



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 376 OF 2008**

**AMBROSE OTIENO WEDA.....PLAINTIFF**

**-VERSUS-**

**THE NAIROBI STAR PUBLICATIONS LTD.....1<sup>ST</sup> DEFENDANT**

**PAULINE ODHIAMBO.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling emanates from a notice to show cause dated 28<sup>th</sup> September, 2017. A replying affidavit sworn by the plaintiff herein was filed on 8<sup>th</sup> November, 2018 largely stating that a court order was made to the effect that the file in this case be consolidated with others; that the plaintiff has made attempts to fix the matter for hearing or directions but that the remaining files have not been availed for purposes of consolidation. The deponent added that he is interested in prosecuting the case.

2. On their part, the defendants are in full support of the notice to show cause and have filed a supporting affidavit to that effect. The deponent in this instance, *Linda Musita*, averred that the consolidation of the present suit and two (2) other separate suits was ordered by the court on 29<sup>th</sup> January, 2010; that the defendants filed an application dated 9<sup>th</sup> September, 2013 seeking to have the plaintiff's suit dismissed for want of prosecution and that the same was declined vide a ruling delivered on 25<sup>th</sup> February, 2014 on condition that the plaintiff would prosecute the suit within 60 days from that date. That the plaintiff has since neither taken any steps towards prosecuting the suit nor placed any evidence before this court of having done so; that the requisite files were availed to the court.

3. Having considered the rival arguments by the parties, it is upon me to determine whether or not the case warrants a dismissal. In addressing my mind to the same, I am in appreciation of the fact that the present case was consolidated with HCCC No.s 571 of 2009 and 395 of 2008.

4. It is noteworthy that the court on its own motion thereafter issued a notice to show cause on 28<sup>th</sup> September, 2017. Upon perusal of the court file, I am able to confirm that the matter came up severally before court and it was recorded that the other consolidated files had not been made available. However, on 21<sup>st</sup> May, 2018 the court confirmed that the necessary consolidated files had been availed save for HCCC No. 395 of 2008 and directions were given to the deputy registrar in ensuring availability of the pending file.

5. It would appear the parties were scheduled to appear in court on two (2) separate occasions but the court did not sit. As it stands, there is no confirmation as to whether the pending file has been availed, which verifies the plaintiff's arguments to this extent. It would not have been possible to proceed with prosecution of the matter in the absence of any of the consolidated files. In finding so, I am guided by *Martin Muriuki v Rosemary Kanambiu [2019] eKLR* wherein the High Court held that a court ought to approach the dismissal of cases cautiously particularly where sufficient cause has been shown.

6. That notwithstanding, there is nothing to show that the plaintiff on his own motion took active steps towards fixing the matter for hearing or directions in respect to the pending file and hence the notice to show cause to begin with. Again, the aforementioned court in the *Martin Muriuki* case (supra) did appreciate that:

***“The appellant had a duty to move the court to have the files tied together with each bearing a copy of the order for stay. I note that this was not done and it gave an impression that the appellant had never taken any action in his case since the pleading closed.”***

7. Having considered the above, I am of the view that the apparent unavailability of one of the files is reason enough to keep the suit in place. In any case, it would be contrary to the interest of justice to punish the plaintiff for happenings beyond his control. That said, it is obvious that this is an old matter which ought to be expedited.

8. In view of the foregoing, I direct that parties do fix the matter for a mention at the earliest opportunity so as to confirm the status of the pending file. In addition, the plaintiff shall take the necessary steps to prosecute the relevant suit(s) within 120 days from the date hereof, failure to which the same shall stand dismissed.

**Dated, signed and delivered at NAIROBI this 14<sup>th</sup> day of February, 2019**

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendants