



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE NO. 15 OF 1995

NICANOR K. SIRMA 1st PLAINTIFF

JAMES KUTO 2ND PLAINTIFF

BOAZ BIWOTT 3RD PLAINTIFF

-VERSUS

JOSHUA KIPKURGAT RUTO 1ST DEFENDANT

SALOME KORGOREN 2ND DEFENDANT

DAVID CHUMO 3RD DEFENDANT

CHARLES METTO 4TH DEFENDANT

SAMSON KOLUM 5TH DEFENDANT

CHEPCHUMBA ROTICH 6TH.DEFENDANT

RULING

This is a Notice of Motion dated 9th April 2005 purported to have been brought under Order 50 Rule 1 of the Civil Procedure Rules as well as section 3 and 3A of the Civil Procedure Act (Cap. 21). It seeks for four orders. Firstly, that the application be certified as urgent and the same be fixed for hearing on priority basis. Secondly, that the court orders dated 8th April 2005 dismissing the suit for want of prosecution to be set aside. Thirdly, that the suit to be reinstated and be fixed for hearing on the merits. Fourthly, that costs be provided for.

Before the application was heard interpartes it was certified as urgent. When the application came for hearing, Mr. Murei for the applicants submitted that the suit was dismissed for want of prosecution under Order 16 rule 2(1) of the Civil Procedure Rules. The notice of intention to dismiss the suit from the Deputy Registrar was not served on them. He was later informed by a colleague, Mr. Erick Nge'no that the suit was actually dismissed. He checked in his pigeon hole at the High Court but did not find notice for such dismissal. Mr. Misoi advocate also informed him of the dismissal of the suit. Mr. Murei confirmed the same from a Mr. Chelugi who is a court clerk in the registry. He submitted that the matter was last in court on 26th July 2004. A consent was entered by the parties in August 2004. Therefore one year had not lapsed to justify the dismissal of the suit.

Mr. Lel for the respondents opposed the application. He submitted that this was the second time that the applicants were making a similar application for the reinstatement of the suit. The last time his client accommodated it and a consent was recorded. No further action was taken since then. He submitted that the applicants ought to have applied for the review or appealed against the court orders. In his view, the

application was meant to delay the rights of the defendants who wanted to enjoy the fruits of the judgement.

Order 16 Rule 2(1) of the Civil Procedure Rules provides as follows: -

“2. (1) In any suit in which no application has been made and steps 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.”

From the above provisions of the law, it is clear that a suit cannot be dismissed under these provisions of the law unless at least one year has elapsed after any step was taken by either party in the suit. Secondly, the court has to give notice in writing to the parties to show cause why the suit should not be dismissed. Thirdly, that the suit may only be dismissed if cause has not been shown to the court's satisfaction.

From the record in the file, it is clear that the matter was before the Deputy Registrar for the last time on 31st August 2004. It was for assessment of party and party bill of costs. That date was less than a year from the date when the suit was dismissed. The notice from the Deputy Registrar for dismissal for want of prosecution was not dated, but the suit was dismissed on 4th April 2005. That was less than a year from 31st August 2004, when the matter last came up before the Deputy Registrar. In those circumstances, the notice issued by the Deputy Registrar for the dismissal of the suit was premature. The second point is that Mr. Murei argued that the notice did not actually reach him. I find credence in his argument. There is no record in the file that shows how the notice was served. Also the notice from the Deputy Registrar is not dated. In those circumstances, I find that the notice for dismissal of the case for want of prosecution was not served on Messrs. Murei and Company Advocates for the plaintiffs. The provisions of the law under Order 16 Rule 2(1) provides that the parties should be given notice in writing to show cause. If that notice in writing did not reach them or their advocates, then they would not be in a position to come to court to show cause. Therefore, it would be for the Registrar to ensure that the notice reaches the parties or their advocates. In this particular case, there is no information as to how the notice was dispatched or how it was served on counsel for the plaintiffs.

In the above circumstances, I find justification in the application and allow the same. I order as follows: -

- (i) The court's orders dated 18th April 2005 dismissing the suit for want of prosecution be and are hereby set aside.**
- (ii) The suit is reinstated and it will be heard and determined on its merits.**
- (iii) Costs of the application will be in the cause.**

Dated and Delivered at Eldoret this 18th Day of May 2005

George
Ag. Judge

Dulu