



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 45OF 2008 (OS)

KAMRO AGROVETS LIMITED.....PLAINTIFF/ APPLICANT

VERSUS

CEVA SANTE ANIMALE.....1ST DEFENDANT/RESPONDENT

CEVA ANIMALE HEALTHY PTY.....2ND DEFENDANT/RESPONDENT

BARCLAYS BANK OF KENYA LIMITED....3RD DEFENDANT/RESPONDENT

RULING

1. By a notice of motion dated 10th May, 2017 brought under Sections 1A and 3A of the Civil Procedure Act and Order 12 rule 7 and Order 17 rule 4 of the Civil Procedure Rules, plaintiff/applicant prays for orders:-

1. THAT this court be pleased to set aside the orders made on 13th December, 2016 and reinstatethe plaintiff's suit for hearing

2. Costs of the application be provided for

2. The application is based on the grounds among others among others that plaintiff was not served with a notice under Order 17 rule 2(1) of the Civil Procedure Rules and that as at 13.12.16, one year had not elapsed from the date of last action.

3. The application is also supported by an affidavit sworn on 10.4.17 by N. E. Mogusu, advocate for the applicant who reiterates the grounds on the face of the application. Attached to the affidavit is a copy of a mention notice dated 27.6.16 inviting defendant advocates to fix a date on 14.7.16.

4. The application is opposed on the grounds set out in a replying affidavit sworn on 15.9.17 by Nazima Malik, advocate for the 1st and 2nd respondents. She avers that the applicant has not given any reasonable explanation for the inordinate delay in fixing the matter for hearing since 6.11.13 when the case was last listed for hearing.

5. I have considered the notice of motion in the light of the supporting affidavit and replying affidavit and the written submission filed on behalf of the 1st and 2nd defendants on 18.4.18.

6. The court record shows that the matter was last in court on 6.11.13 when it was adjourned by consent to 19.4.14. The matter does not appear to have been listed on that day. It was subsequently dismissed under Order 17 rule 2 on 13.12.16.

7. Order 17, rule 2 provides as follows:

(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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

8. The court record shows that a notice to show cause Order 17, rule 2 (1) was taken out on 22.11.16. There is however no evidence that the notice was served on the any of the parties to this suit. The applicant was therefore condemned unheard and was thus denied an opportunity to explain why the case had not been set down for hearing.

9. As much as I agree with the 1st and 2nd respondent that the applicant, by his past conduct, does not appear keen to prosecute this suit, an application under Order 17 rule 2(1) does not require an applicant to explain the delay in fixing the matter for hearing. All that the applicant is required to demonstrate is that the notice to show cause was not served and that, the applicant has proven.

10. Consequently, the notice of motion dated 10th May, 2017 is allowed and it is hereby ordered that this suit be set down for mention for directions as to the hearing without further delay.

11. Costs shall be in the cause

DATED, DELIVERED AND SIGNED THIS 17th DAY OF May 2018

T.W.CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant	- Felix
For Plaintiff/Applicant	- Mr. Nyamweya
For 1st and 2nd Respondent	- Mr. Ouma/Ms. Malik
For 3rd Respondent	- N/A