



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 16 OF 2015

APOLLO NJERU.....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIRINYAGA.....1ST DEFENDANT

STEEN FLAMAND.....2ND DEFENDANT

RULING

This suit was last in Court on 25th February 2015 when **BWONWONGA J.** directed that the parties who were absent take dates before the Deputy Registrar.

By 25th November 2016 however, the plaintiff had not taken any steps to have the suit or his application filed under certificate of urgency prosecuted and therefore this Court, as mandated by the provisions of **Order 17 Rule 2 (1) of the Civil Procedure Rules**, issued notices informing the parties that this suit would be dismissed on 5th December 2016 unless cause is shown why that should not be done.

On 5th December 2016, both the plaintiff and the 1st defendant were absent except for counsel for the 1st defendant **MS KIMOTHO**. As no sufficient reason was advanced by the plaintiff who was absent, his suit was dismissed and **MS KIMOTNO** was allowed to take a date to prosecute the 2nd defendant's counter-claim.

On 20th December 2016, the plaintiff filed the application subject of this ruling citing **Order IXB Rule 8 of the Civil Procedure Rules** seeking the main order that this Court sets aside the order dated 5th December 2016 dismissing his suit and reinstate the same for hearing. The application was canvassed orally by plaintiff's counsel **MS MANEGENE** and is supported by her supporting affidavit the gist of which is that the plaintiff had complied with the provisions of **Order II Civil Procedure Rules** and was in the process of fixing the suit for pre-trial. Further, that the notice to dismiss this suit was received in counsel's office on 8th December 2016 three days after the suit had been dismissed.

In response to that application, the 1st defendant filed grounds of opposition stating that no sufficient cause had been shown why there was no representation by the plaintiff on 5th December 2016 when his suit was dismissed and this application is therefore un-meritorious, frivolous and vexatious and should be dismissed. No response was filed by the 2nd respondent.

I have considered the application and the grounds of opposition filed by the 1st defendant. It is clear this Court should have been moved by a Notice of Motion and not a Chamber Summons. Further, it is common ground that the relevant provision is not **Order IXB of the Civil Procedure Rules**. Counsel will no doubt take that into account in future.

Having said so, Order **17 Rule 2 (1) of the Civil Procedure Rules** provides as follows:

“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”. Emphasis added

My interpretation of the above provision is that issuance of a notice to the parties before dismissal of a suit in which no action has been taken for one year is not mandatory. Neither is it mandatory that such suit be dismissed if cause is not shown to the satisfaction of the Court. That explains the use of the word “**may**” which is permissive. However, where the Court elects to issue notices to the parties, as was the position herein, then if there is evidence that the notice was not received, it is proper that an order for dismissal be set aside. In the circumstances of this case, counsel for the plaintiff has availed a copy of the notice of dismissal dated 25th November 2016 showing that it was posted at Kerugoya on 30th November 2016 and was received at counsel’s office on 8th December 2016 three days after the plaintiff’s suit had been dismissed. The notice did not therefore serve the purpose for which it was meant and by promptly filing this application on 20th December 2016, the plaintiff has demonstrated that he is desirous of prosecuting this suit. I also note from the record that on 9th November 2016, the plaintiff had filed a pre-trial questionnaire obviously with the intention of having pre-trial directions taken in this matter. So at least the plaintiff had taken a step towards having the case prepared and ready for trial. It is worth noting that **Order 17 Rule 2 of the Civil Procedure Rules** talks of situations where:

“..... no application has been made or step taken by either side for one year..... “.
Emphasis added

By filing the pre-trial questionnaire on 9th November 2016, the plaintiff was taking a step towards having the matter heard and strictly therefore, this suit was not ripe for dismissal under **Order 17 Rule 2 (1) of the Civil Procedure Rules**. The order for dismissal must therefore be set aside.

Finally, it is clear to me that the use of the word “**may**” in **Order 17 Rule 2 (1) of the Civil Procedure Rules** connotes that the dismissal is not mandatory but is permissive. Therefore the Court is granted latitude in deciding whether or not to dismiss a suit for want of prosecution. In doing so, the Court will no doubt bear in mind the requirements of **Article 159 of the Constitution**, the need to do substantive justice to the parties by, as much as possible, determining cases on their merits. Most importantly, the Court must appreciate that driving a party from the seat of justice without affording him a hearing is a draconian measure to be resorted to in only the most obvious of cases. To deny a party a hearing should be the last resort of a Court – **SEBEI DISTRICT ADMINISTRATION VS GASYALI 1968 E.A 300** in which **JAMNADAS SODHA VS GORDANDAS HEMRAJ 1952 7 ULR 7** was cited with approval. The Court nonetheless retains inherent jurisdiction in appropriate cases to dismiss cases that are merely clogging the judicial system and taking up limited judicial time and resources where parties have gone to sleep.

Having considered all the issues herein, I am persuaded that this Court’s orders dated 5th December 2016 dismissing the plaintiff’s suit must be set aside which I hereby do. It is further directed that the parties do comply with pre-trial directions and have this suit ready for trial in the next sixty (60) days.

Costs in the cause.

B.N. OLAO

JUDGE

21ST APRIL, 2017

Ruling delivered, dated and signed this 21st day of April 2017

Ms Muthike for Mr. Manegene for Plaintiff present

Ms Kiragu for 2nd Defendant present.

B.N. OLAO

JUDGE

21ST APRIL, 2017