



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Civil Case 458 of 2006

NELSON MWANGI.....PLAINTIFF

VERSUS

KIKUYU TOWN COUNCIL & ANOTHER...DEFENDANT

RULING

The background information herein is that the applicant first moved to this court vide an application dated 9th June 2006 and filed on 18th June 2006 seeking transfer of Kikuyu CMCC No 308 of 2005 to the High Court at Nairobi for hearing and final disposal. Apparently it was not prosecuted prompting the respondent to present the application by way of notice of motion dated 27th February 2007, seeking an order for dismissal for want of prosecution on 17/11/06. Osiemo Judge dismissed the applicant's application for want of prosecution.

The applicant came back again to court vide an application dated 24th September 2007 by way of chamber summons presented under the relevant rules seeking orders that the orders made on 17th November 2006 erroneously indicated to have been made by Justice Aluoch Judge as she then was, but in effect they were made by Osiemo judge, dismissing the application dated 9th June 2006 for directions on the hearing date be set aside, and the said application be reinstated for hearing and that costs be provided.

The respondent filed grounds of opposition against the said application.

The application for reinstatement came up before this court on 22/10/08 for disposal. Counsel for the applicant failed to attend court. The applicant was in court and informed the court that he had agreed with his Counsel that they would meet in Court.

The respondent's Counsel was not willing to have the matter either marked SOG or adjourned and so he proceeded to argue the same. His grievances against the application are that:

- The original application took along time to be prosecuted hence justification for its dismissal.
- The current application too has been in court for long.
- The applicant is not keen to proceed with the matter which is holding up the trial in the Lower Court.
- There was no justification to seek the orders sought evidenced by the fact that pleadings filed in the lower Court on the basis of which a transfer could be sought has not been annexed.

The court has schemed, through the record and considered the content in the light of the grounds of the opposition filed as well as the oral representations in court and the court makes the following findings.

(i) Despite absence of the prosecution counsel since the opposing counsel has made representation in court the application has to be disposed on the merits.

Due consideration has been made to this fact and in this courts opinion in the absence of the applicant having displayed the proceedings filed in the Lower Court. This court is not in a position to know the nature of the complaint filed by the plaintiff and the defendant reasons for opposing it.

It should be noted that the High Court superior powers over the Lower Court is discretionary in nature and like all other judicial discretions it has to be exercised judiciously and with a reason.

In the absence of the Lower Court proceedings there is no basis upon which the courts discretion can be exercised as the pleadings filed in the Lower court were necessary to enable this court to determine whether the plaintiff's claim is a matter fit for handling by the lower court or High court.

The reason given reinstatement of the dismissed application will not serve any useful purpose. For the reason given the court finds no merit in the applicant's application dated 24/9/2007. The same is dismissed with costs to the respondent.

Dated, Read and delivered at Nairobi this 31st day of October 2008.

R.N.NAMBUYE

JUDGE