REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 164 OF 2009

BHAVEN HARJIVAN KURJI. ……..……. PLAINTIFF

VERSUS

TRIVEDI SUSHIL LILADHAR. ……..……. RESPONDENT

R U L I N G

The Application for determination by this Honourable Court is the one dated 13th October, 2015 brought by way of a Notice of Motion. The same is brought under Order 51 Rule (1), Order 50 Rule 6 of the Civil Procedure Rules Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya.

The Application seeks for orders that: -

1. That this Honourable Court be pleased to set aside the Orders issued herein on the 26th February, 2015 dismissing the Plaintiff's suit for want of prosecution by the Plaintiff.
2. That subsequent to prayer (1) above, the Honourable Court be pleased to Order that the Plaintiff's suit be reinstated and the same be listed for hearing in the normal manner or in such manner as may be ordered by this Honourable Court.
3. Costs of the Application be provided for.

The Application is premised on the grounds set out on the body of the same and on the annexed Affidavit of Bhaven Harjivan Kurji sworn on the 13th October, 2015.

The Summary of the Plaintiff's/Applicant's case as captured in the Supporting Affidavit is that: -

The suit herein was dismissed on the 26th day of February, 2015 for want of prosecution.

That the Plaintiff's Advocate was never served with a Notice in wiring to show cause why the suit should not be dismissed and consequently they were not aware of the hearing date of 26th February, 2016 and this would explain why the Advocate and his client did not attend court to show cause.

It is further deponed that the Plaintiff has always been ready and willing to prosecute the matter and had made efforts to invite the other party to set down the case for hearing from last year and the last such invitation was done on the 11th February, 2015 a fortnight before the matter was dismissed but they had been unable to get a date in the matter.

That the Plaintiff's Advocate had been engaged in an out of court negotiations with the Defendant's

Advocate with a view to reaching an amicable out of court settlement and the Defendant's advocate is fully aware of this fact.

The Plaintiff further depones that following the accident, the injuries sustained in the accident and the severity of the injuries, he has been forced to attend several medical operations in India to reconstruct the tissue within his injured leg, the last of such surgery that he attended was between the 4th November, 2014 to the 24th February, 2015 and he only returned to the country in June, 2015.

The further treatment and the medical expenses incurred necessitated the need to amend the plaint and he instructed his Advocate on record to amend the plaint and include the said Medial Expenses but the court file was not available.

He concludes by deponing that his Advocate only managed to get the file on 8th October, 2015 and it is then that he learnt the suit was dismissed on the 26th February, 2015. He urges the court to grant the Application for he stands to suffer irreparable damage and prejudice if the dismissal orders are not vacated and/or set aside since he has always been ready and willing to pursue the matter. The Application has been made without undue delay and that he has an arguable case with high chances of success which should be allowed to proceed on merits.

The Application is opposed vide the grounds of opposition filed on the 13th November, 2015. The Defendant/Respondent opposes the Application on the grounds that the same is misconceived, bad in law, it has no merits and that the Applicant is guilty of laches.

The same came up for hearing on the 19th November, 2015 when it proceeded by way of oral submissions.

I have considered the Application together with the Affidavit in support, the grounds of opposition and the submissions made by the learned counsels.

I have also had a chance to peruse the court file and I have been able to establish that though the matter was filed in the year 2009, the first action was taken on the 13th April, 2011 when the Plaintiff filed a supplementary list and bundles of documents plus list of intended witnesses. The pre-trial questionnaire and witness statements were later filed on 11th December, 2012 by the Plaintiff's Advocate. The matter was fixed for mention on the 22nd July, 2013 and the date was fixed by the Plaintiff's Advocate. On the said date a Mr. Omondi appeared for the Plaintiff while a Miss Ngugi was present for the Defendant when the court was informed that the Plaintiff had not fully complied with Order 11. The court was further informed that the matter was also under negotiations.

Miss Ngugi, Advocate for the Plaintiff is on record as confirming that the matter was under negotiations and she sought 60 days to comply with Order 11 and the court gave them a further mention date for 8th October, 2013. On the said date the court permitted the suit to proceed to trial. This was the last action taken in the matter before it was dismissed on the 26th February, 2015.

