



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 15 OF 2014**

**PATRICK MAINA KINGURU..... PLAINTIFF**

**V E R S U S**

**KENYA TEA DEVELOPMENT AGENCIES MS LTD.....1<sup>ST</sup> DEFENDANT**

**MUNUNGA TEA FACTORY COMPANY LTD.....2<sup>ND</sup> DEFENDANT**

**WILLIAM NJIRAINI NGURU KIMANI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The matter pending before court is the application dated 04/12/2017 seeking for orders that the Court be pleased to reinstate the plaintiff's suit which was dismissed on 17/07/2017 for want of prosecution.
2. The application is based on the fact that the notice to show cause why the suit should not be dismissed was never served upon plaintiff's former advocate. That both his former advocate and himself never attended court as they were unaware of the date of dismissal. That the plaintiff learnt of the dismissal when he personally visited the registry to follow up and he still has interest in the matter.
3. In response the defendants' advocate stated that the plaintiff has not explained why he had not fixed his suit for hearing since 18/03/2015 when it was last in court until 17/07/2017 when it was dismissed. That he has not explained what prompted him to go to the court registry to follow up on his case unless he knew what transpired on 17/07/2017. That it is clear that the plaintiff's claim has been overtaken by events.
4. I have considered the application and the submissions. **Order 17 rule 2 Civil Procedure Act** provides:

*“(1) In any suit in which no application has been made or step 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.*

*“(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.”*

The order gives court discretion to dismiss the suit for want of prosecution.

**Mwangi S. Kimenyi v Attorney General & another (2014) eKLR**

The court in dealing with reinstatement of suit stated;

**The decision whether a suit should be re-instated for trial is a matter of justice and it depends on the facts of the case.....**

**So where the plaintiff commits acts of inordinate delay in prosecuting his case, he occasions injustice on the Defendant. But courts of law are courts of justice to all the parties. And as I stated earlier, dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgement. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore courts should strive to sustain suits rather than dismiss them especially where justice would be done and fair trial had despite the delay. Any explanation for the delay which is given should be properly evaluated by the court to see whether it is reasonable.**

**5. Proceedings:**

There are no proceedings for 17/07/2017 when the suit was dismissed for want of prosecution. The last proceedings are dated 24/01/2012 when ruling was delivered dismissing the Notice of Motion dated 17/01/2012. Thereafter the file which was formerly **Embu HCCC No.10 of 2012** was transferred to Kerugoya vide order dated 30/10/2012. Later, notice to show cause dated 28/06/2017 directed the plaintiff's advocate to appear on 17/07/2017 to show cause why the case should not be dismissed for want of prosecution.

There is no evidence that the counsel for the plaintiff attended court on 17/07/2017. It would seem he never attended and the file was returned to the archives. The applicant was not vigilant because even after being served with the notice to show cause why the suit should not be dismissed he never took any action. It is a maxim of equity that – **"Equity aids the vigilant not the indolent."**

The applicant's Advocate denies that he was served with notice to show cause. The notice was sent through the address which the Advocate had given. It is therefore a mere denial that he was not served.

The applicant has owned up and stated that the fault was on the side of his former Advocate failing to fix the matter for hearing. The applicant has not given a good reason for not fixing the matter for hearing. It does not help for the applicant to state that the delay was occasioned. The court of Appeal has stated that the suit belongs to the litigant and not his advocate and is supposed to follow it up and prosecute the case. **The Court of Appeal at Nairobi in the case of Rajesh Rughani –v- Fifty Investments Limited & Another (2016) eKLR held** as follows:-

***"..... The above line of thinking no longer holds water and in my view it is the duty and light of any litigant to put pressure on his counsel to have the suit prosecuted earliest possible. If counsel cannot rise to the task, the Plaintiff has the power and the right to dismiss such an Advocate and get the services of another ..... It must always be remembered it is the Plaintiff's suit, not the Advocate's which risk dismissal for want of prosecution. Put differently, it is not acceptable for a plaintiff to hide behind his counsel's inaction, for such a defence is tantamount to an admission or collusion with his Advocate, not to prosecute the suit as required by law ....."***

6. The applicant has taken action to change his Advocate when it is too late. The respondent has submitted that the plaintiff was seeking a prayer for an injunction to stop an election that had been slated for 25/1/2012. He submits that the claim has been overtaken by events.

7. The plaintiff at Paragraph 12 of the plaint was seeking the following orders:-

**1. An injunction restraining the defendants from declaring and/or confirming 3<sup>rd</sup> defendant as a Director of 2<sup>nd</sup> defendant during the annual general meeting slated for 25/1/2012 or on any other date elected unopposed.**

**2. A declaration that the purported appointment as unopposed of the 3<sup>rd</sup> defendant William Njiraini Nguru (Kimanyi) is illegal and unlawful and the 1<sup>st</sup> & 2<sup>nd</sup> defendants be compelled to re-advertise for application for nomination and hold elections.**

**3. Costs of the suit.**

8. The applicant had filed an interlocutory application seeking an order of injunction restraining the defendants from confirming 3<sup>rd</sup> defendant as elected Director. The application was dismissed. The claims have been overtaken by events and no useful purpose would be served by reinstating the suit. The applicant in his supporting affidavit is stating that he will apply to amend the plaint if the suit is reinstated. This shows that the suit as it is cannot be sustained and can only be salvaged by an amendment.

9. This court has discretion to order the reinstatement of the suit. The discretion is to be exercised judicially depending on the circumstances of the case. Though dismissal of the suit should be an order of last resort, reinstating a suit which is moribund would not serve the interest of justice to all the parties and would prejudice the respondents. The delay in this matter has rubbished the constitutional requirement that justice shall not be delayed. This the court cannot entertain.

10. I find that the application is without merits and is dismissed with costs.

**Dated at Kerugoya this 4<sup>th</sup> day of May 2020.**

**L.W. GITARI**

**JUDGE**