



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 562 OF 2014

GIDEON NJOROGE MUIGAI.....PLAINTIFF/RESPONDENT

- VERSUS -

EDWARD MWIGAI.....1ST DEFENDANT/APPLICANT

PATRICK MUGI KAMAU.....2ND DEFENDANT

RULING

1. 1st defendant by the notice of motion dated **28th March 2018**, seeks dismissal of this case for want of prosecution.
2. The plaintiff filed this case on **13th August 2014**. The 1st defendant filed his defence on **23rd September 2014**. There is no evidence in the court file that the 2nd defendant filed his defence even though he participated in the interlocutory applications in this matter.
3. By the ruling dated **3rd November 2016**, this court dismissed the 1st defendants application whereby the 1st defendant sought to be struck out of this suit. After that ruling, there was no further action in this matter until the 1st defendant filed the notice of motion dated **28th March 2018** which is under consideration, for the dismissal of this suit for want of prosecution.
4. The plaintiff by the replying affidavit oppose the application on the ground that there were matters beyond his control which prevented him from proceeding with the matter since the year 2016. The plaintiff deponed that from 2016 to **20th May 2018**, his then advocate **Manwa Mabeya** could not be traced by him because he was avoiding arrest by the police. That it was not until the said advocate was arrested that the plaintiff traced him and obtained his file which was at the said advocates home. The plaintiff therefore stated that the delay in prosecuting this suit was not deliberate. He deponed that he was ready to proceed with this matter and requested he be afforded a chance to do so.
5. Since what is deponed by the plaintiff, that his then advocate was a fugitive of the law, and because the power to dismiss a suit, just like the power to strike out pleadings is draconian and because the courts, where the interest of justice require it, should look to sustain a suit, I am of the view that the plaintiff should be given an opportunity to prosecute his suit.
6. Accordingly, the notice of motion dated **28th March 2018** is dismissed but the costs thereof shall be in the cause. The plaintiff should proceed to expediate the hearing of this suit.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE