

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 338 OF 2011

WILSON WAFULA KHAEMBA T/A SIPETO CONTRACTORS.....PLAINTIFF

VERSUS

KENYA INVESTMENT AUTHORITY.....DEFENDANT

RULING

The plaintiff's suit was dismissed by the court on 9th June, 2016 under Order 17 Rule 2 (1) of the Civil Procedure Rules. This is an application by way of Notice of Motion under Sections 1A,1B,3A and 63 (e) of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules for an Order to set aside the dismissal of the suit.

The application is supported by the plaintiff's affidavit alongside other grounds set out on the face of the application. It is opposed and there is a replying affidavit sworn by the Managing Director of the defendant. The court directed that the application will be decided on affidavit evidence.

The last entry before the dismissal order according to the record, was 18th June, 2014 when the case was listed for hearing but could not go on at the instance of the plaintiff. The dismissal order was within the period allowed by the rules under which it was made. The record shows the plaintiff has over a period of time changed advocates at least three times and this may have occasioned the delay in the prosecution of the suit.

When the matter came up for dismissal on 9th June, 2016, both counsel did not appear. Dismissal of a suit is a drastic step which should only be ordered in deserving cases and only then, with a lot of caution. For all intents and purposes this is a suit which was ready for hearing but for reasons not known could not proceed to hearing. It is the duty of the plaintiff to ensure that the case is listed for hearing but in the event this is not done the defendant also has a duty to move the court for the same purpose. Some explanations have been offered by the plaintiff as to the reason of delay relating to some criminal charges which were raised against him.

This reason appears plausible as it may have led to distraction from the main cause. I have also considered what prejudice may result to the defendant and in my view, more prejudice will result to the plaintiff if the suit is not reinstated. I am inclined to exercise discretion in favour of the plaintiff by setting aside the dismissal order and reinstating the suit. I direct that the parties shall take a hearing date in the registry and have the case prosecuted within 120 days from today. In default the suit shall stand dismissed without reference to the court. The plaintiff shall pay the defendant costs occasioned by this application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 13th Day of December, 2017

MBOGHOLI MSAGHA

JUDGE