



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 94 OF 2006

JOSEPH MUTURA KAMAU.....PLAINTIFF

VERSUS

1. MOMBASA COASTLINE

2. ANWARALI & BROTHERS.....RESPONDENT

RULING

1. By a notice of motion dated 6th July, 2017, the plaintiff sought for the reinstatement of this suit. In support thereof, learned counsel in conduct of this matter on behalf of the plaintiff, R.N. Kavita swore an affidavit wherein she expressed that the case came up for dismissal on 17th July, 2015 when both the parties counsels were absent having not been served with a notice to show cause. That in the effort to have this matter heard and determined, the plaintiff's counsel prepared an application to have the same transferred to the lower court since she was not aware the same had been dismissed. She urged that the plaintiff's suit be reinstated since he is desirous to prosecute it.

2. In response thereto, the defendants through their counsel Michael L. Mulupi filed a replying affidavit on 12th September, 2017. They contended that this is an old case which had been pending for nine (9) years without prosecution before it was dismissed in the year 2015. That the plaintiff never took steps to reinstate it soon after the dismissal. That there is no evidence showing that the plaintiff requested the deputy registrar to trace the file if at all it was missing in the registry and that the correspondence attached are for the year 2017 thereby showing that there is no evidence that the plaintiff is keen on prosecuting this matter.

3. When the matter came up for hearing of the application, the defence counsel was absent despite hearing notice having been served. The plaintiff's counsel's submissions were a reiteration of the averments in the supporting affidavit.

4. I have carefully considered the application herein. Order 17 rule 2 (1) of the Civil Procedure Rules requires the court to give the parties concerned notice to show cause why a suit should not be dismissed. In the event cause is not shown, the court may go ahead and dismiss such a suit. I have perused the record and it is clear that there exists the notice but the same was not given to the parties. The notice of dismissal of suit is dated 2/07/2015 addressed to Advocates for the parties. However, a keen perusal of the names of the Advocates shows that the said Advocates might not have been in conduct of the suit on behalf of the parties at the time of issuance of the notice. For instance the firm of L. M. Wambua & Co. Advocates for the Plaintiff had already come on board in place of Musinga Munyithya in the year 2011 whereas the firm of K. Itonga & Co. Advocates for the 2nd Defendant had already filed a notice of change of Advocates replacing the 2nd Defendant's previous Advocates M/s Iseme Kamau advocates. Since the notice was addressed to Musinga & Co. Advocates and Iseme Kamau & Maema Advocates and coupled with absence of an affidavit of service, I find the Plaintiffs claim that he had not been served merited. Again there was no official stamp on the notice to show that the Plaintiff's Advocates had been served.

5. In view of the foregoing it is my finding that the dismissal for the Plaintiff's suit for want of prosecution was draconian. The Plaintiff did not receive the notice so as to show cause why the suit should not be dismissed for want of prosecution. There was no proper service of the dismissal notice and hence the Plaintiff sort of was condemned unheard. Consequently, I find the Plaintiff's Application dated 6/7/2017 has merit. The same is allowed in the following terms:-

(a) The order made on 17/07/2015 dismissing this suit is hereby set aside.

(b) The suit herein is hereby reinstated.

(c) As this is a fairly old matter, the Plaintiff is granted 30 days to set down the matter for hearing failing which the suit shall automatically stand dismissed.

(d) Each party shall bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 8th day of May, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Mukula for Kavita for the Plaintiff

No appearance for Kitonga/Malonza for the Defendants

Kituva - Court Assistant