The issue that the court has to determine is whether the failure by the Plaintiff and his Advocate to attend court on 26th February, 2015 when the matter was dismissed was intentional and if not, whether there were good reasons for that failure.

The Plaintiff in his affidavit depones that his advocate on record was not served with a notice to show cause. In his submissions, the counsel reiterates the contents of his client's Affidavit to that effect. He submitted that he came to learn the notice had been issued through a cause list on 26th February, 2015, but he had not been notified.

The matter herein was dismissed under Order 17 Rule 2(1) which provides: -

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

Order 17(2) talks about: -

"A Notice in writing to the parties to show cause why the suit should not be dismissed", but it does not specify how the notice should be served. There are many ways of giving a notice in writing which include but is not limited to advertisement in a local Daily Newspapers, in a daily cause list, as it was done in this case or it can as well be posted in the website.

The counsel for the Respondent asked the court to take Judicial Notice of the fact that the Chief Justice publicized on the Notice Board the intention to dismiss the matters. She further submitted that under the provisions of order 17 Rule 2(1) the court may give notice to the parties, the court was not under a duty to issue notices physically but notices were issued.

In tackling that issue and while I do agree with the counsel for the Defendant that the court is not under duty to issue notices physically, the court will take judicial notice of the practice that the courts have employed over the years when dealing with dismissals such as this one, which is that notices are issued physically to the parties or they are sent by mail.

The way the notices were issued in this case, it would have been possible for a party/Advocate not to see the same and for that reason I will given the Plaintiff the benefit of doubt.

The counsel for the Defendant also took issue with the provisions under which the Application was brought in that they do not relate to reinstatement of suits dismissed under Order 17 Rule (2)(1). It is true that the Application was brought under the wrong provisions of the law but this is just a procedural defect. In saying so, I am guided by the provisions of Article 159 (2) (d) of the Constitution which provides that: -

"Justice shall be administered without undue regard to procedural technicalities" and for that reason, I would excuse the Plaintiff/Applicant for moving the court under the wrong provisions.

Before I conclude, I also note from the annextures to the Supporting Affidavit that on the 13th March, 2014, the Plaintiff's Advocate wrote a letter to the Deputy Registrar requesting for a Mention date though it is not clear why a date was not taken following that request.

The Plaintiff had also invited the Defendant for fixing the matter for hearing on the 19th January, 2015 and as late as 4th February 2015 but a date could not be fixed as the court file was missing.

The Plaintiff has also annexed correspondences showing that parties were engaged in an out-of-court settlement which are dated 16th January, 2015, 24th April, 2015 and 30th April, 2015. Counsel for the Defendant asked the court not to consider the said letters as they were done on a ***"without prejudice"*** basis and while I agree with her that the said letters cannot be relied on as evidence, the court record of the 22nd July, 2013 confirms that parties were negotiating the matter. On the said date a Miss Ngugi who appeared for the Defendant confirmed as much and it is on record.

As deponed in paragraph 7 of the Affidavit in support and as evidenced by annextures BHK 2(b) and BHK 2(c), the Plaintiff had travelled to India to attend further medical operations to reconstruct the tissue within his injured leg which he attended from 4th November, 2014 to 25th February, 2015 when he returned to the country, the matter was dismissed only two (2) days after he came back and it's only fair and just that this court gives him a chance to prosecute the matter.

In the upshot and for the reasons given above, the court will make the following orders: -

1. ***The orders issued herein on the 26th February, 2015 dismissing the Plaintiff's suit for want of prosecution are hereby set aside and the same is reinstated.***

2. ***That the suit be prosecuted within 120 days from today failure to which the same shall stand dismissed.***

3. ***There will be no orders as to costs.***

Dated, signed and delivered at Nairobi this 4th day of February, 2016.

……

L NJUGUNA

JUDGE

<u>In the Presence</u>

……. *For the Plaintiff*

…… *for the Respondent.*