



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 662 OF 2012

MRS. ANNUNCIATA WAITHERA KIBUE.....1ST PLAINTIFF

DR. SUSAN NJERI KIBUE.....2ND PLAINTIFF

PAUL KIMARI NJAO.....3RD PLAINTIFF

-VERSUS -

GIBSON KAMAU KURIA T/A KAMAU KURIA & KIRAITU ADVOCATES.....DEFENDANT

RULING

1. The plaintiff's suit was dismissed on 19th June 2015, after the court concluded that the plaintiffs had failed to provide any satisfactory response to a Notice which had required them to Show Cause why the case should not be dismissed.
2. The order for the dismissal of the suit was made pursuant to the provisions of Order 17 Rule 12 of the Civil Procedure Rules.
3. When the learned Judge was dismissing the suit he made it clear that he was satisfied that there had been inordinate delay, of 2 years, in the prosecution of the case.
4. Considering that the case had last been in court on 16th December 2013, the Court held that there had been a want of prosecution of the case.
5. The plaintiff has now asked this court to set aside the dismissal of the suit, so that the case can be reinstated.
6. Mr. Mohamed Dubow, the learned advocate for the plaintiff submitted that the main reason why the plaintiff failed to respond to the Notice to Show Cause was that the plaintiff was never served with the said Notice.
7. In his considered view, it was a mandatory requirement of Order 17 Rule 2 (b) of the Civil Procedure Rules, that the parties to the suit be served with the Notice requiring them to show cause.
8. It is common ground that Havelock J. had directed the parties to file written submissions on the substantive Originating Summons. Those directions were given on 12th November 2013, after the parties both asked the court to allow them to canvass the Originating Summons by written submissions.
9. The plaintiffs were allowed 14 days to file their submissions. Thereafter, the defendant was to also have 14 days, from the date of service, to file his submissions.
10. The court records show that by 16th December 2013, the plaintiffs had not yet filed their submissions.
11. Havelock J. concluded that the plaintiffs were not interested in pursuing their Originating

- Summons. Therefore, the learned Judge directed that the Court file in Cmcc No. 1037 of 2012 be returned to the Chief Magistrate's Court.
12. After that order was made, the plaintiffs and the defendant did not take any other steps in the case.
 13. Accordingly, Riechi J. was right to have noted, when he handled the case, on 19th June 2015 that the case had last come up before the court on 16th December 2013.
 14. The defendant submitted that Riechi J was right to have dismissed the suit for want of prosecution. The defendant is convinced that the plaintiffs were not serious about pursuing the case.
 15. Indeed, the defendant believes that the general conduct of the plaintiff did not warrant the grant of the orders for the reinstatement of the suit.
 16. As far as the defendant was concerned, the plaintiffs were guilty of abusing the process of the court.
 17. The defendant also submitted that he had been prejudiced for 5 years, during which period of time the plaintiffs had failed to pay money which they had admitted owing to the defendant.
 18. For those reasons, the defendant urged the court to dismiss the application for the reinstatement of the suit. However, if the suit were to be reinstated, the defendant asked the court to order that it be conditional upon the plaintiff first depositing in court, the sum of Kshs. 1,844,230/-.
 19. But the defendant denied ever having admitted liability. In fact, the defendant said that the court had already dismissed the plaintiff's application for judgement.
 20. The court records reveal that on 15th February 2013 the defendant had asked the court to order the plaintiffs to deposit Kshs. 1,844,230/- in court, pending the hearing of the case which was in the Magistrate's Court.
 21. However, Havelock J. did not grant that order. Instead, the learned Judge directed that the court file from the Magistrate's court be made available to him, to enable him verify the facts contained in it.
 22. The file was made available in November 2013, and thereafter the parties recorded a consent order, pursuant to which they were to file written submissions. In other words, the defendant did not, at that stage, persist in his quest for the plaintiffs to be ordered to deposit the money in court.
 23. Of course, the fact that the defendant did not push forward that agenda at that time does not bar him from raising it at this stage.
 24. The defendant has not challenged the plaintiffs' contention that the law requires the court to serve Notices on the parties before the court can proceed to dismiss a suit pursuant to Order 17 Rule 2 of the Civil Procedure Rules. The said rule reads as follows;

“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”.

25. Parties are expected to keep their cases active. They ought not to let their cases go to sleep for more than a year, at any time. Therefore, if a case had remained inactive for over a year the court could give notice to the parties, requiring them to show cause why the case should not be dismissed.
26. There is no obligation on the court to issue notices in all cases which had been inactive for over one year.
27. However, when the court decided that any particular case had been inactive, it was open to the court to give notice.
28. When the court was of the view that a case had remain inactive and that it may be a candidate for dismissal for want of prosecution, the court was under an obligation to serve a notice in writing, upon the parties. The reason why notice had to be served before the court could proceed to dismiss the suit is that the parties were given an opportunity to show cause why their case should not be dismissed.
29. In other words, the fact that a case was inactive for over a year was not an automatic trigger for its dismissal. The rules appreciate that the parties to any such case may have sufficient or satisfactory explanation for such delay.
30. Therefore, it was only if the parties who had been served failed to show cause that the case would

- be dismissed.
- 31.It therefore follows that when parties had not been notified of the court's intention to dismiss a suit for want of prosecution, the court ought not to dismiss the suit.
- 32.In this case, the plaintiffs were never served with a notice to show cause why their case should not be dismissed for want of prosecution. Therefore, it was a mistake to dismiss the case.
- 33.Accordingly, the said dismissal is now set aside.
- 34.I find no reason, in law, to warrant the imposition of conditions to the order setting aside the dismissal.
- 35.Accordingly, I do not accept the defendant's invitation, to have the plaintiffs deposit in court the amount of money which the defendant was claiming.
- 36.Finally, I order that the costs of the application dated 23rd July 2015 shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of March 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Miss Makungu for Mbabu for the Plaintiffs

Karanja for the Defendant

Collins Odhiambo – Court clerk.