



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Suit 300 of 1993

CHIRA MIATU KINGATA PLAINTIFF/APPLICANT

VERSUS

NYERI MUNICIPAL COUNCIL DEFENDANT/RESPONDENT

RULING

This suit was initiated by the Plaintiff Chira Miatu Kingata who filed a plaint on 19th August 1993 claiming general damages from the Defendant Nyeri Municipal Council who was his former employer. The suit was for general damages for injuries alleged to have been suffered by the Plaintiff on 18th August 1992 as a result of the negligence of the Defendant.

The Defendant having been served with the plaint and summons filed a defence on 29th September 1993. Thereafter the case was listed for Summons for directions on 16th December 1994 however no directions were taken as service had not been effected on the Defendant. From that time no further action appears to have been taken in this matter.

About 6½ years later no further action having been taken the court on its own motion on 25th June 2001 dismissed the Plaintiff's suit under Order XVI rule 6 of the Civil Procedure Rules.

The Plaintiff/Applicant has now come by way of Notice of Motion dated 5th March 2003 under section 3A of the civil Procedure Act, Cap 21 Laws of Kenya and order 44 rule 1 of the Civil Procedure Rules seeking to have the suit reinstated.

Mr. Muraguri Mwangi the applicant's advocate who has sworn an affidavit in support of the application maintains that the Plaintiff was not served with any notice prior to the dismissal of his suit. He further contends that the Plaintiff had made attempts to have the suit listed for hearing but that his attempts were frustrated as the court file could not be traced.

Mr. Muraguri urges the court to invoke its inherent jurisdiction to assist the Plaintiff who suffered serious injuries including partial paralysis of his left arm and for which he may not be able to get any remedy unless his suit is reinstated.

Mr. Wahome Gikonyo who appeared for the Defendant objected to the application on the grounds that

it is a gross abuse of the process of the court and that there has been inordinate, unexplained and inexcusable delay. He further argued that the application was incompetent as the Plaintiff/Applicant has asked for reinstatement of the suit without first applying for the setting aside of the order of dismissal and that in any case his application is wrongly brought under Order 44 rule 1 of the civil Procedure Rules.

It is evident that this is a very old suit having been filed over 10 years ago. Although Mr. Muraguri has submitted that a step had been taken just before the order of dismissal was made and the court therefore ought to have given notice to the Plaintiff under order XVI rule 5 (d) before dismissing the Plaintiff's suit for want of prosecution, the court record clearly shows that no action had been taken by the Plaintiff for more than 3 years prior to the dismissal of his suit. The allegations made by Mr. Muraguri that efforts were made to have the suit listed for hearing have not been substantiated, no evidence of service of any such letters inviting the Defendant for fixing of a hearing date have been produced nor are any copies of such letters (which indeed ought to have been copied to the court) in the court file.

Moreover the explanation that the delay in prosecuting the Plaintiff's suit was caused by the difficulty in tracing the court file has also not been substantiated. No single letter has been produced written by the Plaintiff or his advocate to the court complaining of the none availability of the court file nor did the plaintiff attempt at any time to have the court file reconstructed which is the remedy he ought to have sought if indeed the court file could not be traced for such a long time.

Although I concur with Mr. Muraguri that on the authority of **Rawal v/s The Mombasa Hardware Ltd. [1968] EA 392**, that the remedy provided under Order 16 rule 6 of the Civil Procedure Rules is not exhaustive and that the court can indeed exercise its inherent powers under section 3A of the Civil Procedure Act to reinstate a suit in order to meet the ends of justice, I do not agree with him that this is an appropriate case in which such special powers should be exercised.

The applicant has been guilty of unexplained inordinate delay. Much as the court sympathises with him, it would not be fair nor just to reinstate this suit which has been pending for over 10 years. Moreover although it is being alleged that the applicant suffered partial paralysis of the left arm, the plaint does not reveal any such injury. The Defendant is also likely to suffer prejudice if this case is reinstated as the long delay is likely to lead to difficulty in tracing witnesses. For all the aforesaid reasons I find that the Notice of Motion dated 5th March 2003 must fail. It is accordingly dismissed with costs.

Dated, signed and delivered this 18th day of March 2005

H. M. OKWENGU

JUDGE