



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 84 OF 2010**

**ISAAC WEPUKHULU.....PLAINTIFF**

**VERSUS**

**ELIZABETH SIMIYU WALUNYWA.....DEFENDANT**

**RULING**

**The Application**

1. By a notice of motion dated **9/7/2020** and filed on **15/7/2020** brought under provisions of **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Article 159 of the Constitution**, the plaintiff/applicant seeks the following orders:

**(1) ...spent**

**(2) That this court be pleased to give further directions as to the *inter partes* hearing of the application dated 23/12/2019.**

**(3) That costs be in the cause.**

2. The application is grounded on the following grounds: the application dated **23/12/2019** was filed in court but a date could not be fixed due to an availability of the court file; that the defendant has now taxed her costs and that it is in interest of justice that the application be heard on priority. The application is supported by the affidavit of the Counsel for the plaintiff sworn on **9/7/2020** which reiterates the above grounds.

**The Response**

3. The defendant through her advocate filed a replying affidavit sworn on **28/7/2020**. He depones that the application before court has no merits; that the suit herein was dismissed for want of prosecution on **18/1/2018**. Counsel contends that by **6/2/2019** when counsel for the plaintiff was filing an application to cease acting, the suit had long been dismissed and that the notice of taxation mentioned by the applicant was served on him way in **March 2019**.

4. Counsel for the defendant maintained that the filing of the present application is belated, irregular and an afterthought only meant to further delay the Respondent from realizing the costs awarded to her by the court. The court is urged to dismiss the application with costs on the basis that it is overly untenable.

**Submissions**

5. The court gave directions on **15/7/2020** which were to the effect that the application be disposed of by way of written submissions. It would appear that the defendant did not file submissions in respect of the said application as none were in the file as at the time of the preparation of this ruling.

**Determination**

6. The issue that arises in the instant application is whether the applicant is entitled to the orders sought.

7. From a perusal of the instant application, it would appear that counsel for the applicant is seeking for further directions on the manner of hearing of the application dated **23/12/2019** which in summary seeks an order that this suit, which was dismissed for want of prosecution

way back on **18/1/2018** be reinstated for hearing on the merits. It is clear from the court record that the application dated **23/12/2019** has not been determined. The delay in the hearing of that application is attributed by the unavailability of the court file which hampered the fixing of a hearing date.

**8.** I have perused the court record and found that this suit was dismissed for want of prosecution on **18/1/2018**. I have also found that the applicant was dealing with issues concerning representation before the application dated **23/12/2019** was lodged by his current advocate. I also do not find any statement by the respondent's counsel to the effect that they had not been served with the application in question.

**9.** This court has also noted that taxation took place more than one year after the dismissal and that during that period there is no evidence that the plaintiff took any action in the matter. The only period during which the file could have been said to be in the hands of the Deputy Registrar was from **16/1/2019** when the bill of costs was filed till **28/5/2020**. The application was filed on **23/12/2019** and this court is persuaded that the process of setting it down for hearing could have been incommoded by the taxation proceedings as well as the application by Mr. Ngeywa, the plaintiff's erstwhile advocate, to cease acting for the plaintiff in this matter. As for the delay that took place before the filing of the application it is the opinion of this court that that issue can be canvassed in the hearing and is indeed the subject of the application dated **23/12/2018**, and not the instant application.

**10. Article 159(1) (d)** of the **Constitution of Kenya 2010** enjoins courts to be guided by the principle that justice must be administered without undue technicalities. **Article 50** of the **Constitution** vests in every person the right to a fair hearing which under **Article 25(c)** cannot be limited.

**11. Section 1A, 1B and 3A** of the **Civil Procedure Act** provides for the expeditious, just and proportionate of disputes before the court. In this case some delay would ensue from the grant of the instant application.

**12.** It is the last resort of a court of law to turn away a litigant without hearing him when he has already come before it for justice. This court exists for the purpose of dispensing justice between parties in disputes such as this one. The application in question is already part of the court record. It seems in this court's view, it would be just to hear the application dated **23/12/2019** if only to find out if it is well founded, and to give breath to the applicant's right as enshrined in **Article 159(1)** of the **Constitution** cited above.

**13.** I find that is in the interests of justice that I allow the applicant to have the application dated **23/12/2019** be determined on the merits. I therefore direct that the application dated **23/12/2019** be set down for hearing. Hearing of the application shall be by way of written submissions. The applicant shall file and serve his submissions within **7 days** of this order and the respondent shall file and serve her written submissions within **7 days** of the last day upon which service of the applicant's submissions are due. There will be a mention of this matter on **29/10/2020** to issue a ruling date in respect of the application dated **23/12/2019**.

**Dated, signed and delivered at Kitale via electronic mail on this 13<sup>th</sup> day of October, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE**