



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MATRIMONIAL CAUSE NO. 8 OF 2010

J O K N.....PETITIONER/APPLICANT

VERSUS

P N N.....RESPONDENT

RULING

The Petitioner/Applicant filed a petition for divorce on 23rd April 2010 against the Respondent. It was replied to on 18th May, 2010. On 10th April, 2015 under *Order 17 rule 2* of the *Civil Procedure Rules*, the court dismissed the petition for inordinate delay. 5 years had lapsed since the last step was taken by the petitioner on 18th May, 2010. The petitioner who was initially represented by *Ms. Muranje & Company Advocates*, hired another Advocate on 5th February, 2018. The Advocate filed the current notice of motion on 8th February, 2018. The prayers sought in it are that:

- a. The honorable court be pleased to set aside the order of dismissal and the cause be reinstated for hearing and determination.
- b. Upon reinstatement, this honorable court be pleased to make an order transferring this cause to the Chief Magistrate's court at Eldoret for expeditious hearing and determination.

The application is based on the grounds that the applicant was not given notice to show cause why the suit should not be dismissed before its dismissal. Him being a lay person in law was made to believe that the cause was concluded and divorce granted. He is keen to prosecute this cause to its logical conclusion. The appellant is in need of decree absolute so as to move on.

The applicant further contends that the delay was not deliberate for since 17th July, 2014 when the cause was to be heard, the court file went missing. On several occasions he wrote to the Deputy Registrar for assistance in tracing it, but in vain. He is willing to abide upon such terms as the court may deem just for allowing the application and he'll be prejudiced if the orders sought are not granted.

The respondent in her replying affidavit dated 22nd March, 2017 opposes the application on the grounds that the plaintiff demonstrated no interest in prosecuting this cause as she took no steps to set it down for hearing since 28th May, 2008.

The cause was rightly dismissed by the court under *Order 17 rule 2* of *Civil Procedure Rules* and the court cannot be faulted on that. The letters to the Deputy Registrar were written 9 years after the suit was filed of which is a clear demonstration of lack of interest in the matter. If at all the court file was missing, the petitioner/applicant should have moved the court for reconstruction of the file, but elected not to bother. It is in the interest of justice that litigation comes to an end.

In determining whether or not to reinstate the petition dismissed for want of prosecution, I have considered the principles which have evolved in law as guidance to the court in exercise of the discretion. These were laid out in the case of **Utalii Transport company limited and 3 others -vs- NIC Bank and Another [2014] eKLR**. The court considers: -

1. Whether there has been inordinate delay on the part of the plaintiff's in prosecuting the case;
2. Whether the delay is intentional, contumelious and, therefore inexcusable;
3. Whether the delay is an abuse of the court process;
4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;
5. What prejudice will the dismissal occasion to the petitioner/plaintiff?

6. Whether the petitioner has offered a reasonable explanation for the delay;

7. Even if there has been delay, what the interest of justice dictates.

I do agree with the respondent that five years delay is inordinate. However, as expressed in consideration No. 7 above, the court must also consider the interest of justice in the matter. This is a divorce cause which was dismissed. The presentation by both parties shows since 2010 when the petition was filed, they have not reconciled or found a way forward. Dismissal of the petition did not offer a solution to their problems. They were not heard and a just decision founded on facts and law made. The issues raised in the application can be better deliberated and decided on, if the petition is reinstated and heard. I do find it would be in the interest of justice to reinstate the petition. I do therefore allow the application. The petition should be heard before the Chief Magistrate's court Eldoret. Cost be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 30th day of October, 2018

In the absence of both parties

Mr.Mwelem – Court Assistant