



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NUMBER 461 OF 2011**

**DAVID KEMEI.....PLAINTIFF**

**VERSUS**

**ENERGY REGULATORY COMMISSION.....1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF POLICE.....2<sup>ND</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

This is a Notice of Motion dated 8<sup>th</sup> September, 2016 by the Plaintiff/Applicant David Kemei brought under Section 1A, 1B and 3A Civil Procedure Act and Order 51 of the Civil Procedure Rules seeking orders: -

***a. That the Honourable Court be pleased to set aside its order dismissing the suit and re-instate the Plaintiff's suit for hearing and determination on merit.***

The application is premised on the grounds that: -

- i. The Plaintiff's/Applicant's case was dismissed for want of prosecution.**
- ii. No Notice to Show Cause why the suit should not be dismissed was served on the Applicant's Advocates to enable them file a suitable deposition to explain the delay.**
- iii. It is in the interest of justice and fairness that the orders sought herein are granted.**
- iv. No prejudice will be suffered by the Defendants/Respondents if the orders sought herein are granted.**
- v. This application is brought in good faith and without undue delay.**

The application is supported by the affidavit of Christine Alando Advocate sworn on 8<sup>th</sup> September, 2016 in which she depones that the Plaintiff/Applicant brought this suit by way of Plaint dated 20<sup>th</sup> November, 2011 and service of summons were duly effected upon all the Defendants/Respondents by way of personal service. That the 1<sup>st</sup> Defendant/Respondent entered appearance through a Memorandum of Appearance dated 11<sup>th</sup> November, 2011 by the firm of S. Musalia Mwenesi Advocates. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents entered appearance through a Memorandum of Appearance dated 10<sup>th</sup>

November, 2011 by the State law Office of the Hon. Attorney General.

She depones further that the parties exchanged pleadings and an invitation to fix a mention date for directions which were sent to the Defendants/Respondents. By consent of parties the matter was fixed for hearing on 23<sup>rd</sup> July, 2012. A reminder to the Defendants/Respondent's advocates asking them to comply with the pre-trial procedures before the said hearing date was sent. On the 23<sup>rd</sup> July, 2012 the matter did not proceed for hearing as it was not listed on the court's cause list.

She avers that no notice to show cause why the suit should not be dismissed was ever served upon the Plaintiff/applicant or his advocates. The Plaintiff/Applicant was not afforded an opportunity to explain why the suit should not be dismissed. That the dismissal of the suit without notifying the Plaintiff/applicant or his advocates is highly prejudicial since he was denied an opportunity to offer the necessary explanation negating the withdrawal.

She further avers that it is in the interest of justice and fairness that this application be allowed and the Plaintiff's suit be rein-instated for hearing and determination on merit. She deponed that the Plaintiff has at all times been desirous of prosecuting his case, the application was brought in good faith and without undue delay and in any event no prejudice will be suffered by the Defendant//Respondent if this application is allowed.

By consent both parties filed their respective submissions.

The history of this suit is that the Plaintiff/Applicant filed a suit against the Defendants/Respondents by plaint dated 12<sup>th</sup> October, 2011 seeking special damages of Ksh.29,500,000/- general damages for false imprisonment and exemplary damages arising from his arrest and prosecution on allegations of colluding to defraud the company of Ksh.1,107,566/-. The Defendants/Respondents filed their statement of defence dated 9<sup>th</sup> January, 2012 and filed on even date. The Defendant filed an application to amend statement of defence which was granted by order dated 11<sup>th</sup> July, 2013.

The Applicant then did not take any step to prosecute the suit. On 9<sup>th</sup> June, 2016 notice having been issued under Order 16 Rule 2 (1) Order 42 Rule 35(2) Civil Procedure Rules and there being no objection, the suit was dismissed for want of prosecution.

M/s Olando for Plaintiff/applicant submitted that the Applicant was not aware of the proceedings leading to dismissal of the suit for want of prosecution as the notice was never served on them. Counsel submits that the delay in prosecuting the suit was not deliberate but was mainly due to unavailability of hearing dates as informed by the High Court Registry and listed several dates when though matter was fixed for hearing the same could not proceed. Counsel submitted that the delay having been explained, the court can set aside the order for dismissal and reinstate the suit because the Respondent will not suffer any prejudice if same is reinstated. Finally, counsel submits that this application for setting aside has been made without undue delay.

M/s Mwangi for 1<sup>st</sup> Respondent and Mwenesi for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also filed written submissions. Counsel urged this court to determine whether the Applicants had come to come in good faith, brought the application within reasonable time and if the reinstatement will prejudice the Defendant. Counsel submitted that none of those factors obtained in this application and this application, therefore should be dismissed.

Order 17 (2) under which this suit was dismissed provides as follows:-

***“1. 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.***

***2. If the cause is shown to the satisfaction of the court it may make such orders as it thinks fit to***

***obtain expeditious hearing of the suit.”***

The provisions gives the court discretion to dismiss the suit or make such orders as it may deem fit. In this suit it is clear that the last step taken by the Plaintiff/Applicant was when they attended the ruling of the application by Defendant to amend their defence on 11<sup>th</sup> July, 2013. The court in exercising the discretion to set aside the dismissal must be guided by the cardinal principle of justice that suits must be determined in an expeditious manner and that the court in exercising its discretion must take into consideration the interest of both the Plaintiff and Defendant and the justice of the case.

In this application, there is no evidence on record that the Applicant was served with the notice to show cause. I am not prepared to find that publication in the website and cause list alone was sufficient notice particularly where the Applicant contends that no such notice was served to them. This application for setting aside was brought without undue delay, and I am satisfied that the Applicant has demonstrated that he is desirous to prosecute the suit. I, therefore, allow the application, set aside the order for dismissal dated 9<sup>th</sup> June, 2016. I direct the suit be reinstated and same be prosecuted by the Applicant within six (6) Months. If the same is not prosecuted within 6 months of today’s date the suit will stand dismissed.

**Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of September, 2017.**

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**S N RIECHI**

**JUDGE**