



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 180 OF 2011**

**STEPHANO KIMANI NGUGI.....PLAINTIFF/APPLICANT**

**VERSUS**

**SAMUEL MAIN NJENGA.....1<sup>ST</sup> DEFENDANT/1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT/2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 5<sup>th</sup> February, 2020 seeks orders **that this honourable court be pleased to review, vary and/or set aside the orders issued by this court on the 12<sup>th</sup> July, 2018 and reinstate the suit herein.**
2. The application is premised on the grounds set out in the application and the supporting affidavit sworn by the Applicant's counsel.
3. On 3<sup>rd</sup> November, 2017 this suit came up for the hearing of a Notice to show Cause why it should not be dismissed for want of prosecution. The suit was dismissed for non-attendance by the Plaintiff but was subsequently reinstated on 12<sup>th</sup> July, 2018 following an application by the Plaintiff. The court further gave orders that the suit being an old one should be prosecuted within 90 days from the said date or shall stand dismissed. Thus the suit stood dismissed by the time the matter came up in court on 4<sup>th</sup> November, 2019.
4. It is deponed that the Plaintiff's advocates inadvertently took a date beyond the 90 days period given by the court. That the first hearing date following the said ruling was given by the court on the 89<sup>th</sup> day but the case was adjourned following an application for adjournment by the Defendants. That on the next hearing date on 19<sup>th</sup> March 2019 the court was not sitting and matter was taken out. That the next hearing date given to the parties was on 4<sup>th</sup> November, 2019 when the court informed the parties that the suit had stood dismissed.
5. It is further stated that the Plaintiff has not been indolent and has consistently and diligently prosecute this case and is interested on prosecuting it to its logical conclusion. The court was urged not to dismiss the matter on technicalities but to give it a chance on merits as it concerns grave Constitutional and Human Rights Violations.
6. The application is opposed by the 2<sup>nd</sup> Defendant as per the grounds of opposition dated 10<sup>th</sup> February, 2020 which state:
  1. **That the Plaintiff is guilty of inordinate delay of over one year and 6 months in bringing the said application and ought not to be excused by this honourable court.**
  2. **That the Plaintiff has not been keen and vigilant to prosecute his case and has exhibited extreme indolence and carelessness in not moving the court promptly upon the lapse of timelines granted by the orders issued on 12<sup>th</sup> July, 2018.**
  3. **That the Defendant will be greatly prejudiced if this application is allowed as he is being re-disturbed noting that this suit was deemed closed long ago.**
7. I have considered the application, the response to the same and the rival submissions filed.
8. The orders that the case be prosecuted within 90 days were given on 12<sup>th</sup> July, 2018. The court then proceeded to give a hearing date on 8<sup>th</sup> October, 2018. This date fell on the 11<sup>th</sup> hour. On 8<sup>th</sup> October, 2018, following an application for adjournment by the Defendants, the case was referred to the registry for the fixing of a hearing date on priority basis. It seems that it was not brought to the attention of the court that the 90 days were coming to an end. The next hearing dates on 19<sup>th</sup> March, 2019 and 4<sup>th</sup> November, 2019 fell outside the 90 days and

the parties were informed by the court on 4<sup>th</sup> November, 2019 that the suit stood dismissed.

9. The instant application was filed on 6<sup>th</sup> February, 2000. That was a period of about 1 ½ years following the order of 12<sup>th</sup> July, 2018 when the suit was reinstated. The Plaintiff has explained that there was inadvertence on the part of the advocates in fixing the hearing dates. This explanation is not satisfactory in the circumstances of this case. It does not demonstrate consistency and diligence as averred in the supporting affidavit. The delay is inordinate and inexcusable.

10. The sword of justice is double edged and cuts both ways. As submitted by the 2<sup>nd</sup> Defendant, the delay is prejudicial to the Defendants as with the passage of time it becomes more difficult to secure the attendance of witnesses. The court may have had its own issues but the history of the suit does not reflect due diligence on the Plaintiff's side. It is now time for the Plaintiff to bear the consequences of his mistakes albeit through his advocates.

12. In the upshot, the application is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCT., 2021**

**B.THURANIRA JADEN**

**JUDGE**