



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 338 OF 2011

WILSON WAFULA KHAEMBA T/A SIPETO CONTRACTORS.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA INVESTMENT AUTHORITY.....DEFENDANT/RESPONDENT

RULING

1. This ruling is premised on the plaintiff's/applicant's Notice of Motion dated 24th April, 2019 supported by the grounds set out on its body and the affidavit sworn by the said applicant. Therein, the applicant is seeking two (2) substantive orders: that is, the review and/or setting aside of the order made by this court on 9th April, 2018 and all consequential orders; and the reinstatement of his suit.

2. In his affidavit, the applicant explained that when the suit came up before this court on 9th April, 2018 for hearing as scheduled, his advocate on record sought leave to put in a further list of documents and which leave was granted on condition that the matter be prosecuted within 120 days from that date, failing which the suit would stand dismissed.

3. The applicant stated that pursuant to the aforesaid order, his advocates scheduled the matter for hearing on 7th June, 2018, on which date the defendant's/respondent's counsel sought an adjournment on the basis that he wishes to substitute the witness statement on record. The prayer for an adjournment was allowed and parties were directed to take fresh dates at the registry.

5. It is the applicant's averment that his counsel was able to obtain a hearing date for 7th February, 2019 but which date fell outside the 120 days ordered and consequently, the suit was rendered dismissed.

5. The applicant was keen to add that he has at all times been keen on prosecuting his case and thus urges this court to grant the orders being sought.

6. The respondent has opposed the Motion by way of the replying affidavit of *Anthony Mbaji*. The deponent stated that when the respondent's advocate applied for the adjournment on 9th April, 2018 such application was not opposed by counsel for the applicant, neither did such counsel seek an early hearing date.

7. The said deponent was careful to mention that this is not the first instance the applicant is seeking the reinstatement of his suit, the same having previously been dismissed for want of prosecution on 9th June, 2016 on the court's motion. That the dismissal order was set aside on 13th December, 2017 on the condition that the applicant prosecutes the same within 120 days from that particular date.

8. It is also the deponent's assertion that the applicant's current advocate, Mr. Peter Wangaki Wena, previously worked at the firm belonging to the respondent's advocate as its Head of Litigation, thus granting him access to confidential information pertaining to the respondent's case. Consequently, it is the respondent's argument that the respondent will be greatly prejudiced in the event that the said advocate continues acting in the matter.

9. The Motion was argued orally before this court. *Mr. Munene* learned counsel for the applicant presented his submissions first, by and large restating the facts deponed to in the supporting affidavit, save to add that if there indeed was a delay in the prosecution of the suit, then both parties ought to share the blame. This court was urged to consider the analyses in *Mwangi S. Kimenyi v Attorney General & another [2014] eKLR* and *Pithon Waweru Maina v Thuka Mugiria [1983] eKLR*.

10. *Mr. Mbaji* advocate for the respondent equally echoed the facts laid out in the replying affidavit in urging this court to dismiss the Motion, to which *Mr. Munene* in rejoinder submitted that the applicant has taken reasonable steps to prosecute his case within the ordered timelines. The applicant also argued that the respondent has not shown the manner in which it stands to be prejudiced should the current firm

of advocates on record for the plaintiff proceed with the matter, citing *Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] eKLR* in this respect.

11. I have taken into consideration the grounds stated on the face of the Motion; the affidavits in support of and in opposition to the same; as well as the rival oral arguments articulated before this court on 24th June, 2019.

12. The record confirms that the suit was first dismissed for want of prosecution on 9th June, 2016 but later reinstated by the Honourable Mr. Justice Mbogholi Msagha vide his ruling of 13th December, 2017 on condition that the same be prosecuted within 120 days.

13. Subsequently, it is evident from the record that when the suit came before this court on 9th April, 2018, the applicant was granted a last adjournment on the strict condition that his suit be prosecuted within 120 days from that date.

14. The record further discloses that when the file was placed before the Honourable Lady Justice Githua on 7th June, 2018, the respondent sought an adjournment on the basis that it was unable to secure the attendance of its witnesses, to which the applicant did not object. In the circumstances, parties were directed to take fresh dates at the registry.

15. Thereafter, the applicant obtained the date of 7th February, 2019 from the registry, which date obviously fell outside the 120 days ordered by this court.

16. In view of the foregoing, what echoes clearly is that the applicant is not at all determined or at the very least keen on prosecuting its suit. The parties will acknowledge that so far, the said applicant was granted more than one opportunity to prosecute its suit but to date, there has been no progress in the matter.

17. Whereas this court is alive to the argument that the respondent has contributed to the delay in the matter, the fact remains that it is ultimately the responsibility of the applicant to diligently and expeditiously prosecute its case; this is not reflected in the record.

18. In my considered view, litigation must surely come to an end and the applicant has not shown willingness in assisting the court adhere to the overriding objective. This is a classic example of a non-serious and non-committed plaintiff who has given the court no reason to grant the orders sought.

19. The upshot is that the Motion is completely unmeritorious and I am only left to dismiss it with no order as to costs.

Dated, signed and delivered at NAIROBI this 11th day of July, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent