



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 829 OF 2007

PAMPHIL SIMON MWASHEGHWA MAWORA (SUING AS THE ADMINISTRATOR AD LITEM OF

THE ESTATE OF CHRISTINE SAMBA

MWASHEGHWA-DECEASED).....PLAINTIFF/APPLICANT

-VERSUS-

THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated 14th December, 2018 currently before me has been brought by the plaintiff/applicant herein and the same stands supported by the grounds set out on the face thereof coupled with the affidavit of *Leah Gikonyo*. The plaintiff/applicant is seeking the orders hereunder:

i. Spent.

ii. THAT an order do issue setting aside the orders made on 3rd December, 2018 dismissing the suit for non-attendance.

iii. THAT an order do issue reinstating the suit.

iv. THAT an order do issue for such directions as to the further conduct and hearing of the suit.

v. THAT costs be in the cause.

2. *Leah Gikonyo*, advocate for the plaintiff/applicant, deponed that the plaintiff/applicant has been proactive in prosecuting the suit, which concerns the allegedly unlawful and negligent killing of the deceased by police officers; that when the matter came up in court on 3rd December, 2018 and was called out, the plaintiff/applicant was seated outside of the courtroom while she was stuck in traffic jam.

3. The deponent also asserted that upon arrival in court, she was informed that the matter had already been called out and dismissed for non-attendance, following which she apologized to the court and was advised to file a formal application; adding that the advocate for the defendant/respondent similarly arrived in court around the same time.

4. No response was filed in opposition to the Motion.

5. In view of the foregoing, I have considered the averments made in the Motion and affidavit in support thereof. The issue really is whether or not the plaintiff/applicant has given sufficient reason to have the suit reinstated.

6. The record confirms that the suit was dismissed on 3rd December, 2018 pursuant to *Order 12, Rule 1* of the Civil Procedure Rules and thus prompting the filing of the Motion.

7. In view of the above, I have firstly observed that the application has been brought without inordinate delay and I will not dwell any further on the point.

8. On the question of non-attendance, my view is that while there is nothing to corroborate the deponent's account that the plaintiff/applicant

was within the court premises at the time the matter was called out, the deponent stated that she was held up in traffic and upon arrival, found her client waiting for her outside the courtroom. The mere fact that she apologized to the trial court and explained the reason for her lateness is excusable since this was evidently a factor beyond her control. The plaintiff's/applicant's advocate made an effort to attend court albeit after the matter had been called out. Furthermore, I have taken into account that fact that the defendant/respondent was similarly absent from court.

9. I will also consider the subject of whether the suit was keenly prosecuted prior to its dismissal. Upon perusal of the court record, I have established that the plaintiff/applicant diligently prosecuted his case and faithfully attended court as and when required. On a similar note, I did observe that the defendant/respondent is yet to comply with pre-trial directions despite having been granted several opportunities to do so; this can be taken to have largely contributed to the delay in the hearing of the suit. Suffice is to state, it cannot be denied that the plaintiff/applicant took reasonable steps to prosecute his case.

10. In close reference to the above, I similarly noted that sometime in 2016, the court file apparently went missing, prompting the plaintiff's/applicant's advocate vide a letter dated 28th December, 2016 to address the issue with the deputy registrar. That the deputy registrar informed the said firm of advocates as and when the file was traced sometime in 2017. From then on, the plaintiff/applicant continued to ensure prosecution of the suit.

11. I now turn to *Order 12, Rule 7* of the Civil Procedure Rules expressing as follows:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

12. The above goes to show that this court bears the discretion to set aside the dismissal of a suit where justice demands so. In the case before me, it is undeniably clear that the plaintiff/applicant has been consistent and diligent throughout and the circumstances resulting in the dismissal have been explained to my satisfaction. In consideration of the above coupled with the sensitive nature of the case, I am convinced that it would be in the interest of justice to grant the plaintiff/applicant an opportunity to proceed with his suit, without disregarding the fact that this is an old matter. In any event, the orders sought have not at all been opposed by the defendant/respondent.

13. In the end, I will allow prayers ii), iii) and iv) of the Motion and make the following orders consequently:

- a. My order made on 3rd December, 2018 is hereby set aside and the suit is reinstated.
- b. The Plaintiff is hereby ordered to prosecute the matter within 120 days from today failing which it shall stand dismissed.
- c. Costs shall abide the outcome of the suit.

Dated, signed and delivered at NAIROBI this 7th day of March, 2019.

L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff/Applicant

.....for the Defendant/Respondent