



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 6463 OF 1990**

**H. W. GICHOHI.....PLAINTIFF**

**- V E R S U S -**

**J. MUCHEMI WANYEKI.....DEFENDANT**

**RULING**

1) The subject matter of this ruling is the motion dated 23<sup>rd</sup> October 2015 taken out by the plaintiff whereof he sought for the following orders:

*i. THAT this honourable court be pleased to set aside the orders made on 23<sup>rd</sup> February 2015 dismissing the plaintiff's suit.*

*ii. THAT this honourable court be pleased to reinstate the plaintiff's suit.*

*iii. THAT the costs of the application be in the cause.*

2) The motion is supported by the affidavit of H. W. Gichohi. J. Muchemi Wanyeki, the defendant herein, filed grounds of opposition to resist the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion together with the facts deponed in the supporting affidavit plus the grounds of opposition. I have further taken into account the rival written submissions.

4) It is the submission of the plaintiff that his suit was dismissed for want of prosecution on 23.2.2015 and that the plaintiff's advocate were unable to trace the court file at the court registry having been removed and placed for dismissal. It is the averment of the plaintiff that the file had been missing despite several attempts by his advocate to find it. This court was implored in the circumstances to set aside the orders dismissing the suit and reinstate the suit for hearing.

5) The defendant argued against the motion stating that he has not been keen to pursue his matter. It was pointed out that the suit was last in court in 2002 when the same was adjourned generally. The defendant argued that the assertion that the court file was missing is not convincing. It was pointed out that the plaintiff begun pursuing this case only after he realised that the same had been listed for dismissal for want of prosecution. It is also stated that the delay to prosecute the matter is inordinate. The defendant further stated that even after the plaintiff was informed of the availability of the court file on 5.9.2014, the plaintiff took no action until his suit was dismissed on 23<sup>rd</sup> February 2015, hence the delay in filing the application was also inordinate. The plaintiff further argued that he was not served with a notice to show cause by the court why the suit should not be dismissed for want of prosecution.

6) Having considered the material placed before this court together with the rival submissions, it is clear that this suit was listed for dismissal before Mr. Justice Majanja on 23.2.2015. It is apparent from the record that parties were issued with notices to show cause for 23.2.2015. The plaintiff does not deny in his affidavit filed in

support of the motion that he had notice of the notice to show cause. He however submits that he was not notified. The plaintiff merely states that the suit was dismissed on 23.2.2015 but he does not state when and how he came to learn of the dismissal order. In the letter dated 21st September 2015 and attached to his affidavit filed in support of the motion, the plaintiff's advocate is informing the plaintiff that he had perused the court file and discovered that his suit had been dismissed.

7) The Deputy Registrar of this court also informed the plaintiff's advocate vide the letter dated 5.9.2014 that the court file was available and that is how the registry managed to effect the notice of change of advocates on 2/9/2014. It is clear that by 2nd September 2014, the court file was available at the court registry. On the face of the motion, the plaintiff avers that he instructed his current advocates on 27.7.2014 who was able to file their notice of change of advocates on 1st August 2015. The record shows that the notice of change of advocates of the plaintiffs advocate was actually filed on 3rd September 2014 and not in 2015 as alluded.

8) It is also apparent from the record that the Deputy Registrar of this court wrote to the plaintiff vide the letter dated 5.9.2014 that the court file was readily available. The facts I have outlined clearly show that the court file was available at the material time. It cannot therefore be said that the plaintiff was prevented by the missing file from prosecuting his case.

9) It is also apparent that the plaintiff took an inordinately long time to file and prosecute the current motion even after learning of the dismissal order. It is also clear that the plaintiff was notified of the notice to show cause but decided not to avail himself in court to show cause. For the above reasons I find no merit in the plaintiff's application. Consequently, I decline to exercise this court's discretion in the plaintiff's favour.

10) In the end the motion dated 23<sup>rd</sup> October 2015 is found to be without merit. It is dismissed with costs to the respondent.

**Dated, Signed and Delivered in open court this 14<sup>th</sup> day of December, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant