



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LANDS AND ENVIRONMENT DIVISION
CIVIL CASE NO. 613 OF 2008

SUSAN NJAMBI NJERI.....PLAINTIFF

VERSUS

ANNASTACIA NJAMBI KUNGU.....1ST DEFENDANT

ANN NDUTA RIGII.....2ND DEFENDANT

RULING

1. I have before me the plaintiff's notice of motion dated 24th February 2012. The plaintiff prays that the order of 2nd February 2012 dismissing the suit be set aside and that she be reinstated to the seat of justice. The motion is expressed to be brought under section 1A, 1B and 3A of the Civil Procedure Act.
2. The principal grounds are contained in a deposition sworn on 24th February 2012 by James Njengo. He is counsel for the plaintiff. On 2nd February 2012, the suit had been set down for hearing of a notice to show cause. Neither the plaintiff nor the defendant appeared. The suit was dismissed. The plaintiff's counsel avers that he had not been served with the notice for dismissal and only found out about it when he was attending to a different suit in court. By the time he rushed to the material court, he found the suit had been dismissed. He also avers that the plaintiff has sought interlocutory judgment against the 2nd defendant in default of defence. It was also contended that the defence of the 1st defendant is defective for want of execution. Lastly, the plaintiff avers that she is keen to prosecute the suit but the court file got misplaced when the records were being transferred from the old court building.
3. The defendants were served with the motion but did not appear or file a reply. I thus find that the averments in the above deposition are uncontroverted. But that is not to say they are true. I will give an explanation. I have examined the notice to show cause dated 21st December 2011 fixing the matter for dismissal for 2nd February 2012. It shows that it was served on J.M. Njengo, the plaintiff's counsel, on 23rd January 2012 at 9.50 a.m. There is affixed on the notice an official receipt stamp of the plaintiff's law firm. There is also affixed a process server's endorsement of service of the notice on that date. So when the said lawyer depones at paragraph 5 of the affidavit that "no prior notice had been received" he is lying through his teeth. I thus find that the notice for dismissal was not only served and acknowledged, but that the plaintiff had more than sufficient notice. No evidence is provided to show that the plaintiff

had taken any steps to fix the suit for hearing. No letter is even attached addressed to court to inquire about the court file that the plaintiff says was misplaced.

4. Order 17 rules 2(1) and (2) of the Civil Procedure Rules provides;

“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”.

5. The courts inherent power to dismiss a suit was well laid out in Mukisa Biscuit Manufacturing Company Vs West End Distributors Ltd 1969 E A 696. See also Fitz Patrick Vs Batger & Company Limited [1967] 2 ALL ER 657 and Mugo Njogu Vs Mary Githinji [2010] e KLR.

6. In the decision in Fitz Patrick Vs. Batger & Co Ltd [1967] 2 ALL ER 657 Lord Denning delivered himself thus;

“It is the duty of the plaintiff’s advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. Just consider the times here. The accident was on 13th December 1961. If we allowed this case to be set down now, it would not come up for trial until the end of the year. That would be six years after the accident. It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution”.

7. This suit dates back to the year 2008. Over 3 years later, no concrete step has been taken by the plaintiff or his advisors to set it down for hearing or for formal proof or at all. The court, having served the notice to show cause with sufficient notice to the plaintiff, and no cause having been shown, the order of dismissal was regular. I find no sufficient reason to disturb it.

8. For all the above reasons, I find that the plaintiff’s notice of motion dated 15th February 2012 lacks merit. I order that the application be dismissed. As the defendants did not appear, I shall not order costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 17th day of May 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

No appearance for the 1st Defendant.

No appearance for the 2nd Defendant.

Collins Odhiambo – Court clerk.