



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 317 OF 2013

JONATHAN CHELOTI MAKHANU.....PLAINTIF

VERSUS

FRED MUKHEBI WALUBENGO.....DEFENDANT

R U L I N G

Order 17 Rule 2(1) of the Civil Procedure Rules reads as follows:-

“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.” Emphasis added.

From the use of the word “**may**” it is clear that dismissal of suits under **Order 17 Rule 2(1) of the Civil Procedure Rules** is not mandatory. Rather, it is a discretionary power to be exercised by the Court judiciously the aim being to do justice to the parties. I shall also be guided by the decision in **IVITA V KYUMBU 1984 KLR 441** where **CHESONI J** (as he then was), having considered several authorities on dismissal of suits for want of prosecution observed that:-

“So the test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant; so both parties to the suit must be considered and the position of the Judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the Court that he will be prejudiced by the delay or even the plaintiff will be prejudiced. He must show that justice will not be done in the case due to prolonged delay on the part of the plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the Court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties notwithstanding the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

On 16th March 2018, the Deputy Registrar issued notices to the parties in this case that the suit would be dismissed on 18th June 2018 unless sufficient cause is shown why such orders should not be made. The notices were duly served to counsel on record for both parties. On 18th June 2018 when the suit came up for dismissal only **MR OCHARO** holding brief for **MR KASSIM** for the defendant was present. Both the plaintiff and his advocate **MR WERE** were absent and the suit was dismissed after **MR OCHARO** informed the Court that the plaintiff had taken no action in the matter since 17th September 2014.

By his application dated 3rd September 2018, the plaintiff seeks leave to act in person and also the setting aside of the dismissal orders issued on 18th June 2018. The gist of the application is that his then advocate **MR WERE** did not inform him that the case was coming up for dismissal on 18th June 2018 and it is in the interest of justice that he be given an opportunity to prosecute this suit.

The application is opposed and **MR PAUL KASSIM** counsel for the defendant has filed a Replying Affidavit dated 30th October 2018 in which he has deponed, inter alia, that this Court suo motto served all the parties with the notices for dismissal of this suit and for four (4) years, the plaintiff did not liaise with his advocate over the prosecution of this suit. He urged that this application be dismissed with costs.

By consent of the parties, the application was canvassed by way of written submissions which were filed both by the plaintiff in person and **MR KASSIM** for the defendant.

I have considered the application, the rival affidavits and the submissions.

As is now clear from the provisions of **Order 17 Rule 2(1) of the Civil Procedure Rules**, dismissal of suits for want of prosecution is not mandatory and the guidelines have been discussed in **IVITA .V. KYUMBU** (supra). The plaintiff's suit was dismissed on 18th June 2018 and this application was filed on 3rd September 2018. He says his advocate then on record did not inform him about the hearing on 18th June 2019. But what he does not say is what he was doing between 2nd July 2015 when the suit was last mentioned before Justice **MUKUNYA** and 18th June 2018 when it was dismissed a period of three (3) years. Surely it is his case and he ought to be active in having it prosecuted because it does not belong to his advocate who is only his agent. A delay of three (3) years is long. On the other hand, there is nothing to suggest that the defendant will be prejudiced if the suit is reinstated to hearing. I have not heard the defendant say that his witnesses will not be readily available for trial or that his evidence may no longer be available due to the lapse of time. I am further reminded of the decision in **SEBEI DISTRICT ADMINISTRATION .V. GASYALI & OTHERS 1968 E.A 300** where **SHERIDAN J** adopted the words of **AINLEY J** in **JAMNADAS .V. SODHA HEMRAJ 1952 7 ULR 11** that:-

“ it should always be remembered that to deny the subject a hearing should be the last resort of a Court.”

I will also give the plaintiff the benefit of the provisions of **Article 50 of the Constitution** about fair hearing but also caution him that the right to a fair hearing is not a carte blanche to allow him to file cases and go to sleep because the same constitution under **Article 159 (2) (b)** requires that justice shall not be delayed.

Ultimately however, and having considered all the circumstances in this case, I allow the plaintiff's Notice of Motion dated 3rd September 2018 in the following terms:-

- 1. The order dated 18th June 2018 dismissing the plaintiff's suit is hereby set aside and the suit reinstated to hearing.**
- 2. The plaintiff shall however meet the defendant's costs of this application which I assess at Kshs. 3,000/= payable within 30 days from to-day.**
- 3. In default of (2) above, the dismissal order shall revert.**
- 4. The parties to comply with all the pre-trial directions so that this case is heard and determined before the end of this year being a 2013 case.**

Boaz N. Olao.

J U D G E

23rd May 2019

Ruling dated, signed and delivered in Open Court this 23rd day of May 2018 at Bungoma.

Mr Onyonyi for Mr Kassim for defendant present

Plaintiff present

Joy/Felix – Court Assistants present

Boaz N. Olao.

J U D G E

23rd May 2019.