



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 3008 OF 1989**

**HARTWELL J.M MWAZIGHE.....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion dated 21<sup>st</sup> December, 2017 under Order 17 Rule 2 of the Civil Procedure Rules seeking reinstatement of the suit and costs of the Application. In a Supporting Affidavit of even date and sworn by the Applicant, he deponed that his suit was dismissed for want of prosecution without the Court issuing a Notice to Show Cause. It was deponed that the suit was dismissed on 21<sup>st</sup> July, 2003 whereas the Applicant had complained in writing to the Court that the file was missing via letters dated 3<sup>rd</sup> January, 2002 and 16<sup>th</sup> December, 2003 which letters were received by the Court. It is further deponed that on 9<sup>th</sup> July, 2004, the Applicant made an application for reconstruction of the court file. That in order to cut down the travel costs from Mombasa to Nairobi, the Applicant avers that he instructed the firm of F.M Mwawasi & Co. Advocates which firm of Advocates did not take any action in the matter. He depones that he realised the suit had been dismissed despite the fact that the court had received his letters complaining about the missing file. It is the Applicant's averment that the Respondent will not suffer any prejudice if the orders are granted.

2. The Respondent did not file a Response and did not appear in Court when the Application came up for hearing on 9<sup>th</sup> April, 2018.

3. Order 17 Rule 2 of the Civil Procedure Rules, 2010 Provides that

***“(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.”***

4. Order 17 Rule 2 (1) of the Civil Procedure Rules grants the court power to dismiss a suit in which no step has been taken for one year. The Order also requires the court to give notice to the party concerned to show cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit. This order is permissive and it allows quite significant room for exercise of discretion to sustain the suit. It is so especially when one considers the requirements of article 159 of the Constitution and the overriding objective which demands of courts, unless for very good cause, to serve substantive justice.

5. Notwithstanding the foregoing, the courts will only exercise discretion and allow the reinstatement of a suit which has been dismissed for want of prosecution, if the delay is explained to the satisfaction of the Court. The Applicant has annexed two letters written to the Court complaining about missing court file. One of the letters was received on 3<sup>rd</sup> January, 2002 whereas the other was received by the court on 13<sup>th</sup> December, 2003. One of the letters was received by the Court before the dismissal whereas the other one was received after the dismissal. This is an indication that the applicant was not aware of any Notice of Dismissal of the suit.

6. The test for dismissal of a suit for want of prosecution is stated in the case of ***Ivita -v- Kyumbu (1984) KLR 441***. The test was expressed as follows:

***“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.”***

7. The delay in prosecuting this suit has been explained in that the file was missing and the applicant did due diligence in following up on the file. In fact there is annexed an application to have the file reconstructed. I find that justice can still be done despite the prolonged delay. It has been deponed that the Respondent will not be prejudiced if the orders are granted. **Justice F.Gikonyo** in the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** described what would amount to prejudice to a Defendant if a suit is reinstated when he held that,

*“For re-instatement of suit to give rise to substantial risk to fair trial or result into grave injustice to the Defendants, the Defendant must show he suffered some additional prejudice which is substantial and results to 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant. It must also be shown that the delay has worsened the Defendant’s position in the suit. It will not, therefore, be sufficient to just make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out herein above. This thought derives legitimacy as a principle of law drawing upon the Constitution; promoting access to justice; enforcing the principles of justice especially on substantive justice in Article 159 of the Constitution; and achieving just resolution of disputes filed in court through a fair and public hearing in accordance with Article 50(1) of the Constitution. See the opinion of **Russel L.J.** in **WILLIAM C. PARKER LTD v F.J. HAM & SONS at p 1586** which was quoted in **BIRKET v JAMES p 335.**”*

8. I find that the re-instatement of the suit will not cause any specific hardship and aggravated costs upon the Respondent. The Respondent was served with the application but did not file a Response to explain any hardship which he is likely to suffer, if any.

9. I am persuaded, the circumstances of this case justifies giving the Applicant another chance which is the just thing to do. I accept the explanation provided to be reasonable explanation for the delay. However considering that this is an old matter, I direct the Plaintiff to prosecute the suit within the next 120 days from the date of this ruling failing which the same shall stand dismissed.

**Dated, Signed and Delivered at Nairobi this 10<sup>th</sup> Day of May, 2018.**

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....*For the Applicant*

.....*For the Respondent*