



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT NO. 83 OF 2005 (O.S)

SAADIA HIRBO.....PLAINTIFF/APPLICANT

-Versus-

ADAN HAILE DARCHE.....DEFENDANT/RESPONDENT

RULING

Reinstatement of suit

[1] By a Notice of Motion Application dated 29th February 2016, the Plaintiff/Applicant has sought the following orders:

- 1. THAT this Honourable Court be pleased to review and set aside the Order made herein on 13th July 2015 dismissing the Plaintiff/Applicant's suit herein and to reinstate the same for hearing and final disposal thereof.***
- 2. THAT upon granting of prayer No. 1 here above, this Honourable Court be pleased to order for the transfer of this suit from the High Court of Kenya at Meru to Marsabit for its hearing and disposal.***
- 3. THAT the costs for this Application be in the cause.***

[2] The application is expressed to be brought under Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act CAP 21 of the Laws of Kenya, and all other enabling provisions of the law. It is supported by the affidavit of SAADIA HIRBO.

Applicant: NTSC not served

[3] The gist of the Application is reinstatement of this suit which was dismissed by Court on 13th July 2015 for want of prosecution. The Applicant argued that the *Notice to Show Cause* issued by the Court under Order 17 Rule 2 of the Civil Procedure Rules was served upon the firm of F.K Gitonga & Company Advocates who are no longer acting for the Applicant, instead of Alfred Kitheka & Company Advocates who are on record for the Applicant. Therefore, neither the Applicant nor her advocates was aware of or served with notice to dismiss the suit. Consequently the Applicant contended that there was an error apparent on part of the court and that it would only be fair and just that the dismissal order be renewed and be set aside.

Respondent: delay inordinate and not explained

[4] The Application was opposed via a Replying Affidavit filed in court by the Respondent on 17th May 2017, where he deposed inter alia that the Applicant filed this suit 12 years ago and abandoned it. Thus, forcing the court to issue notice to show cause why it should not be dismissed. He also urged that the allegation that the court file was missing from the registry was not true and was not supported by any evidence. Further, application to reinstate the suit was not filed until one year later and the delay thereto had not been explained by the Applicant. On that basis, the Respondent should be viewed as an indolent litigant and should not be assisted by the court.

DETERMINATION

[5] This suit was filed in court on 7th September 2005. No action was taken by the parties for about 10 years; and no explanation was given for the delay, thus, culminating into its dismissal on 13th July 2015. Again, from the time the suit was dismissed, the Applicant filed this Application only on 2nd March 2016; about 8 months later. Similarly, no explanation for that delay has been given. I note however that the basis for applying is that the Notice to Show Cause issued by court under Order 17 Rule 2 of the Civil Procedure Rules was served upon the firm of F.K Gitonga & Company Advocates who were no longer acting for the Applicant. The record shows that the firm of Kitheka & Company Advocates filed a Notice of Change of Advocates on 27th April 2011. This was 6 years after the suit had been filed. Notably, however, the firm of Kitheka & Company Advocates took no action from 27th April 2011 until 2nd March 2016 when they filled the instant application; this again is a period of 4 years since they came on record for the Applicant. No explanation has been given by them for this delay.

[5] Although there is no exact amount of time which constitutes inordinate delay, but a delay that is beyond acceptable limits is inordinate and inexcusable. And a suit suffering from that kind of delay should be dismissed although such is draconian action. See what was stated in **Allen v Sir Alfred Mc Alpine** (supra):

“To put right this wrong, we will in this court do all in our power to enforce expedition; if need be we will strike out actions where there has been excessive delay. This is a stern measure, but it is within the inherent jurisdiction of the court, and the rules of the court expressly permit it. It is the only effective sanction that they contain.”

The justification for taking such drastic action is founded on the principles of justice enshrined in article 159 of the Constitution after the old age adage that; *Justice delayed is justice denied*. In that spirit also, our law has seen the introduction of overriding objective of the law which has placed a statutory obligation on parties and their legal counsels to assist the court attain the overriding objective of law *inter alia* to dispose of cases expeditiously. And I can do no better than Warsame J (as he then was) in exemplifying the dire consequences of delay in prosecuting cases in the case of **London Distillers (K) Ltd V Philip Kipchirchir & 2 Others [2007] eKLR** that;

“In my view delay is affront to the administration of justice, delay is something to be deplored, delay is repugnant to justice, delay spoils the image of the judiciary, delay foments public outcry against the judiciary, delay creates disharmony between the consumers of justice and the courts. Delay is a disguised disinterest in the disposal of the suit. Delay creates desolate and despair in the minds of the party affected by the delay. It is a despicable attempt to enslave a party to an endless contest. That contest must come to an end if the instigator is unwilling to end it. In this case the plaint of the plaintiff is like a despotic ruler hanging over the head of the defendants”.

[6] I am, however, aware what Chesoni j (as he then was) in the case of Ivuta posed; whether despite the prolonged delay it was still possible to serve justice between the parties. There has been no explanation of the delay herein which is quite inordinate. But because there may have been an omission in the service of the notice of dismissal, I will indulge the Applicant and resurrect the suit except subject to strict conditions that is to say;

(a) The Applicant shall take such appropriate and necessary steps to prepare this suit for, and have it set down for hearing within 30 days. Should she fail to do so within the time prescribed herein, this suit shall automatically stand dismissed without the need to apply for its dismissal. It is so ordered.

Dated, signed and delivered in open court at Meru this 24th October 2017.

F. GIKONYO

JUDGE

In the presence of:

Mr. Murango advocate for respondents

Mr. Murithi advocate for Kitheka advocate for applicant

F. GIKONYO

JUDGE