



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 525 OF 2007
GEOFFREY ALEXANDER GATHUTHI KIMARU.....PLAINTIFF
VERSUS
INDUSTRIAL AND COMMERCIAL DEVELOPMENT
CORPORATION.....DEFENDANT

RULING

1. On 17th February 2012 the court dismissed the plaintiff's suit for want of prosecution.
2. The plaintiff has now come to court, asking that the suit be reinstated.
3. According to the plaintiff, it was not until 11th February 2015 that the advocates acting for the defendant served the plaintiff's advocate with a letter dated 10th February 2015, together with a copy of the order dated 17th February 2012. It is then that the plaintiff was made aware of the dismissal of the suit.
4. Prior to 11th February 2015 the plaintiff was totally unaware that his case had been dismissed.
5. The defendant has opposed the application for the reinstatement of the suit. It points out that the case was last in court on 19th November 2009.
6. The defendant also faulted the application on the grounds that the supporting affidavit was sworn by the plaintiffs advocate, instead of the plaintiff himself.
7. Thirdly, the defendant pointed out that the plaintiff did not, in this application, explain what he had done for the last 7 years. In the opinion of the defendant, if the plaintiff had been served with a Notice To Show Cause, he would have been expected to explain the delay in prosecuting his case.
8. But, in any event, the defendant believes that Order 17 Rule 2 of the Civil Procedure Rules does not require service to be effected upon the plaintiff before the court can dismiss the suit.
9. The defendant considers the plaintiff as having been very casual in his handling of his case. Therefore, the court was asked to reject the application for the reinstatement of the suit.
10. In determining this application, I start on the premise that the defendant did not challenge any of the

facts deponed to by the plaintiff. That means that the defendant acknowledged that the plaintiff was never served with any notice requiring him to show cause why the case ought not to be dismissed.

11. It is true that if the plaintiff had been served, he would have been expected to show cause why the case should not have been dismissed for want of prosecution. But because he was never served with any notice, the plaintiff was denied the opportunity of providing any such explanation as he may have had.

12. By dismissing the suit without having accorded the plaintiff an opportunity to show cause, the court condemned him unheard.

13. Order 17 Rule 3 of the Civil Procedure Rules provides that if neither party to a case has taken any step in a case for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed. The said Rule provides that if cause is not shown to the satisfaction of the court, the suit may be dismissed.

14. Order 17 Rule (2) states that if cause is shown to the satisfaction of the court, the said court could make such orders as are deemed fit to obtain the expeditious hearing of the case.

15. Obviously, if a party is not served with a notice requiring him to show cause, he could not be expected to know that the court required him to do anything.

16. In this case neither of the parties were served with notices requiring them to show cause. They could not therefore have been expected to discharge the onus of showing cause, to the satisfaction of the court or at all.

17. I hold the considered view that when the court decides to take action pursuant to Order 17 Rule 2 (1) of the Civil Procedure Rules, it must serve notices on the parties. If the court proceeds to dismiss the suit on the ground that the plaintiff did not show cause to the court's satisfaction, such a dismissal ought to be set aside if the plaintiff had not been actually served with a notice requiring him to show cause.

18. The scenario in which the court is required to serve the parties with a notice can be contrasted to the situation which was anticipated in the previous Order 16 Rule 6 of the Civil Procedure Rules. The said Rule provided as follows;

“In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed; and in such case the plaintiff may, subject to the law of limitation, bring a fresh suit”,

19. That rule does not impose any requirement for service of any notice on the plaintiff or on any other party.

20. But that rule is no longer in place.

21. Accordingly, I reiterate that the plaintiff was condemned unheard. Therefore, that is reason enough to warrant the setting aside of the dismissal of the suit.

22. In the event, the *ex parte* orders made on 17th February 2012 are set aside, and the suit is reinstated.

23. Nonetheless, the costs of the application dated 13th February 2015 shall be in the cause. I cannot, at this stage, order the defendant to pay the costs of that application because it played no role in the dismissal of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of June 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kamunya for Keyonzo for the Plaintiff

Kamau for the Defendant

Collins Odhiambo – Court clerk.