



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL SUIT NO. 388 OF 2009**

**MWOLOLO DAVID.....PLAINTIFF/RESPONDENT**

**VERSUS**

**PARBAT SIYANI CONSTRUCTION CO. LTD.....DEFENDANT/APPLICANT**

**RULING**

1. This is ruling on an application dated 17<sup>th</sup> March 2015 principally seeking an order that the plaintiff's suit against the defendant be dismissed for want of prosecution with costs to the defendant. The application is founded on the provisions of Order 17 rule 2 (3) of the Civil Procedure Rules. The application was supported by an affidavit of the Defendant's counsel, Ms. Emily Akinyi Omondi, sworn on 17<sup>th</sup> March 2015 deponing to the effect that the plaintiff who filed his plaint dated 10<sup>th</sup> December 2009 on the 16<sup>th</sup> December 2009 had taken no steps to have the matter fixed for hearing since the close of pleadings with the plaintiff's filing on 17<sup>th</sup> February 2010 of reply to the Defendant's defence filed on 5<sup>th</sup> February 2010.

2. During the hearing of the application on 3<sup>rd</sup> December 2015, the Plaintiff's counsel though duly served with the application and hearing notice for the day did not attend and Counsel for the Defendant/Applicant, Mr. Nthiwa, submitted that the application was unopposed and urged the court to grant the application as prayed.

3. It is clear from the record that the Plaintiff's counsel M/S Nelson Kaburu & Co advocates were by a letter dated 5<sup>th</sup> August 2015 and filed in court on 7<sup>th</sup> August 2015 invited by counsel for the defendant/applicant to attend the court registry to fix a mutually convenient date on the 7<sup>th</sup> August 2015 and that upon their failure to attend, a date for the hearing of the application dated 17<sup>th</sup> March 2015 was fixed for 3<sup>rd</sup> December 2015. By an affidavit of Christopher Githui, a court process server, of 2<sup>nd</sup> December 2015, it is demonstrated that the said counsel for the plaintiff was on the 10<sup>th</sup> August 2015 served with a hearing notice dated 10<sup>th</sup> August 2015 for the scheduled hearing of the application on 3<sup>rd</sup> December 2015. Counsel for the plaintiff/respondent, however, did not file a replying affidavit or grounds of opposition or indeed attend court for the hearing of the application dated 17<sup>th</sup> March 2015.

4. Order 17 Rule 2 of the Civil Procedure Rules is in terms as follows:

*"2. (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 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.*

*(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.*

*(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”*

5. It is not correct that the plaintiff had not taken any step in the suit since the close of pleadings with the filing of the reply to defence on 17<sup>th</sup> February 2010. The record shows that the counsel for the plaintiff did file on the 9<sup>th</sup> April 2010 in readiness for hearing the Plaintiff’s List of Issues for determination and the Plaintiff’s List of Documents both dated 12<sup>th</sup> March 2010. No further action was taken on the file until the Defendant’s application dated 17<sup>th</sup> March 2015, some four (4) years later, for dismissal of the suit for want of prosecution.

6. In the absence of any explanation for the default in taking action towards the hearing and determination of the suit for the past four (4) years, no cause is shown why the suit should not be dismissed in terms of Order 17 rule 2 (1) of the Civil Procedure Rules.

7. However, as the matter involves a personal injury claim wherein the plaintiff alleges to have been injured in the course of his employment with the defendant suffering ‘severe injuries leading to amputation of the right hand’, the court considers it to be in the interests of justice that a Notice to Show Cause as to why the suit should not be dismissed be given in terms of Order 17 rule (2) (1) of the Civil Procedure Rules to the plaintiff personally rather than the present service upon the advocate only in order to obviate any possible mistake of counsel principle before making an order for dismissal of suit if appropriate. The court will therefore issue a Notice to show Cause under Order 17 rule (2) (1) of the Civil Procedure Rules to the plaintiff personally.

## **ORDERS**

8. Accordingly, for the reasons set out above, the applicant’s application herein filed on 17<sup>th</sup> March 2015 is declined and an order for the issuance to the plaintiff personally of a Notice to Show Cause why the suit should not be dismissed made. The return date for the Notice to Show Cause shall be given in the Registry. Costs in the Cause.

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF JANUARY 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

**Mr. Mbaya for Ms. Oyaro for the Defendant/Applicant**

**N/A for the Plaintiff/Respondent**

**Ms. Doreen - Court Assistant.**