



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 80 OF 2008

DAMARIS WAMUCII KAGECHU.....PLAINTIFF

VERSUS

JOSEPH KIRUI1ST DEFENDANT

UNILEVER TEA (K) LTD.....2ND DEFENDANT

RULING

The plaintiff filed this suit against both defendants vide a plaint dated 6th December, 2007 but filed on 13th March, 2008. She was injured following a road traffic accident that took place on 16th June, 2005 and therefore claimed general damages, special damages and costs of the suit.

Her claim was denied by the defendants who filed a defence on 6th May, 2008. The record shows that the 2nd defendant failed to file a defence and therefore the plaintiff applied for interlocutory judgment which was entered on 26th May, 2008. It is not clear why that entry was made, considering that the Memorandum of Appearance filed on 24th April, 2008 alongside the defence filed on 6th May, 2008 was by the same counsel for the defendants, and the defence clearly indicated that the said counsel appeared for both defendants.

More significantly however is that, the defence was filed on 6th May, 2008 while the entry for the judgment was made on 26th May, 2008. The entry of that judgment was clearly irregular going by the record of the court. The suit remained without any steps being taken thereafter despite the fact that a list of documents had been filed by the advocate for the plaintiff.

On 15th March, 2013 there was a change of advocates for the plaintiff and subsequent thereto, on 27th January, 2014 the defendants filed an application for the dismissal of the suit for want of prosecution, which however was never prosecuted. The record shows that it was listed for hearing on 29th July, 2014 but no proceedings appear on the record for that day.

On 16th June, 2016 the suit was listed for dismissal under Order 17 Rule 2 (1) of the Civil Procedure Rules, and the court having confirmed that both parties did not appear on that day, proceeded to dismiss the suit.

There is now before an application dated 25th November, 2016 praying that the dismissal order be vacated and or set aside. The reasons for seeking the said order appear on the face of the application alongside an affidavit sworn by the plaintiff. The application is opposed and there is a replying affidavit to that effect.

There is yet another notice of change of advocates by the plaintiff filed on 4th September, 2017. Both parties filed submissions to address the application which I have read. The thrust of the application is that the plaintiff blames her counsel on record for not informing her of the progress of the matter. It is also her case that the court file was not easily accessible in the registry which also compromised the process of the hearing. On the other hand, the respondents submit that the delay is inordinate and in any case the application is defective and should be dismissed. There is an issue that has been raised of notice of change of advocates and service thereof, but I do not think the final decision of this court will stand on such a submission.

It is true that a period of 4 years and 8 months during which no action was taken by the plaintiff's advocate has not been sufficiently explained. It is also true that it is the duty of a party who approaches the court to address his or her cause of action, to ensure that it is determined within a reasonable time. This will also give the opposite party the opportunity to present their case before the evidence is compromised by extended lapse of time.

The order sought is discretionary and the court has to weigh the circumstances leading to the dismissal of the suit and also the reasons of whether or not to set it aside.

Parties represented by counsel rely almost entirely on the advice and steps taken on their behalf by counsel. That is why time and again the courts have held that parties may not be punished for the mistakes of counsel. I have also looked at the cause of action and the impact left on the plaintiff.

Justice looks at both sides. The notice under Order 17 has not been displayed and it may be true that the plaintiff was never informed of any date to show cause, or that the matter was listed for dismissal on that date. That alone is reason enough to tilt the scales in favour of the plaintiff. I also note that on the date the suit was dismissed both counsel were not in court. The defendants cannot celebrate the loss of the plaintiff yet they were also absent.

In view of the foregoing, I am inclined to exercise my discretion in favour of the plaintiff by setting aside and vacating the dismissal order made on 16th June, 2016. The suit is accordingly reinstated. Parties shall comply with Order 11 of the Civil Procedure Rules within 30 days from the date of this ruling, after which a hearing date shall be taken on priority.

The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 6th Day of March, 2018.

A.MBOGHOLI MSAGHA

JUDGE