



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 59 OF 2008

SILAS MUGENDI NJERU..... PLAINTIFF/APPLICANT

VERSUS

THE COMMISSIONER OF POLICE.....1ST DEFENDANT/1ST RESPONDENT

HON. THE ATTORNEY GENERAL.....2ND DEFENDANT/2ND RESPONDENT

R U L I N G

The suit herein came up for hearing on the 12th day of July, 2016. On the said date, the Defendants were not ready to proceed because the state counsel who was dealing with the same was on leave and for that reason it was taken out of the day's cause list with an order that it be prosecuted within 45 days of the date thereof failing which it shall stand dismissed.

The Plaintiff failed to prosecute the matter as aforesaid and the same stood dismissed after the expiry of the period ordered by the court.

By way of an application dated the 19th October, 2016, the Plaintiff/applicant moved this Honourable Court seeking to set aside the orders made by the court on the 12th July, 2016, and a further order to reinstate the suit for hearing.

The application has been made on grounds that the suit was dismissed due to a default Order made by the court on the 12th July, 2016, that the Plaintiff on several occasions moved to fix the matter for hearing but there were no dates as the court diary was full.

The Plaintiff has relied on two affidavits one sworn by Wesley John Kamau and another by Francis Gichuri Mugunu both of which are annexed to the application. The summary of the facts as captured in the two affidavits are that, after the orders of the court made on 12th July, 2016, Francis Gichuri who is the deponent to the affidavit sworn on the 19th October, 2016 and a clerk with the firm of Wesley John, Austin & Associates, the firm on record for the Plaintiffs, was charged with the responsibility of fixing the matter for hearing.

That by a letter dated the 21st July, 2016, he invited the Defendants for fixing which was scheduled for the 27th July, 2017 but on the said date, the Attorney General's office which is representing the Defendants failed to send a representative at the registry. That the said clerk was informed that there were no available dates the rest of the year but he was given a mention date for the 16th August 2016. When the matter came up in court, no party appeared and the court ordered the file be returned to the registry. The Plaintiff again fixed the matter for mention on 13th October, 2016 when the court reminded the Plaintiff's

counsel that the matter stood dismissed on the 45th day from the 12th July, 2016 and, therefore, there was no pending matter and hence the application herein.

The court has considered the application together with the two affidavits in support of the same. The application proceeded ex parte as counsel for the Defendants failed to attend court when it was scheduled for hearing. He also did not file any response to the application.

The court has taken into account the reasons advanced by the Plaintiff for failure to prosecute the suit within the period of 45 days ordered by the court on the 12th July, 2016. I have also perused the letter dated 21st July, 2016 inviting the Attorney General to fix the matter for hearing. The same was received at the registry on the 27th July, 2016 as evidenced by the registry stamp. As for the one dated 1st August, 2016, it is doubtful whether the Plaintiff attended the registry for fixing as the same does not bear High Court registry stamp which position also applies to the other letter dated 20th August, 2016.

It is noted with concern that when the matter came up for mention on the 16th August, 2016, the Plaintiff failed to attend court thus losing an opportunity in which the court could have given him a hearing date before the expiry of the 45 days period. No explanation has been offered by the counsel for the Plaintiff why he failed to attend court yet it was a golden opportunity for him to save his client's case. However, this being a court of justice, it has positively considered the fact that counsel for the Plaintiff made an effort to fix the matter for hearing and by way of recognizing that small effort, I will allow the application dated the 19th January, 2016 and order that the suit be prosecuted within forty five (45) days from the date hereof failing which it shall stand dismissed.

Dated, signed and delivered at Nairobi this 23rd day of February, 2017.

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L NJUGUNA

JUDGE

In the presence

..... *for the Plaintiff*

..... *for the Defendant*