REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 51 OF 1999

VISHVA BUILDERS LTD ……..…… PLAINTIFF

VERSUS

MOI UNIVERSITY …… DEFENDANT

RULING

1. By the Notice of Motion dated 28th July 2015 and filed in court on 30th July, 2015, the plaintiff/Applicant (the plaintiff) approached this court praying that an order dismissing its suit for want of prosecution made on 8th July, 2015 be reviewed and set aside. The motion is expressed to be brought under *Section 1A, 1B, 3, 3A* and *Section 80* of the *Civil Procedure Act; Order 45; Rule 1* and *Order 51 Rule 15* of the *Civil Procedure Rules.*

2. In support of the Motion, the plaintiff contends that no formal notice or any other notice for dismissal was issued as the court's causelist for 8th July 2015 was not posted in the internet; that there was no sufficient cause to warrant dismissal of the suit; that the delay in prosecuting the suit was due to factors beyond its control.

3. The plaintiff also averred that the order of dismissal was made by mistake and that there was an error on the face of the record as at the time the order was made, an year had not elapsed since 16th October, 2014 when the suit was last fixed for hearing; that all pre-trial procedures had been complied with by both parties and that the plaintiff was ready to comply with any directions the court may make towards the speedy prosecution of the suit. All the above matters are detailed at length in a deposition made on 28th July 2015 on the plaintiff's behalf by its learned counsel *Mr. Nelson Havi.*

4. The motion is opposed by the respondent. There is a replying affidavit sworn by *Mr. Alfred King'oina Nyairo,* learned counsel for the respondent. *Mr. Nyairo* deposed that the suit was properly dismissed when the plaintiff failed to show cause why the same should not be dismissed; that the "justice at last" old cases clearance initiative was published through the media and posting of notices in all courts for the attention of litigants and Advocates; that the suit was instituted in 1999 and was last in court on 19th September, 2012 which shows that the plaintiff has not been diligent in progressing the hearing of the suit; that the court's discretion should not be used to aid the indolent and lastly, that the application is an abuse of the court process and ought to be dismissed with costs.

5. On 2nd December, 2015, parties agreed that the application be canvassed by way of written submissions: Those of the applicant were filed on 26th January 2016 while those of the respondent were filed on 8th April, 2016.

6. I have carefully considered the application, the depositions and rival submissions made by the parties.

It is common ground that the plaintiff's suit was dismissed for want of prosecution under *Order 17 Rule 2 (1)* of the *Civil Procedure Rules 2010* (the Rules) during an initiative of the judiciary styled "justice @ last". *Order17 Rule 2(1)* of the Rules is in the following terms;

> ***"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".***

7. It is the plaintiff's case that the order of dismissal should be set aside and the suit be reinstated for hearing firstly because it was not served with a notice to show cause why the suit should not be dismissed and secondly because the suit had not been dormant for one year to warrant issuance of a notice to show cause.

8. On the issue of notice, the plaintiff contends that the notice ought to have been served on it or its agent in the manner provided by *Order 5 Rule 8* of the *Civil Procedure Rules 2010.*

The respondent in rejoinder submitted that there was no requirement under *Order 17 rule 2* that the notice be served on the plaintiff; and that all the law required was to give notice, which notice was given through the judiciary website.

9. Without delving into the legal distinction between the "giving" and "serving" of notice, a close scrutiny of *Order 17 Rule 2 (1)* shows clearly that the requirement of giving notice to show cause in cases where no application or step has been taken for one year is not mandatory. It is important to note that the word used in the rule is "May" not "shall' which means that the provision is not couched in mandatory terms.

This in effect means that in such cases, the court can exercise its discretion and in appropriate cases may dismiss a suit *suo moto* without giving any notice to the parties.

10. I must however hasten to add that the court should be slow to take such a drastic course of action as its net effect would be to drive away a plaintiff from the seat of justice without being heard. The constitutional principle of access to justice to all and the right accorded to all persons by *Article 50* of the Constitution to have any dispute that can be resolved by the application of the law heard in a fair and public hearing before a court mitigates against such action. And that is why as a matter of practice, courts routinely issue notices to parties even in cases which have been dormant for years to show cause why the suits should not be dismissed for want of prosecution.

