



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 772 OF 1986

STEPHEN W. GICHURU.....PLAINTIFF/APPLICANT

VERSUS

MOHAMMED H. SAID.....DEFENDANT/RESPONDENT

R U L I N G

1. The Notice of Motion dated 20th March, 2018 and filed on 21st March, 2018 was taken out by the Plaintiff/Applicant and sought the following orders inter alia:

i. That the order of the Honourable Court delivered on 7th March, 2018 dismissing the suit filed herein be set aside and/or varied.

ii. That this Honourable Court be pleased to reinstate the suit filed herein for hearing.

iii. That the costs of this application be provided for.

2. The Motion supported by the Supporting Affidavit of Mildred K. Gakoi sworn on 20th March, 2018. She averred that she is an advocate of the High Court of Kenya in conduct of this matter and therefore competent to swear this affidavit. She stated that the suit was dismissed by this court on 7th March, 2018 owing to lack of evidence.

3. She argued that the Plaintiff/Applicant was not indolent in pursuing the suit and is keen and desirous to prosecute the suit to its logical conclusion and further stated that the Plaintiff/Applicant had previously been available in court ready to proceed with the suit.

4. She also averred that on 1st February, 2016 she had invited the Defendant/Respondent's counsel to fix a hearing date at the court registry but the court file was missing and that on 19th June, 2017, she wrote to the Deputy Registrar of this court informing him of the missing file and the Plaintiff/Applicant's availability to give evidence as he resides out of the country.

5. She averred that on 13th October, 2017, the Plaintiff's advocate was served with a hearing notice for 7th March, 2018 by the Defendant/Respondent's counsel that she responded to the Defendant/Respondent's counsel notifying them of her client's unavailability on the date set for hearing.

6. She pointed out that the matter had gone through Pre-Trial process and all supplementary documents had been availed. She averred that the suit was an old matter and the Plaintiff/Applicant was available and ready to prosecute the matter.

7. She also stated that the Plaintiff/Applicant's health would be affected in the event the suit was dismissed without full trial. She averred that the suit had high chances of succeeding and ought not to be dismissed for want of prosecution and urged this court to allow the application and reinstate the suit for hearing and determination.

8. The Defendant filed Grounds of Opposition dated 12th April, 2018 to resist the motion. The Defendant/Respondent argued that the Plaintiff/ Applicant's application lacked merit and ought to be dismissed with costs to the Defendant.

9. He argued that the Plaintiff/ Applicant's suit was not dismissed on procedural technicalities.

10. The Defendant denied that the Plaintiff/Applicant had previously been available in court and argued that the Plaintiff/ Applicant had never attended court in person and neither is there evidence to show his court attendance for the past 32 years.

11. He also argued that the Plaintiff/Applicant had been invited by the Defendant/Respondent vide the letter dated 28th September, 2017 for

fixing of a hearing date at the court registry on 10th October, 2017 but the Plaintiff/Applicant did not show up hence the hearing date was taken out ex-parte and that the Plaintiff/Applicant was served with a hearing notice on 13th October, 2017 for hearing of the suit on 7th March, 2018.

12. The Defendant point out that the Plaintiff/Applicant had 145 days within which to make arrangements to have the Plaintiff attend court and that for the past 18 years, the Defendant/Respondent has often times taken out hearing dates ex-parte citing the Plaintiff/Applicant's lack of concern in the suit. He argued that the court was right in dismissing the suit for lack of evidence as provided for under Order 12 Rule 3 (1) and (2) of the Civil Procedure Rules. He stated that the Plaintiff/Applicant had failed to provide an explanation as to the Plaintiff's absence from court on 7th March, 2018.

13. The Defendant/Respondent challenged the affidavit deponed by Mildred K. Gakoi arguing that it failed to demonstrate her authority to swear the affidavit on behalf of the Plaintiff.

14. The Plaintiff further argued that the Defendant/Respondent it would be prejudicial to the Defendant/Respondent in the event this court reviews and sets aside the dismissal order and reinstates the suit given that 32 years has lapsed since the suit was instituted. This court was asked to dismiss the application with costs.

15. I have considered the grounds stated on the face of the Motion and the facts deponed in the affidavits filed in support and against the Motion. I have further considered the written grounds of opposition. The court is vested with unfettered discretion within which it can allow or deny the application herein. One key element that the court ought to address before coming to its decision is whether it is satisfied with the reason provided by the Plaintiff/Applicant's advocate on record explaining the Plaintiff's absence on 7th March, 2018.

16. The Plaintiff/Applicant's advocate has deponed that she had communicated her client's absence to the Defendant/Respondent. However, this explanation was not shared with the court and the matter was listed for hearing.

17. Further, no evidence has been tabled before this court highlighting steps made in availing the Plaintiff. She also deponed that the Plaintiff was not in good health, again, nothing has been tabled before this court to demonstrate that the Plaintiff's non-attendance to court was caused by ill health.

18. Court finds that no satisfactory explanation has been provided to warrant review of its decision to dismiss the suit and for its reinstatement.

19. It is worth noting that this matter has been in court for the last 32 years and evidence has never been given. This demonstrates a lack of seriousness on the part of the Plaintiff. The delay in prosecuting this suit has been inordinate and inexcusable.

20. The application is hereby dismissed with costs to the Defendant.

Dated, Signed and Delivered in Nairobi this 28th day of September, 2018.

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J.K. SERGON

JUDGE

In the presence of:

..... For the Plaintiff/Applicant

..... For the Defendant/Respondent