



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 178 OF 2013**

**DANNY CONSTRUCTION COMPANY LIMITED....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**V E R S U S**

**THE CABINET SECRETARY IN THE MINISTRY OF**

**INTERIOR AND CO-ORDINATION OF**

**NATIONAL GOVERNMENT.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

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

**RULING**

1. Before this Court is the Notice of Motion dated 31<sup>st</sup> October 2019 by which **DANNY CONSTRUCTION COMPANY LIMITED** (the Plaintiff/Applicant) seeks for orders:-

**“1. THAT this Honourable Court may be pleased to review, vary and/or set [aside] the orders issued by the Honourable Justice Chemitei on the 11<sup>th</sup> day of September 2019, dismissing the suit herein for want of prosecution.**

**2. THAT this Honourable Court may be pleased to reinstate the Plaintiff’s suit that was dismissed on the 11<sup>th</sup> day of September 2019 for want of prosecution.**

**3. THAT this Honourable [Court] may be pleased to issue any further directions as are necessary for the expeditious hearing of this suit.**

**4. THAT costs of this application be provided for.**

2. The application which was premised upon **Sections 1A, 1B, 3A** of the **Civil Procedure Act, Cap 21, Order 51 Rule 1** of the **Civil Procedure Rules** and all other enabling provisions of the law was supported by the affidavit of even date sworn by **DENNIS MUNENE** an Advocate of the High Court of Kenya.

3. The 1<sup>st</sup> Defendant/Respondent **THE CABINET SECRETARY IN THE MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT** and the 2<sup>nd</sup> Defendant/Respondent **THE HONOURABLE ATTORNEY GENERAL**, both opposed the application through the Replying Affidavit dated **18<sup>th</sup> December 2019**, sworn by **WANJIKU A. MBIYU OGW**, a Chief State Counsel. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions on **26<sup>th</sup> February 2020** whilst the Defendant/Respondent failed to file any written submissions.

**BACKGROUND**

4. The present suit was instituted by the Plaintiff/Applicant vide a Plaint dated **9<sup>th</sup> May 2013** filed on even date. In the said Plaint the Plaintiff prayed for judgment against the Defendants for:-

**“(a) The sum of Kshs. 30,834,750/-.**

**(b) Interest on (a) above at Court rates from the date of filing suit until payment in full.**

**(c) Costs.**

**(d) Any other relief the Court deems fit to grant.”**

5. Following the institution of the suit no further action was taken by the Plaintiff in the matter. Accordingly on **16<sup>th</sup> August 2019** a Notice to Show Cause why the suit should not be dismissed was issued under **Order 17 Rule 2 of the Civil Procedure Rules 2010**. The Notice to Show Cause was set down for hearing on **11<sup>th</sup> September 2019**. On that date the Plaintiff failed to appear in Court to defend the Notice to Show Cause and as such the suit was dismissed for want of prosecution. The Plaintiff/Applicant thereafter filed this present application seeking the review, variation and/or setting aside of the orders of **11<sup>th</sup> September 2019** dismissing the suit, and praying that the suit be reinstated for hearing.

#### **ANALYSIS AND DETERMINATION**

6. **Order 17 Rule 2(1) of the Civil Procedure Rules 2010** provide as follows:-

**“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.”**

7. It is not in dispute that, the instant suit was filed on **9<sup>th</sup> May 2013**. Summons were extracted which Summons were duly served upon the Defendant/Respondent on **4<sup>th</sup> November 2019**. The Defendants filed their Memorandum of Appearance on **20<sup>th</sup> June 2014**. The Plaintiff then filed its list of witnesses on **12<sup>th</sup> March 2015**. Thereafter the Plaintiffs apparently went to sleep and took no further steps to have the suit set down for hearing. It was not until **March 2019** a full six (6) years **after** the suit had been instituted that the Plaintiffs apparently began to make attempts to trace the file in the Registry.

8. I am mindful of and have considered the following two decisions cited by the Plaintiff/Applicant in support of its place to have the suit reinstated.

In **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) (2015)eKLR** the Court observed as follows:-

**“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with Article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties respectively constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the Court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that, courts should sparingly dismiss suits for want of prosecution or dismissal is a draconian act which drives away the Plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit – of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstate.” (Emphasis supplied)**

9. Likewise in **Mwangi S. Kimenyi v Attorney General & another [2014]eKLR** the learned Justice F. Gikonyo stated as follows:-

**“... I admit that a party should always take steps to progress his case to logical conclusion. That is a requirement of justice and the overriding objective in assisting the court to attain expeditious and just disposal of cases which follows after the long standing adage; justice delayed is justice denied. So where the Plaintiff commits acts of inordinate delay in prosecuting his case, he occasions injustice on the Defendants. 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 judgment. 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 still 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 .... That notwithstanding a court of law should not hesitate to dismiss a suit for want of prosecution where it strongly feels the sustenance of the suit will only breed extreme prejudice to the Defendant. But in ascertaining prejudice to the Defendant it must also weigh the prejudice the dismissal will cause to the Plaintiff. The balance thereof need not be symmetrical, but the impulsion should come from the dictates of justice and where need be, the suit should be sustained.”**

10. A look at the Plaintiff dated **9<sup>th</sup> May 2013** reveals that the cause of action for this suit occurred way back in the year **1987** [see paragraph 5 of said Plaintiff]. The suit was not filed until the year **2013** which was sixteen (16) years after the cause of action arose. Even then having filed the suit in **March 2013** the Plaintiff/Applicant suit took no action to prosecute said suit until the year **2016** six (6) years after filing the suit when they began to seek for the file in the Registry in order to commence pre-trial. No explanation is given for this extended period of inaction on the Plaintiffs.

11. The Plaintiffs claim that the file went missing at the Court Registry, hence they were unable to take any action in the matter. There has been no confirmation from the Deputy Registrar that this file was ever missing from the Registry.

12. The fact remains that having filed this suit way back in **March 2013** the Plaintiff/Applicant took no action to advance the suit until the year **2019** when it alleges the file went missing from the Registry. No explanation is given for the Plaintiffs inaction from the year **2013**, when the suit was filed. The Plaintiff is before this Court seeking to have the Court exercise its discretion to reinstate the suit in its favour therefore the Plaintiff is seeking an equitable remedy. Equity it is said will not aid the indolent.

13. Given that the cause of action in this matter occurred in **1987** it would in my view be prejudicial against the Defendants to reinstate the suit thirty-two (32) years after the cause of action occurred. The Defendants have in their Replying Affidavit indicated that they would experience great difficulty in locating witnesses after such a long period of time. In view of the Plaintiffs lack of explanation for their inaction since **2013** when they filed the suit, this Court is not inclined to exercise its discretion in their favour. Accordingly I decline to grant the orders being sought in the present application. The Notice of Motion dated 31<sup>st</sup> October 2019 is hereby dismissed in its entirety with costs to the Defendant/Respondent.

**Dated in Nairobi this 11<sup>TH</sup> day of DECEMBER, 2020.**

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**MAUREEN A. ODERO**

**JUDGE**