REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO.103 OF 1998

LAWRENCE KINYUA MWAI……...….APPLICANT/PLAINTIFF

Versus

NYARIGINU FARMERS COMPANY LIMITED…….1ST DEFENDANT

FLORENCE WAIRIMU MUITA…..2ND RESPONDENT/DEFENDANT

RULING

Reinstatement of suit

[1] In a ruling delivered on 28th April 2016, the court dismissed this suit for want of prosecution. The Plaintiff has now applied in the application dated 21st June 2016 for the order dismissing the suit to be set aside and the suit to be reinstated for hearing on merit. The application is anchored upon the supporting affidavit of the Plaintiff, the grounds set out in the application and others stated during oral submissions in court.

[2] Although it is not indicated the provisions of the law under which it is brought, the nature of order sought and arguments made, show that the application is essentially one for review. I should ask therefore whether there is a discovery of new and important matter or evidence which, after due diligence, was not within the knowledge of or the applicant could not have produced it at the time the order was made? Or, is there an error apparent on the face of the record? Or, is there any sufficient cause which may found a review? The Applicant has rehashed all the grounds and arguments which he had put forth in his explanation of the delay when the court called upon him to show-cause why his suit should not be dismissed for want of prosecution. The grounds relate to closing of court diary and alleged inaction by DR to issue him with a date for hearing of his case. The court considered all those explanations and determined them in the ruling delivered on 28th April 2016.Seethe grounds set out in the application, the averments in the affidavits filed as well as his oral submissions on 3rd November 2016.

Unfortunate allegation

[3] But there is one allegation by the Applicant which I find to be utterly disturbing. He has stated in ground 6 on the face of the application:-

THAT the file was kept under lock and key in the Justice Judge's cabinet from 3rd March

2016 to 15th June 2016''.

The less I say about this allegation the better. But it suffices to state that the allegation has not been substantiated and is most unfortunate for, this court, on 3rd March 2016, reserved its ruling on dismissal of suit to 28th April 2016- is it not a matter of integrity of record and process of court that a file pending ruling or judgment ought to be secured? Second, upon delivery of the ruling on 28th April 2016 the file was returned to the registry. I say no more.

[4] I turn to the main course of the proceedings. The Applicant has argued that he was not served with notice of dismissal of his suit and also of reading of ruling on 28th April 2016.This could be a substantial argument. Let me therefore, fall back to the record for answers.

The Record reveals that…

[5] This suit had been dismissed on 6th July 2015. The Applicant/plaintiff, however, applied for its reinstatement vides application dated 20th July 2015. The court heard the Applicant on 29th October 2015 and reserved its ruling for delivery on 24th November 2015. On 24th November 2015 in presence of the Applicant/plaintiff the court delivered its ruling; the relevant part is reproduced below:-

> **I have not seen any evidence that the Notice to Show Cause under Order 42 rule 35 (1) (2) of the Civil Procedure Rules was given to the plaintiff as required by the said Rule. But, there is every indication that the Notice to show cause was transmitted to or served upon the Applicant after the date for its hearing had already passed. That kind of service cannot be said to be have given Notice to the Applicant of the impeding dismissal of his suit. Therefore, there is a glaring omission or irregularity on our part as a court of law which renders the order of dismissal of suit a candidate for setting aside *ex debito justitiae*. Accordingly, I set aside the order dismissing this suit on 6th July, 2015. The suit is thus resurrected. However, after perusal of the file, I should not leave the Applicant off the hook as fast as this is an old matter which should have left the shelves for active files to the archives if indeed the plaintiff was a diligent and keen litigant. I will, therefore, direct that the Applicant is now under notice under Order 17 rule 2 of the Civil Procedure Rules to appear before this court on 2nd day of February 2016 and show cause why this suit should not be dismissed for want of prosecution. The delay in prosecuting this case calls for satisfactory account by the Applicant. He shall file an affidavit to that effect and serve it within 7 days of today. That is the reason why I have not evaluated all the other explanations that have been offered in this case by the Applicant as they need to be properly evaluated in light of a proper notice to show cause. It is so ordered.**

The Applicant was present when the above ruling was delivered and he even requested for certified copies of proceedings and the court ordered he be supplied with certified copies of proceedings upon payment of requisite court fee.In the said ruling, the Applicant was given notice to appear before court on 26th February 2016 to show cause why his suit should not be dismissed. He was also required to file an affidavit to that effect and serve it within 7 days thereof. He filed REPLYING AFFIDAVIT dated 25th November 2015 explaining why his case has not been fixed for hearing. I need not rehash the averments in that affidavit. On 2nd February 2016, in the presence of the Applicant/plaintiff, Mr. Mutunga requested for time to get instruction from his client so that he can reply to the affidavit filed by the Applicant. The court allowed Mr. Mutunga 14 days to file his client's replies and the matter was scheduled for mention on 3rd March 2016. On 3rd March 2016, in the presence of the Applicant/plaintiff and in the absence of the Respondent, the Applicant/ plaintiff confirmed that he has filed a detailed affidavit giving reasons why his suit should not be dismissed. The court then reserved its ruling for dismissal of suit to 28th April 2016. On 28th April 2016 in the presence of M/S Mbaikiata for Mr. Mutunga for the 2nd Respondent but in the absence of the Applicant/plaintiff the court delivered its ruling dismissing this suit.

[6] From the record, the Applicant was duly given notice to show cause why his suit should not be dismissed and he gave his explanations for the delay in prosecuting his case which the court considered

and determined. It is therefore not true that the Applicant was not given notice to show cause why his suit should not be dismissed. Again, from the record, the Applicant was present on 3rd March 2016 when the date for ruling, i.e. 28th April 2016 was given. Therefore, he had notice that ruling would be delivered on 28th April 2016. Thus, there was no requirement of service of another or further notice of delivery of the ruling upon the Applicant. He absented himself for reasons known to him. Accordingly, it is not also true that he had no notice of delivery of the ruling scheduled for 28th April 2016. As such, there is absolutely no error on the record which would warrant review or act *ex debito justitiae* and set aside the order dismissing his suit.

[7] But is there any other sufficient reason which would impel the court to set aside its order dismissing this suit? It bears repeating that the issues being raised now were raised and ably canvassed by the Applicant in his response to the notice for dismissal of suit. The court carefully considered them and made its decision. The court took elaborate journey through the record and the entire file before it dismissed the suit. In doing so, the court was acutely alive to the fact that dismissal of suit without hearing the merits was quite draconian judicial act. But the court also observed that if that be the most appropriate course to take in a proceeding in order to prevent prejudice to the other parties, then it ought to take it and order dismissal of the suit. See below what the court stated in the ruling of 28th April, 2016 that:-

> **I am also quite alive to the fact that summary dismissal of a suit without hearing the merits is most draconian a judicial act, comparable only to the proverbial drawing of the sword of the Damocles. However, despite the unpleasant nature of the dismissal order, if it is the only appropriate measure to take in a proceeding, the court should not hesitate to take it. See what was stated in Allen v Sir Alfred Mc Alpine [1968] All ER 543:**
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> **"To put right this wrong, we will in this court do all in our power to enforce expedition; if need be we will strike out actions where there has been excessive delay. This is a stern measure, but it is within the inherent jurisdiction of the court, and the rules of the court expressly permit it. It is the only effective sanction that they contain."**

The question is: What are the facts of this case?

[8] And after careful and thoughtful consideration of all factors, the court, albeit with great trepidation, dismissed the suit. See what the court stated that:

> **Therefore, taking into account the totality of the circumstances of this case, delay in prosecuting this case has not been explained. Accordingly, the delay is inordinate and inexcusable. I am minded to state that the old-age adage, justice delayed is justice denied, has now found expression as a principle of justice in article 159 of the Constitution. And where delay is contumelious as is the case [here], subsistence of the case becomes a source of prejudice to the other parties as well as to the process of court. Such temporizing of judicial proceedings in *ad infinitum* is much loathed by Equity. Now therefore, no cause has been shown to the satisfaction of the court as required under Order 17 Rule 2 of the Civil Procedure Rules, and with much trepidation, I dismiss the suit with costs to the defendants. This measure is quite unpleasant, but the most appropriate to take in these proceedings. It is so ordered.**

[9] In light of these matters, I am convinced that there is absolutely no sufficient cause shown for me to exercise my discretion in favour of reinstating this suit. Looking at the tenor and substance of the arguments by the Applicant, he is stealthily persuading the court to sit on appeal over its decision. That would be inappropriate. He may, however, appeal my decision and see what the Court of Appeal will have to say. On the basis of those reasons, I dismiss his application dated 21st June 2016. I will not, however, condemn the Applicant to costs as his was a legitimate quest for justice. It is so ordered.

Dated, signed and delivered in open court at Meru this 23rd day of February 2017

F. GIKONYO

JUDGE

In the presence of:

Plaintiff/applicant – present

Mutunga advocate for defendant

Defendant – present

F. GIKONYO

JUDGE