



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 91 OF 2012

W. MUCHANGA & E. OLUNGA T/A WOMI ASSOCIATES....PLAINTIFF

-VERSUS -

THE HON. ATTORNEY GENERAL.....DEFENDANT

RULING

1. The application before me is for the reinstatement of the suit.
2. The suit was dismissed for want of prosecution, on 19th June 2015. The order for the dismissal of the suit was made at the instance of the court. In other words, it was not the defendant who made an application for the dismissal of the suit: The court acted on its own motion.
3. In this application, the plaintiff pointed out that he was never served with any Notice, prior to the dismissal of the suit. He says that if he had served, he would certainly have come to court to oppose the intended dismissal of his suit.
4. The defendant answered to the application by stating that the plaintiff had never been keen to prosecute his suit since he filed it in 2008. Therefore, the defendant believes that the plaintiff was not entitled to have the suit reinstated.
5. The plaintiff had suggested that the parties had held some negotiations to try and settle the case.
6. However, the defendant categorically denies ever having been involved in any negotiations for settlement.
7. A perusal of the letters produced by the plaintiff's advocates, to try and show that there had been some negotiations, reveals that the said 2 letters were written by the plaintiff's said advocates after the suit had already been dismissed. Therefore, the alleged negotiations cannot have been the reason why the plaintiff did not take steps to prosecute his claim.
8. Secondly, the plaintiff did not produce any communication from the defendant, to prove that the defendant had engaged him in the alleged negotiations. When one party writes to the other party, who does not respond, that cannot constitute negotiations.
9. In this case it is clear that the suit was filed in court in 2008. It therefore follows that by the time the suit was dismissed on 19th June 2015, a period of seven years had lapsed.

10. The plaintiff has not provided the court with any explanation for his failure to take steps to prosecute the case.
11. An unexplained delay and failure to prosecute the suit cannot be described as something resulting from accident, inadvertence or excusable mistake on the plaintiff's part.
12. In this case, the application has been filed through the Law Firm of **OWANG & ASSOCIATES ADVOCATES**. Mr. Donald O. Owang advocate swore an affidavit to support the application. He deponed that the plaintiff had instructed him "*sometimes in November 2015, to take over the conduct of this matter....?*"
13. As the suit had been dismissed in June 2015, any advocate who wished to come on record for the plaintiff thereafter, needed to first obtain the leave of the court.
14. However, the Law Firm of Owang & Associates Advocates does not appear to have sought the leave of the court to act for the plaintiff.
15. In the circumstances, it would appear that the application was not properly before the court.
16. Meanwhile, the plaintiff conceded that the Notice about the dismissal of the suit was effected by having the case placed on the Judiciary Website. In other words, the plaintiff conceded that there had been service.
17. His only reason for not attending court was, that due to an inadvertent omission, the advocate who was acting for the plaintiff, missed the case, on the Judiciary Website.
18. The plaintiff then pointed out that even the defendant failed to attend court on the material date.
19. The court records show that on 19th June 2015, both parties were absent from the court, at the time when the suit was dismissed. However, I hold the view that although the defendant was also absent from court on the material date, that cannot grant some reprieve to the plaintiff.
20. The suit was dismissed because the court was satisfied that there had been no satisfactory response to the Notice which required the parties to show cause why the suit should not be dismissed, after it had remained dormant since 10th December 2012.
21. In the circumstances, whether or not the defendant also failed to attend court on 19th June 2015, that was of no consequence, considering that there was no counter-claim in this case.
22. In my considered opinion, the delay in this case is inordinate and un-explained.
23. It is already nine (9) years since the suit was filed in court.
24. There is a real possibility that memories of witnesses will have faded, and that therefore it would be difficult for the court to do justice to the parties, if the suit were to be reinstated.
25. In the event, I find no merit in the application dated 20th December 2016. It is therefore dismissed, with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 25 day of July 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Miss Kanyi for Kiarie for the Defendant

Collins Odhiambo – Court clerk.