



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E&L CASE NO. 19 OF 2014**

**MARION LEAH NYAMBURA.....PLAINTIFF/APPLICANT**

**=Versus=**

**ALI JAMA MOHAMMED .....DEFENDANT/RESPONDENT**

**RULING**

This ruling is in respect of an application dated 17<sup>th</sup> January 2020 by the plaintiff/applicant seeking for the following orders that:

- a) This Honourable court do set aside the orders made on the 15<sup>th</sup> July 2019 dismissing the plaintiff's suit.
- b) This suit be set down for hearing on the merits.

Counsel agreed to canvass the application by way of written submissions which were duly filed.

**PLAINTIFF/APPLICANT'S CASE**

Counsel for the plaintiff submitted that the plaintiff's advocate was never served with a hearing date or notice for dismissal and that the plaintiff only discovered that the suit had been dismissed when her advocates on record filed a notice of change of advocates. He stated that the plaintiff has a good case with merits and should be allowed to prosecute her suit in the interest of justice.

The applicant relied on the supporting affidavit filed in court and the grounds on the face of record that she filed the suit against the defendant through the firm of Kidyavai & Company Advocates who handed over the conduct of this matter on 11<sup>th</sup> December 2019 to MS Kitiwa & Company Advocates.

It was the applicant's evidence that the firm of Kitiwa Advocates duly prepared a notice of change of advocates for filing in court and upon filing the notice of change of advocates and perusing the court file, they noted that this suit had been dismissed on the 15<sup>th</sup> July 2019.

Counsel submitted that there was no service of any notice to show cause upon the firm of advocates on record. The application is not opposed and that the plaintiff/applicant has keen interest in prosecuting this suit.

Mr. Kitiwa relied on the case of **Kenya Power & Lighting Co. Ltd Versus Key Cold Storage 1964 Ltd HCCC No.387 of 2002**, where Okwengu, J (as she then was), held that

*'Nevertheless dismissal of a suit under order XVI Rule 2(1) of the Civil Procedure Rules (now repealed), require that notice be given to the parties to appear before the court to show cause why the suit should not be dismissed before any order of dismissal is made.'*

Similarly, that Order 17 Rule 2(1) of the Civil Procedure Rules, 2010, provides that

*'in any suit in which no application has been made or step taken by either party for over a year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed.'*

Counsel therefore urged the court to allow the application as prayed as the defendant/respondent will not suffer any prejudice in the event that this suit is reinstated as he will be accorded an opportunity to defend the suit and ventilate his issues.

**ANALYSIS AND DETERMINATION**

The issues for determination in this case is as to whether the plaintiff applicant has met the principles of reinstatement of a dismissed suit for want of prosecution. This suit was dismissed by this court on its own motion under **Order 17 Rule 2 (1)** of the Civil Procedure Rules 2010 as no action had been taken.

A party seeking to have a suit reinstated must demonstrate good faith and bring the application for reinstatement without unreasonable delay as held in the case of **Simion Waitim Kimani & Three others vs Equity Building Society (2010) eKLR** where **Koome J** (as she then was) in Paragraphs 4 and 5 held;

*4. “The courts have discretion generally to reinstate a suit which is dismissed for nonattendance but in all matters involving the exercise of the courts discretion, it must be exercised judiciously based on facts and law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay. This suit was filed on 12<sup>th</sup> March 2002 and since 29<sup>th</sup> November, 2004 no steps were taken to prosecute it. It is the court on its own motion that issued the notice to show cause why the suit should not be dismissed for want of prosecution. The Plaintiff now claims that his lawyer who was on record Messrs Cerere Mwangi & Co. left the country to settle in the United States in the year 2004. The Plaintiff who instituted this suit never enquired about their lawyer or their matter for the last 6 years.”*

*5. Even if this court were to exercise its discretion in favour of the Plaintiff that would be against the principle of equity which does not aid the indolent but aids the vigilant. Secondly, this suit was dismissed by the court on its own motion pursuant to the provisions of Order 16. The notices were sent. No cause was shown and the court dismissed the suit for want of prosecution. According to rule 6 of order 16, if the suit is dismissed when no steps were taken for a period of three years the plaintiff can only bring a fresh suit subject to the Law of Limitation .....*”

The applicant filed this application on 20<sup>th</sup> January, 2020 six months after the suit was dismissed. It should also evident that the plaintiff was never issued with a notice to show cause why the suit should not be dismissed. The plaintiff was never given a chance to explain the delay in not setting down the suit for hearing. The applicant avers that she is still interested in prosecuting her case.

This application is not opposed by the respondent and it would be in the interest of justice that the plaintiff/applicant be given an opportunity to prosecute her case on merit. The application is allowed as prayed with costs in the cause.

**DATED and DELIVERED at ELDORET this 23<sup>rd</sup> DAY OF September, 2020**

**DR. M. A. ODENY**

**JUDGE**