



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 46 OF 2003**

**JMM.....PLAINTIFF**

**VERSUS**

**JMK.....1<sup>ST</sup> DEFENDANT**

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

**RULING**

The ruling herein relates to the plaintiff's application dated the 13<sup>th</sup> day of August, 2018 which has been brought under Section 3(A) of the Civil Procedure Act and order 17 rule 2(1) and 2 of the CPR. It seeks for orders that:

- i. The suit be re-instated/activated and set down for hearing.
- ii. Costs of the application be in the cause.

It is supported by the affidavit of JMM and on the grounds set out on the body of the same.

In the said affidavit, the deponent, who is the plaintiff herein, avers that he is keen on prosecuting the matter and he prays that he be given an opportunity to do so. That the reason for failure to prosecute the suit is that the court file has not been available until 17<sup>th</sup> May, 2018 by which date, the time within which to prosecute the suit as ordered on the 13<sup>th</sup> October, 2017 had expired.

He depones that his advocate has made efforts to prosecute the matter by inviting the defendant to fix it for hearing and he has annexed letters to that effect marked as JMM1.

The defendants did not file any response to the application and despite having been served with the hearing notices for the application, there were no representatives on their part when the application came up for hearing and the same proceeded ex parte.

The court has considered the grounds in support of the application and the facts set out in the supporting affidavit. I have also perused through the record of the proceedings.

The matter was filed in the year 2003 and it was not until 27<sup>th</sup> January, 2015 when it was first listed for hearing and on the said date, it could not proceed because the defendants had not been served with a hearing notice for that day. No reason was given to the court why the defendants were not served.

The record further shows that the matter was again in court on 24/10/2016 for hearing but on the said date, the court was informed that the plaintiff had not complied with Order 11 of the Civil Procedure Rules and it was taken out and given a mention date of 24<sup>th</sup> November, 2016. On the said date, it was not listed.

The court listed the matter for notice to show cause on the 6<sup>th</sup> October, 2017 when counsel for the plaintiff requested for time to file an affidavit in response to the notice to show cause and the matter was stood over to 13/10/2017. On the said date, the court noted that it was not due for dismissal but due to the age of the matter, the court ordered that it be prosecuted within a period of six months failing which it would stand dismissed. Thereafter, the plaintiff did not take any action in the matter until the 13<sup>th</sup> August, 2018 when he filed the present application.

The court has perused copies of the letters marked as JMM1 inviting the defendants to fix the matter for hearing dated 29<sup>th</sup> November, 2017 and 4<sup>th</sup> May, 2018. Both letters were done after the court had issued its orders on 13<sup>th</sup> October, 2017. The plaintiff contends that the court

file was missing until 17<sup>th</sup> may, 2018 when it was traced. The court notes that there is no evidence that a letter was written to the Deputy Registrar seeking assistance in tracing the court file, if indeed, the same was not available.

Even assuming that the court file was not available, the application herein was filed almost six months from 17<sup>th</sup> May, 2018 when the court file was allegedly traced. This is, notwithstanding the fact that there was urgency in bringing the said application in view of the court order issued on 13<sup>th</sup> October, 2017. There is no explanation for this delay. Since the suit was filed in the year 2003, the plaintiff has not done much to prosecute the same.

In view of the foregoing, I find that there is no plausible explanation that has been given by the plaintiff for the delay in prosecuting the matter. In the premises, the application dated 13<sup>th</sup> August, 2018 is hereby dismissed with costs to the defendant.

**Dated, Signed and Delivered at Nairobi this 7<sup>TH</sup> DAY OF NOVEMBER, 2019.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....For the Plaintiff

..... For the 1<sup>st</sup> Defendant

..... For the 2<sup>nd</sup> Defendant