



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 14 OF 2008

STEPHEN MUKUNA KYAMBI.....PLAINTIFF/APPLICANT

VERSUS

CADBURRY KENYA LIMITED.....DEFENDANT

RULING

The Plaintiff/Applicant has moved the court by way of the Notice of Motion, dated the 20th day of September, 2019 brought under sections 1A, 1B and 3A of the Civil Procedure Act and Order 12 Rule 7 and Order 51 Rule 7 of the Civil Procedure Rules.

The applicant has sought orders that;

- 1. The Honourable court be pleased to discharge, vary and/or set aside orders made on the 8th day of February, 2019 dismissing the suit for want of prosecution and that the suit be reinstated for hearing.*
- 2. That once reinstated, the suit be transferred to the Chief Magistrates Court at Milimani for hearing and determination.*

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit of Lawrence Muriithi Mbabu sworn on the 20th day of September, 2019.

In the said affidavit, the deponent who is an advocate of the High Court of Kenya and having the conduct of the matter on behalf of the plaintiff, avers that the matter was last in court on 2nd November, 2017 when the court ordered that parties do take a mention date for directions at the registry.

That a petition was filed at the High Court at Mombasa (*Juma Nyamari Ndungo & 5 Others vs. the AG*) with the LSK as an interested party (2019) eKLR, to have the court determine whether Magistrate's Court have jurisdiction to hear and determine matters of compensation arising from negligence and breach of duty at the work place.

He averred that he had to await the outcome of the same as it had a bearing in this matter and it was not until the 10th June, 2019 when the judgment in that petition was delivered.

That thereafter, the court file could not be traced and upon tracing the same, he realized that the matter had been dismissed on the 8th day of February, 2019 for want of prosecution. He stated that he was not aware that the matter was coming up for notice to show cause as the notice had not been served on his offices and the one sent via mail was never received.

He averred that the applicant is desirous of having the matter heard and determined on its merits and he stands to suffer irreparable loss if the suit is not reinstated.

The court has considered the application and the affidavit in support of the same.

The legal framework on dismissal of suit for want of prosecution is found in order 17 (2) which provides;

- 1. In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.*

2. If cause is shown to the satisfaction of the court, it may make such orders as it thinks fit, to obtain expeditious hearing of the suit.

3. Any party to the suit may apply for its dismissal as provided in sub-rule (1)

4. The court may dismiss the suit for non compliance with any direction given under this order.

The guiding principle to be applied in deciding whether or not to dismiss a suit for want of prosecution can be found in the case of **Ivita vs. Kyumbu (1984) KLR 441** where it is summarized as follows:

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite the delay”

As the court pointed out in the case of **Mwangi Kimenyi Vs. Attorney General & Another (Civil suit no. 720/2009)** what should matter to the court is to serve substantive justice through judicial exercise of discretion which is to be guided by the following considerations;

1. Whether the delay has been intentional and contumelious.

2. Whether the delay or the conduct of the plaintiff amounts to an abuse of the court process.

3. Whether the delay is inordinate and inexcusable

4. Whether the delay is one that gives rise to substantial risk to a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant.

5. What prejudice will the dismissal cause to the plaintiff?

The court notes that the reasons given by the applicant for failure to prosecute the suit for more than a year are that he was waiting for the outcome of petition number 196/2018 and that the court file also got misplaced. I have perused the letters annexed to the affidavit in support and dated 1st August, 2019 and 29th July, 2019. I note that the one dated 1st August 2019 has been duly stamped with High Court registry stamp while the other one is not, but both letters were written to the Deputy Registrar after the dismissal of the suit.

With regard to the petition, I am able to establish that the same was filed in the year 2018 and judgment was delivered on the 10th day of June, 2019 after the suit had been dismissed. Perusal of the record reveals that the matter has been active from 2012 until the year 2017 before it was dismissed on the 8th February, 2019 and though there has been delay in prosecuting the same, such delay has been explained in that the applicant was waiting for the decision of the court in the petition aforesaid.

The application proceeded *ex parte* despite there being evidence of service upon the Respondent/Defendant which implies that it stands to suffer no prejudice if the orders sought are granted.

In the end, and in the interest of justice, I allow the application dated 20th September, 2019. The matter is hereby transferred to the Civil Magistrate’s Court at Milimani for hearing and determination.

The court makes no orders as to costs.

Dated, Signed and Delivered at Nairobi this 21ST Day of November, 2019.

L. NJUGUNA

JUDGE

In the Presence of

..... For the Plaintiff

..... For the Defendant