

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL SUIT NO. 18 OF 2005

JOHN KUNDU KHISA..... APPLICANT

VERSUS

FLORENCE N. WANJALA..... DEFENDANT

RULING

By an application brought under Order 12 Rule 7 of the Civil Procedure Rules and Section 3 & 3A of the Civil Procedure Act, the applicant seeks *inter alia* that the order made on 13th December 2012, dismissing the plaintiffs/applicant suit be set aside and the suit be reinstated for hearing on merit.

The plaintiffs suit was dismissed for want of prosecution under Order 17 of the Civil Procedure Rules. The Applicant argues his former advocates re-located and failed to inform him. Secondly that he was not served with notice dismissing the suit and was therefore condemned unheard. He also blamed the unavailability of enough judges hence the backlog. The Respondents opposed the application and submitted that the applicant has not explained the delay. He averred the applicant has changed advocates 4 times therefore lack of diligence on the part of Mr. Lel cannot be an excuse.

Mr. Samba submitted further that the Respondents will not get a fair trial due to unavailability of crucial witnesses. Alnasir Visram J (as he then was) in **Concorde Container Services Vs. Joseph M. Kago and another eKLR** quoted the court of appeal of England decision of **Allen vs. Sir Alfred McAlpine & Sons [1968] All E.R** which established the principles for governing applications for dismissal for want of prosecution as;

1. Delay is inordinate.

2. Inordinate delay is inexcusable

3. The defendant is likely to be prejudiced by the delay.

Visram J, then went ahead to allow the application stating the delay was explained and ***“it was not inordinate to remove a litigant from the seat of justice. The aim of the court is to sustain suits rather than throwing them out of procedural defaults.”***

Upon perusal of the court file, there is a duplicate copy of the notice of dismissal of suit. I noted at the time of making the dismissal order that there was no proof the applicant was served. There have been several applications in this file, which have been determined previously. The recordings in the court file shows the plaintiff on 22.4.2010 fixed a hearing date in the registry for 27th October 2010. On this date there was no appearance and the matter was taken out of the hearing list.

The next listing was on 22.10.12 when a date was given for dismissal. This was approximately 2 years when the file laid idle.

In my view, two years is inordinate but I am alive to the fact that partly in the year 2011 - 2012 the Bungoma advocates went on a go-slow demanding for posting of additional judges to reduce the backlog of cases. This is one of the explanation given in the supplementary affidavit explaining the delay and I find it credible.

The Respondents have stated that some of their crucial witnesses are unavailable hence they will suffer prejudice. They did not explain the reason for their unavailability. I find they can be compensated by way of costs.

Consequently I allow the application for the reason that the delay was explained and is excusable. The applicant was not served with notice dismissing the suit and the respondents can be compensated by way of thrown away costs. The order dismissing the suit be and is hereby set aside. I proceed to assess thrown away costs for the 1st, 3rd Respondent at Kshs. 15,000/= to be paid within 45 days from the date of this Ruling. In default

execution to issue.

RULING DATED, SIGNED, READ and DELIVERED in open court this 17th day of September 2013.

A. OMOLLO

JUDGE.