

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 195 of 1999

WILLIAM CHESULUT ARAP LELEI:.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD:.....DEFENDANT

R U L I N G

The Plaintiff took out a Notice of Motion under section 3A of the Civil Procedure Act praying for orders that the intended taxation of the Defendant's bill of costs against the Plaintiff be stayed and the court's order of the 25/10/2006 dismissing the suit with costs for want of prosecution under Order XVI Rule 5 of the Civil Procedure Rules be set aside ex debito justitiae or as the court may deem fit and just. A Replying Affidavit was filed in opposition to the application. Before the application could be heard the Defendant took out a Notice of Preliminary Objection to the effect that this court lacks jurisdiction to reinstate the suit as under Rules 5 and 6 of Order 16 the Plaintiff's option is to bring a fresh suit or appeal against the dismissal order. It was argued for the Defendant/Respondent that a suit dismissed under Order 16 Rule 6 of the Civil Procedure Rules cannot be revived. For the Plaintiff/Applicant it was argued that the Plaintiff was never served with Notice to show cause why suit should not be dismissed for want of prosecution. The court's inherent jurisdiction was invoked.

The notice issued to the parties by the court was under order 16 Rules 5 and 6 of the Civil Procedure Rules. Under the said Rules there is no mandatory notice for dismissal required of the court to issue to the parties. The notice required to be served on the parties under Rule 5(d) is for the hearing of the suit if the court should of its own motion set the suit down for hearing. That being the case the notice sent by the court on 21/08/2006 was out of a sense of fairness and enhanced justice as it is not mandatory for the court under this rule to give a notice to show cause why suit be not dismissed. If suit be dismissed under Rules 5 and 6 of Order 16 then that is the end of the road for the Plaintiff with whom limitation has caught up. This is unlike in Rule 2 of the same order where the court may give notice to Show Cause. In my view it matters not whether the parties were served with the Notice to show cause or not. Under rule 6 the court proceeds without any notice to the parties and any notice the court may sent is gratuitous and not mandatory. That is in a case where no action is taken for a period of three years. In this case action was previously taken on 6th July 2005 and suit was dismissed on 25th October 2006. That is not three years and therefore the notice given under rule 6 was premature. The Defendant did not apply for the dismissal of the suit under rule 5(d) of Order 16. Notice to show cause as required under Order 16 Rule 2(1) was not given. It follows therefore that the dismissal was irregular. The same is hereby set aside. But so that the Plaintiff does not go to sleep over this order, he will ready the suit and set the same down for hearing within sixty (60) days of this order in default of which the same shall automatically stand dismissed. This application succeeds and it is allowed with costs.

Orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF MAY 2010

P.M.MWILU
JUDGE

IN THE PRESENCE OF

Machio - Advocate for the Plaintiff/Applicant
Alwanga - Advocate for the Defendant/Respondent
Andrew - Court clerk.

P.M.MWILU
JUDGE