



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 224 OF 2008**

**JOSEPH KYALO MULU.....PLAINTIFF**

**VERSUS**

**G4S SECURITY SERVICES LTD.....1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff has filed a Notice of Motion dated 31<sup>st</sup> January, 2017 seeking a review of this court's orders made on 10<sup>th</sup> October, 2016 and enlargement of time within which to prosecute this matter. The motion is brought under Section 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules. It is supported by the affidavit of the plaintiff and the grounds on the body of the motion. He stated that the court ordered that this matter be prosecuted within 90 days from 10<sup>th</sup> October, 2016 but that his advocates were given a date outside the time prescribed by court i.e. 29<sup>th</sup> December, 2016.

2. The matter was however not cause listed on the said date for the reason that High Court was on vacation. That his advocate later realized that the expiry date for the 90 days period was 31<sup>st</sup> January, 2017, considering the court vacation. He stated that were it not for the interference by the vacation, his matter could have been prosecuted.

3. The 1<sup>st</sup> defendant filed grounds of opposition to the motion. The grounds are as follows:

- a. That the 90 days within which the suit was to be prosecuted have since lapsed and the suit stood dismissed as per the court order.
- b. That the court can only enlarge time after reinstatement of the suit which orders have not been sought in the present application.
- c. That the application is therefore unmerited and should be dismissed with costs.

The 2<sup>nd</sup> defendant did not file any response to the application despite having been aware of the application.

5. In his submission the plaintiff cited **Invesco Assurance Company Ltd v. Cyrus Ng'ang'a Njuru and Joseph M'ekonga Ikonga (2006) eKLR** where the court held that an innocent litigant should not be punished for the advocates conduct. The plaintiff further urged this court to give due regard to substantive justice and cited **Consolata Ndinda Owira & 4 others v. Banuelbovis Omambia (2005) eKLR**.

6. The 1<sup>st</sup> defendant on the other hand submitted that the plaintiff is undeserving of the order for enlargement of time for the reason that an order for review can only be granted if the applicant satisfies the conditions set out in Order 45 of the Civil Procedure Rules. That it has not been alleged that there is discovery of new evidence, or mistake or error apparent on the face of the record or other sufficient reason to warrant review. It was submitted that to the extent that the extension of time is predicated on review of orders, then this motion must fail for not satisfying the minimum legal threshold. It was averred that the plaintiff has failed to give extraneous circumstances that prevented him from setting the matter down for hearing and that the delay is therefore inexcusable.

7. court was told that the delay goes against the spirit of the overriding objectives and Article 159 of the Constitution. On this point the 1<sup>st</sup> defendant relied on **Richard Kinyanga Kubai v. Richard Kinyanga Kubai & Another (2012) eKLR** where it was held that justice is to both the plaintiff and the defendant and both parties to the suit must be considered. That the 1<sup>st</sup> defendant stands to suffer prejudice in terms of time and extra legal costs in litigation, if the suit is reinstated. It was stated that the plaintiff was required to prosecute the suit within 90 days failing which the suit stood dismissed. To support this argument the defendant cited **Hytec Ltd v. Coventry City Council [1977] 1WLR quoted in Kenya Pipeline Company Limited v. Kenya Power & Lighting Company Limited (2014) e KLR**. The court in this case was of the opinion that sanctions should issue in the event of failure to comply with the ‘unless’ orders i.e. orders of last resort.

8. The provisions of Order 50 Rule 6 of the Civil Procedure Rules, 2010 empowers the court to enlarge time upon such terms as the justice of the case may require.

The said proviso states as follows:-

***“Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have such power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”***

9. The plaintiff stated and established by the annexure ‘JK2’ a letter to the Deputy Registrar that the date assigned for hearing fell outside the 90 days ordered by the court and the attempt to get a time within that period was futile. Though the plaintiff has tried to explain the reasons for the failure to prosecute the suit within the time ordered by this honourable court, it is noted that the plaintiff’s counsel was not keen to fix the matter for hearing and waited until the eleventh hour. The court takes judicial notice of the fact that every advocate knows when the High court is scheduled to proceed on vacation and he ought to have endeavored to fix the matter for hearing before the court proceeded for vacation but waited until the last minute thus leaving very little time for any eventualities.

10. This is an old matter which has dragged on for almost 10 years which gives this court the impression that the plaintiff is an indolent litigant who has lost interest in the matter.

11. Finally, and as noted by the first defendant in its grounds of opposition, the suit stood dismissed upon the expiry of 90 days ordered by the court. By the time the application was filed, there was no pending suit. The applicant has not sought to reinstate the suit, which order was paramount.

12. In the result, the order that commends itself to this court is that, the application dated 31<sup>st</sup> January, 2017 is hereby dismissed with costs to the defendants.

Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of June, 2017.

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**L. NJUGUNA**

**JUDGE**

*In the presence of*

..... *for the Plaintiff.*

..... *For the 1<sup>st</sup> Defendant*

..... *For the 2<sup>nd</sup> Defendant*