11. That said, I agree entirely with Gikonyo J in the two cases relied on by the respondent namely ***Fran Investement Limited V G4S Security Services Limited (2015) eKLR*** and ***Mwangi S Kimenyi V Attorney General & Another (2014) eKLR*** that giving of notice of dismissal through the court's official website or through the causelist constitutes sufficient notice for purposes of *Order 17 rule 2 (1)* of the Rules.

12. In this case, the plaintiff has exhibited this courts cause list for 8th July 2015 in the bundle of annextures marked as exhibit "NH2" which confirms that the instant suit was among many others listed for dismissal for want of prosecution that day. I take judicial notice that a notice bearing all cases that were scheduled for dismissal under the justice at last initiative was pinned in the court's notice board and was published in the judiciary website well before the dates the suits were due for dismissal.

I am thus satisfied that a notice to show cause was duly given to the plaintiff but no appearance was made on its behalf to show cause why the suit should not have been dismissed.

13. Having resolved the issue of notice, I now wish to turn to a consideration of whether the suit was ripe for dismissal under *Order 17 Rule 2 (1).* As stated earlier, a suit should only be dismissed under this provision if no step of whatever kind is taken by any party for one year to facilitate hearing of the case in question.

14. I have perused the court record. It shows that the case was filed on 15th March, 1999 and for reasons that are on record, including several amendments to the pleadings, hearing had not taken off by the time the dismissal order was made though the case had been listed many times for mention for directions and for hearing on two occasions. The first hearing date was on 8th February 2012 but it was taken out as parties had not fully complied with pre- trial procedures.

15. At the instance of the plaintiff's advocates, the case was next slated for hearing on 16th October, 2014. But on that date, as evidenced by the annexture to the supporting affidavit marked as Exhibit "HNNH5", the hearing was taken out of the cause list by consent of the parties. Some quick calculation shows that the time lapse between 16th October, 2014 when the suit was fixed for hearing and 8th July, 2015 when it was dismissed is about nine months.

16. It is therefore clear from the court record that in this case, one year had not elapsed since the plaintiff had taken a positive step towards progressing the hearing of the suit. The dismissal of the suit was thus premature. It was based on the mistaken belief that one year had passed before any action was taken in the matter. I consequently agree with the plaintiff's submissions that the dismissal of the suit before the expiry of one year since it was last fixed for hearing constituted an error on the face of the record.

17. Under *Order 45 Rule 1(b)*, the court is empowered to review its own orders if certain circumstances are established which includes a demonstration by the applicant that there was an error on the face of the record relating to the order sought to be reviewed and that the application for review had been made without unreasonable delay.

18. The plaintiff's learned counsel deposed that he became aware of the dismissal of the suit on 22nd July, 2015 when the matter was brought to his attention by his learned friend *Mr. Wambua Kigamwa*. This claim is not contested by the respondent. The instant application was filed on 30th July, 2015 about eight days later. In the circumstances, I am satisfied that the instant application was filed without unreasonable delay.

19. Having established that the dismissal order of 8th July 2015 was made prematurely and that it constituted an error on the face of the record and having found that the application was filed timeously, I am satisfied that the plaintiff has satisfied the requirements of *Order 45* of the *Civil Procedure Rules* and that it is deserving of the exercise of this court's discretion in its favour by allowing the application as prayed.

20. In the result, the order dismissing the plaintiff's suit made on 8th July, 2015 is hereby reviewed and set aside. The suit is consequently re-instated for hearing.

21. In conclusion, I note with concern that this case has been pending in this court for about 17 years now. Given the reasons that have led to the success of the application, i will not attempt to attribute any blame for this prolonged delay to any of the parties as doing so will not serve any useful purpose. I can only say that there is need to expedite the hearing of the suit by fast trucking the trial processes in order to give effect to the cardinal principle of law which has now been elevated to a constitutional principle that justice should be administered expeditiously.

To this end and in order to ensure that the matter does not go to sleep, I direct that this case be mentioned on 28th July, 2016 for the purpose of fixing a hearing date or for further orders.

22. Given that the dismissal of the suit was initiated by the court and not the respondent, the order that best commends itself to me on costs is that each party shall bear its own costs.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 14th Day of July, 2016

In the presence of:

Mrs. Khayo for the Respondent

Mr. Miyienda holding brief for Mr. Mathai for the Applicant

Naomi Chonde Court clerk