

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2464 OF 1997

DOROTHY CECELIA MURPHY.....PLAINTIFF

VERSUS

SAMSON K. NYAMWEYA.....DEFENDANT

RULING

This is one of the oldest cases we have on record, and it is no wonder that on 17th November, 2017 it was flagged for dismissal for want of prosecution under Order 17 Rule 2 (1) of the Civil Procedure Rules. When the matter was called out on the said date, learned counsel for the plaintiff informed the court that his client is a British subject, and he needed to contact her and take instructions with the view of filing an affidavit in answer to the notice to show cause.

Subsequently ,that affidavit was filed but no reply was made by the defendant. Both parties have however filed submissions. I have gone through the affidavits and the submissions by both parties. The plaintiff's counsel has taken the court through a chronology of the movement of this matter from the time it was filed to date. Most significantly is the submission that, on not less than two occasions the court file was misplaced and there is evidence that it had to be reconstructed to facilitate a movement of the matter. There is also evidence that one point judgment was entered in favour of the plaintiff against the defendant who eventually managed to secure an order to set it aside, after which he filed his defence and counter claim.

In the counter claim the defendant was the plaintiff and there is no evidence that he moved the court to have his counter claim heard, nor did he apply for the suit to be dismissed. Above all it is submitted on behalf of the plaintiff that, no prejudice has been disclosed by the defendant if the suit is allowed to proceed. Guided by the authorities cited, and the quest to do justice to both parties, notwithstanding the age of this case, the inordinate delay has been explained satisfactorily and I am persuaded it is excusable.

The foregoing being the case, the notice to show cause is hereby vacated. I direct that the parties shall now draw the issues for determination, if that has not been done, within 30 days from the date of this ruling, and thereafter ensure that this suit is prosecuted within 120 days from the date of filing the issues. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 4th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE