

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 36 OF 2003

GRACE WANJIRU T/A G.W. & SONS LIMITED.....PLAINTIFF

VERSUS

SHIRIJAI INVESTMENTS1ST DEFENDANT

JANTILAL D. NANJI2ND DEFENDANT

NAIROBI CITY COUNCIL3RD DEFENDANT

RULING

The plaintiff's suit was dismissed on 26th February, 2015 for want of prosecution under Order 17 Rule 1 of the Civil Procedure Rules. There is now before me an application by way of Notice of Motion dated 28th October, 2016 seeking orders that the dismissal order be set aside and the suit be reinstated for hearing. The reasons for seeking those orders are set out on the face of the application alongside an affidavit sworn by the advocate for the plaintiff. The application is opposed and there is a statement of grounds of opposition. Both counsel have made their submissions and cited several authorities.

On the day the suit was dismissed only the advocate for the defendants was present. *Prima facie* this would show that the defendants had received the notice contemplated under order 17 rule 2. However the plaintiff's counsel has deponed that no notice was served. The order sought is discretionary and the court has to take into consideration all the facts leading to the dismissal. This suit was filed in the year 2003 and the last time any step was taken relating to the hearing was on 19th October, 2011 when both parties appeared in the registry and listed the case for hearing on 23rd January, 2012.

On that day, no proceedings were recorded and since then, no action was taken until 4 years later when the suit was dismissed. It is the plaintiff's responsibility to move the court as owner of the case and notwithstanding what has been stated in the affidavit in support of the application, there is not sufficient cause that has been given to elicit the discretion of the court.

It is now 14 years since the suit was filed, and if the plaintiff had any interest in pursuing the prayers set out in the plaint, this suit would not be pending today.

I know that dismissal of a suit is a drastic measure because the end result is that a party is driven out of the judgment seat without a hearing. It is also a common understanding that a court should aim at sustaining a suit rather terminating it by summary dismissal. – See **DT Dobie & Co. (Kenya) Limited Vs Muchina (1982) KLR 1.**

The delay in prosecuting this suit is inordinate and inexcusable, and even any blame on counsel cannot sustain this suit. – see **Rajish Lughani Vs. 50 Investments Limited And Another [2016] e KLR.**

Taking everything into consideration, this suit cannot be sustained without resultant injustice on the part of the defendant. I decline to exercise the court's discretion in the circumstances of this case and order that the suit is dismissed with costs to the defendants.

Dated, signed and delivered at Nairobi this 26th Day of July, 2017.

A. MBOGHOLI MSAGHA

JUDGE