REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 113 OF 2001

MACHARIA WAIGURU……..…..... PLAINTIFF

VERSUS

ATTORNEY GENERAL…….…..1ST DEFENDANT

I.P. NJOROGE……...…2ND DEFENDANT

CORP. VIOLET SHIKONDI……..3RD DEFENDANT

P.C.D. KAGAMBO…….4TH DEFENDANT

R U L I N G

On 6th July, 2001, the applicant, who is an advocate of this court, filed the instant suit against respondents seeking damages for unlawful arrest, false imprisonment and malicious prosecution. On being issued with summons to enter appearance, he served the same upon the respondents who reacted by filing a joint statement of defence on 15th November, 2001. Thereafter, the applicant took no steps at all to prosecute the suit. On 7th March, 2006 pursuant to Order XVI Rule 6 of the Civil Procedure Rules, this court on its own motion dismissed the suit for want of prosecution.

On 9th December, 2008 the applicant filed the instant application seeking that the order of dismissal be set aside on the ground that he had twice tried to fix the suit for hearing to no avail as the court file was missing, that he had not been served with notice of intention to dismiss the suit, that the criminal case on which the suit was based was only withdrawn in February, 2008 and finally that the police had persistently refused to obey court orders since the year 2001. The application was further supported by an affidavit sworn by the applicant in which in the main he reiterated and expounded on the grounds aforesaid.

The application was expressed to have been brought under *section 3A* of the Civil Procedure Code and *Order XVI Rule 6* of the Civil Procedure Rules.

The application was resisted by **Ms Munyi**, learned principal litigation counsel on behalf of the respondents. She submitted that the application was misconceived, bad in law and lacked merit. The application was bought under the wrong provisions of the law. That discretion cannot be exercised

capriciously. There was no explanation for the undue delay of 2 years before the filing of the instant application. As a plaintiff it was his duty to pursue the suit to its logical conclusion. This suit ought not to be reinstated therefore. The applicant should instead file a fresh suit subject to limitation.

I have carefully considered the application, the supporting affidavit, rival oral submissions and the law. *Order XVI Rule 6* gives this court jurisdiction to dismiss a suit if no step is taken for 3 years to prosecute the same. The rule is couched thus;

"……**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……"**

The court invoked this rule when it dismissed the suit on 7th March, 2006. As at that time, the suit had been in limbo for 4 years. The rule as can be seen does not provide for Notice of intention to dismiss the suit for want of prosecution to be served on the parties. The court as it were acts *Suo Moto.* Accordingly the complaint by the applicant that he was not served with the Notice is of no consequence. Once the suit is dismissed under this rule, the only remedy available to the party most affected by the order is to file a fresh suit, subject of course to the law of limitation. The rule thus does not envisage an application such as the one we are dealing with here. It is for this reason that I agree with **Ms Munyi's** submissions that the application is misconceived, incompetent and bad in law.

The applicant claims to have been denied the opportunity to prosecute his case because of non-availability of the court file. There is however no evidence placed before me by the applicant to show that the court file went missing at some point in time. The applicant is a lawyer who knows better what to do in the event of a court file missing. I would have expected that he would have formally written to this court pointing out the fact that the court file was missing. I would have also expected that if the court file persistently went missing, he would have made an appropriate application for the reconstruction of the same. The applicant took none of the above steps. To me therefore the applicant was and is an indolent litigant. This court cannot assist such a litigant.

The applicant has stated that he twice tried to fix the suit for hearing albeit unsuccessfully. However it cannot escape my attention that the two letters inviting the respondents for purposes of fixing a hearing date for the suit were dated 12th January, 2005 and 13th May, 2007. These letters are 2 years apart. Secondly, the pleadings herein were closed with the filing of the defence on 15th November, 2001. The applicant thereafter took no steps in the suit between November 2001 and January, 2005 a period of well over 3 years. The foregoing clearly shows that the applicant was and has not been keen on prosecuting the suit. Further the suit having been dismissed for want of prosecution on 7th March 2006, it was not until 9th December, 2008 that he filed the instant application. This is a period in excess of 2 years. Yet the applicant has offered no explanation for the delay.

In asking me to set aside the order of dismissal, the applicant is essentially asking me to exercise my wide and unfettered discretion in his favour. However such discretion cannot be exercised capriciously but on sound judicial principles. Of course in exercising such discretion the conduct of the applicant prior to and after the making of order complained of comes to the fore. As I have endeavoured to demonstrate above, the conduct of the applicant cannot pass for a person who has been anxious to have the suit heard and determined timeously. It is for this reason that I decline to exercise my discretion in his favour. Indeed the same rule has provided a remedy to the applicant. He can file a fresh suit, subject to the law of limitation. The application is accordingly dismissed with costs to the respondents.

Dated and delivered at Nyeri this 21st day of May, 2009.

M.S.A. MAKHANDIA

JUDGE