



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.205 OF 2003

NICHOLAS AMUTAVI SHIVANJI.....1ST PLAINTIFF/APPL

ROSE MIJIDE SHIVAJI.....2ND PLAINTIFF/APPL

VERSUS

NJUGUNA NJOROGE.....1ST DEFENDANT

MARY WANJIRU NJUGUNA.....2ND DEFENDANT

CONSOLIDATED BANK LIMITED.....3RD DEFENDANT

RULING

This is a ruling on the Plaintiffs application dated 21st march 2018.It seeks to set aside and/or vary the order of 20th March 2017 dismissing this suit for want of prosecution.

Grounds on the face of the application are that the Plaintiff made several unsuccessful attempts to set down the suit for hearing.

That there has been no delay to warrant dismissal of this suit and that it would be in the interest of justice to for this Court to invoke inherent powers and reinstate this suit.

The application is supported by Affidavit sworn by Jefferson Mokaya a Process Server in the firm of P. S. Kisaka & Co Advocates. He averred that, he sent out an invitation to the Defendant's Advocates to attend Court on 14th October 2015, 4th November 2015, 14th June 2016, 19th October 2016 and 27th November 2017 to fix hearing dates but no dates were given as the Court file was missing.

He averred that on visiting the registry to follow up the file, he learnt that the suit had been dismissed for want of prosecution. Letters sent to the registry have been attached to the Supporting Affidavit.

In response the Defendants filed Replying Affidavit. Albert B. Amimo Anjichi the Senior Legal Officer of the 3rd Respondent swore Affidavit dated 24th May 2018.

He averred that, this suit was filed on 15th April 2003 and it has been dismissed twice for want of prosecution.

He averred that when it was first dismissed on 6th October 2006, the Plaintiff waited up to 21st April 2008 to move the Court to reinstate it. That after reinstatement of this suit on 13th December 2011, the Plaintiff never took any steps to prosecute it.

The 3rd Respondent avers that the Plaintiffs have been enjoying injunction orders since filing this suit.

That the suit has been pending for 16 years and the 3rd Defendant has been prejudiced in a manner that cannot be remedied by costs.

The 3rd Defendant contends that, there are no correspondence between Plaintiffs and Registrar to confirm that the file was missing. He urged

the Court not to allow the application as it is an abuse of Court process.

Counsels for the parties herein filed written submissions.

Counsel for Plaintiff restated grounds on the face of the applications and averments already captured above.

Counsel for the Plaintiff submitted that delay has been occasioned by the Defendant’s failure to substitute the 1st Defendant who died. He further submitted restated the averments by his process suffer and submitted that attempts to take a hearing date were not successful on the ground that the file was not retrieved and later the Courts diary was closed.

I have perused the Court file and authorities cited. I do agree with Defendants’ argument that it is the primary duty of the Plaintiff to take steps to prosecute the case.

However, the Defendant’s Advocate equally has a duty to ensure any action expected of them is undertaken to ensure prosecution of the case progresses without any hindrance.

From annexures to the Affidavit in support of the application, it is evident that the Plaintiff has made efforts to get a hearing date from Court. I note from the Court record that on 24th September 2014, the Court ordered that the 1st Defendant be substituted before the case could proceed. On 23rd September 2015, 3rd November 2015, 14th June 2016, 14th October 2016 and 27th November 2017 Plaintiffs invited the Defendants to attend Court to fix a hearing date.

There is no indication that the 1st Defendant has been substituted.

I do agree with the 3rd Defendant that this matter has taken long; I however note that the Plaintiffs are not wholly to blame for the delay. From record, the Plaintiffs have shown keen interest in prosecuting this matter. This is shown by requests for hearing dates. There is no indication that Counsel for 1st Defendant has taken steps to substitute the first Defendant.

From the foregoing, I find that it would be in the interest of justice to allow the Plaintiff a final opportunity to prosecute this case.

This suit is reinstated on condition that the Plaintiff pays the Defendants thrown away costs of Kshs. 30,000 within 30 days from today’s date to be shared equally between 1st, 2nd and 3rd Defendants.

FINAL ORDERS

1. Suit reinstated.
2. The Plaintiff to pay Defendants thrown away costs of Kshs. 30,000 within 30 days from today’s date. Kshs. 15,000 for 1st & 2nd Defendants and Kshs. 15,000 for 3rd Defendant.
3. Suit to be set down for hearing within 30 days from today’s date.
4. Failure to comply with order 2 & 3 above the suit to stand dismissed.

Ruling dated, signed, and delivered at Nairobi this 18th day of October, 2018.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

CATHERINE: COURT ASSISTANT

ODUOR H/B FOR KISAKA: **FOR PLAINTIFF/APPLICANT**

ODHIAMBO: **COUNSEL FOR 1ST & 2ND DEFENDANTS/RESPONDENTS**

TERER: **FOR 3RD DEFENDANT**