



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 205 OF 1999

KENSHAVJI JIVRAJ SHAH..... PLAINTIFF

VERSUS

KANWAL SARJI SINGH DHIMAN..... DEFENDANT

RULING

1. The Application before the Court is for the reinstatement of a suit that was struck out by the Court under Order 17 Rule 2 on 15th June 2015. The Application before the Court was brought just under 12 months after the suit was struck out. The Application is dated 13th May 2016 but not filed until 17th May 2016.

2. The Application is brought under “*order 12 Rule 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all enabling provisions of the law*”. It seeks the following Orders.

(i) That the Honourable Court be pleased to set aside the orders made on 15th June, 2015 dismissing the Plaintiff’s suit and all other consequential orders thereto.

(ii) That the Honourable Court be pleased to reinstate the Plaintiff’s suit.

(iii) That the costs of the application be in the cause.

3. The application is based on the Affidavit of Ann Kayoi and the following grounds:

(i) The suit was dismissed on 15th June, 2015 for want of prosecution.

(ii) There was an appeal pending before the Court of Appeal being Civil Appeal No. 33 of 2007.

(iii) Counsel for the Plaintiff was not served with the Notice to show cause.

(iv) The Plaintiff has an arguable case with high chances of success and it is in the best interest of Justice that this suit be reinstated so that it can be heard and determined on merit.

The Application also seeks to rely on “*other grounds and reasons to be adduced at the hearing*” of the Application. None were raised.

4. The Application was served on the Respondent’s Advocates on 26th May 2016. The Return of Service

by Boniface Kioko was filed on 20th June 2016. The Respondent neither attended, nor was represented. [\[1\]](#) The Court is now informed they are not objecting

5. The supporting Affidavit is very clear and succinct. It sets out a partial history of the suit as follows:

(i) That I am an Advocate of this Honourable Court practising as such in the firm of Auta Nyakundi and Company Advocates, having the conduct of this matter on behalf of the Applicants and hence competent to swear this Affidavit.

(ii) That this suit filed on 25th February, 1999 the Defendant failed to enter appearance and/or file the Defence therein leading to an interlocutory judgment being entered and the suit set down for formal proof hearing.

(iii) That on 16th day of September 1999, the Plaintiff obtained a Judgment in his favour.

(iv) That the defendant herein filed an appeal against the said ruling being Civil Appeal No. 33 of 2007.

(v) That the said appeal was determined on 31st July 2015 as per the copy of the judgment annexed herein and marked AK1.

(vi) That pending the hearing of the said appeal this honourable court dismissed this suit for want of prosecution on 15th June 2015 (Annexed herewith and marked AK2 is copy of the said Order).

(vii) That the N.T.S.C was not served upon the Plaintiff and/or Plaintiff's Counsel offices.

6. The Deponent then goes on to state that the notice to show cause was not served on the Plaintiff or the Plaintiff's counsel. That is a question of fact. She then goes on to make a surprising admission at paragraph 8.

(viii) That the new rules were not in place when this suit was filed in Court.

(ix) That in order to comply with new rules, I have been writing letters to the Deputy Registrar to have this matter fixed for pre-trial but the Court file could not be traced (Annexed herein and marked AK3 are copies of the said letters).

(x) That it is until recently, on my quest to have this matter fixed for pre-trial that I learnt about the dismissal.

7. It is surprising that an Advocate of this Court should still be involved in a quest to have a "*matter for pre-trial*" when by Gazette Notice No. 78 of 28th July 2014 and Gazette Notice No.... of September 2014 whereby Order 11 of the Civil Procedure Rules 2010 ceased to apply to matters in the Commercial & Admiralty Division as then was. The procedure the Plaintiff should have followed was set out in the Practice Direction promulgated and adopted for that change of procedure.

8. At Exhibit "AK-2" is a copy of the Order of this Court. The Affidavit does not explain from where a copy of that Order was obtained. The Court therefore assumes that the Plaintiff's position is that neither the NTSC was served on the Plaintiff or its Counsel

9. The Order that the Plaintiff seeks to set aside was made under Order 17 Rule 2 of the Civil Procedure Rules 2010. That provides: **Order 17, rule 2:** Notice to show cause why suit should not be dismissed.

2.(1) 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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) if cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this order.

10. The Order for striking out the Application was made on the basis that neither party had taken any steps in the matter. The Application and record shows a different story.

11. The Order that there has been an inordinate delay of 8 years, the last steps being taken on 8th December 2006. Infact, that was the date of the ruling of Mary Kasango J on the Defendant's Application to review and set aside the exparte judgment of 16th June 1999 and subsequent decree dated 16th September 1999.

12. Following the Ruling of 18th December 2006 the Defendant filed a Notice of Appeal. Thereafter the matter was before the Court of Appeal. The proceedings appear to have been certified in January 2007. The Appeal proceeded as ***Civil Appeal No. 33 of 1997*** and was determined on 31st July 2016. According to counsel for the Plaintiff as appears from the record. As a matter of logic that should probably read ***Civil Appeal No. 33 of 2007*** and determination on 31st July 2015. That interpretation is borne out by a search on e KLR and the copy attached to the application.

13. It is noted that there is no Memorandum of Appeal on the Court file or indeed any other indication on the file that the Appeal was proceeding for the period between January 2007 and 15th June 2015.

14. Therefore on consideration of the true facts, the matter was proceeding and awaiting for a Ruling. In the circumstances it cannot be said that the parties have not taken any steps during that period.

15. Subsequent to the ruling of the Court of Appeal setting aside the "ex parte" judgment the Defendant has filed a Defence and Counterclaim (August 2015) and the Plaintiff has complied with Order 11 albeit that it is not applicable.

16. It is therefore ordered that the order dismissing the suit be set aside and that the suit is reinstated effective from 15th June 2015. Costs are reserved.

17. It is further ordered that the Parties comply with the Practice Direction for Case Management and take a date for the Case Management Conference within 28 days in the new term.

Orders accordingly.

FARAH S.M. AMIN

JUDGE

Dated 4th August 2016.

Signed and Delivered this 2nd day of September 2016.

In the presence of:

Otieno Court Clerk

No Appearance for the Plaintiff – it was later explained that the Cause List set the matter for 9am whereas the Notice of Ruling stated 1200 when Mr Shah attended at 1200

Mr Nduati for the Defendant

[\[1\]](#) On delivery of this Ruling they confirmed that they did not oppose the reinstatement of the suit