENDANT

ASHWIN PATEL.....3RD DEFENDANT

ASHWIN BROTHERS(CERTIFIED PUBLIC ACCOUNTANTS).....4TH DEFENDANT

RULING

Before this Court is the Notice of Motion Application dated 31st May, 2018 in which the Plaintiff/Applicant seeks the following orders.

“1. [Spent]

2. **THAT** this Honourable Court be pleased to set aside the dismissal Order made on the 18th of June, 2015 by Hon. Justice A.K Ndungu under Order 17 Rule 2 of the Civil Procedure Rules [2010].

3. **THAT** an order be made by this Honourable Court requiring the suit to be scheduled for inter - partes hearing.

4. **THAT** the costs of this application be costs in the cause”.

The application which was premised upon **Section 3 and 3A of the Civil Procedure Act, Article 159(d)** of the Constitution of Kenya 2010, and all other enabling provisions of law, was supported by the affidavit of **CLAIRE NEKOYE DAWAI** Advocate sworn on even date.

The defendant/Respondent opposed the application to reinstate the suit by way of a Replying Affidavit sworn by **DAVID MUTHEE MICHUKI** on 25th July, 2018.

The application was canvassed in open Court by way of oral submissions on 25th June, 2018. On that date only counsel for the Applicant appeared before the Court. I have perused the Affidavit of Service sworn on 25th June 2018 which indicates that counsel for the defendant was duly served with the Notice of Motion at 3.18p.m on 13th June 2018. I am therefore satisfied that counsel for the defendant/Respondent had adequate and proper notice of the date of hearing of this application. In the circumstances the matter proceeded in their absence.

The crux of the matter before me is the dismissal of the suit under **Order 17 Rule 2** by **Hon. Justice A.K. Ndungu** on 18th June 2015.

Counsel for the applicant seeks the setting aside of that order of dismissal on the basis that neither party was served with the requisite notice before the matter was dismissed. That the Plaintiff stands to suffer substantial loss if the order of dismissal is not vacated and the suit reinstated. Finally it was submitted that the defendant/respondent stood to suffer no prejudice upon the reinstatement of the suit.

Order 17 Rule 2(1) of the Civil Procedure Rules provides

“2(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 ...miss the suit”. [emphasis provided]

This Rule requires that notice be served by the court upon both parties to the suit inviting them to show cause why the suit should not be dismissed.

I have carefully perused the entire file. I find no evidence to show that notice was served on any of the parties before this suit was dismissed. The Notice of Dismissal of suit signed by **Hon Justice A.K. Ndungu** on 18th June, 2015 did not give any indication as to whether or not service had been effected.

As counsel for the applicant has pointed out it is apparent that neither the defendant or his lawyer were aware of this dismissal of the suit. This is evidenced by the fact that the defendant/respondent filed an application seeking to have the suit dismissed for want of prosecution on **14th December, 2016**. This was almost one and a half years after the dismissal under **Order 17 Rule 2(1)**. I have no doubt that if they had notice of the dismissal on **18th June 2015**, the defendants would **not** have filed their application dated **14th December 2016** seeking to have the suit dismissed for want of prosecution.

It is clear from the above that notice was **not** issued to either party before the suit was dismissed. In the circumstances, the dismissal of the suit under **Order 17 Rule 2(1)** was to say the least unfortunate and unprocedural.

In **KENYA POWER & LIGHTING CO. LTD VS KENYA COLD STORAGE 1964 LTD HCCC NO.387 OF 2002 Hon Lady Justice Hannah Okwengu** (as she then was) held as follows

“Nevertheless dismissal of a suit under OXV1 Rule 2(1) of the Civil Procedure Rules requires that notice be given to the parties to appear before the court to show cause why the suit should not be dismissed before any order of dismissal is made”.

This was clearly not done in the present case rendering the dismissal without notice prejudicial to the plaintiff. The rules of natural justice require that before an order adverse to any party is made by a court, that party ought to be heard and be allowed to make representations.

It is my view that even if the orders sought are granted the defendants will not be unduly prejudiced as they will be accorded an opportunity to defend the suit should they so wish.

Finally, I am satisfied that the present application is merited. I do grant prayer (2) of the Notice of Motion dated **31st May, 2018**. The order dismissing this suit under **Order 17 Rule 2(1)** made by **Hon. Justice A.K. Ndungu** on **18/6/2015** are hereby set aside.

The suit is hereby reinstated. Parties to comply with **Order 11** of the Civil Procedure Rules and to appear before the Honourable Deputy Registrar on 10-8-2018 for Case Management Conference.

Dated in Nairobi this 27th day of July, 2018.

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JUSTICE MAUREEN A. ODERO

Ruling delivered at the Nairobi High Court this 27th day of July , 2018.

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JUDGE