



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 554 OF 2009**

**BABS SECURITY SERVICES LIMITED.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**THE CITY COUNCIL OF NAIROBI.....DEFENDANT/RESPONDENT**

**RULING**

1. This is the notice of motion dated 16<sup>th</sup> May 2018 brought under Section 1A, 1B, 3A and 3B of the Civil Procedure Act, Order 12, Rule 7, Order 51 Rule 1 of the Civil procedure Rules and other enabling provisions of the law.

2. It seeks orders that:-

*(1) Spent.*

*(2) The order of the court dismissing the suit on 22<sup>nd</sup> March 2017 be and is hereby set aside.*

*(3) That suit be and is hereby reinstated for hearing and disposal.*

3. The grounds are on the face of the application and are:-

*1. The plaintiff has recently learnt that this matter was fixed for hearing by the court suo moto on 22<sup>nd</sup> March 2017 during the service week for the ELC division.*

*2. A hearing notice dated 3<sup>rd</sup> February 2017 was issued by the court but it was only served on the defendant's advocates.*

*3. On 22<sup>nd</sup> March 2017 when the matter was listed for hearing, despite the lack of service of the hearing notice on the plaintiff's advocates, the suit was dismissed due to the non-attendance of the plaintiff.*

*4. The plaintiff has been negotiating with the defendant with a view to settling the suit out of court, which negotiations led to a delay in prosecuting the suit.*

*5. The plaintiff has proffered a reasonable explanation for the delay in prosecuting the case, which delay is excusable meriting reinstatement of the suit.*

*6. The plaintiff is still desirous of prosecuting the suit and no prejudice will be occasioned to the defendant which cannot be compensated by an order of costs.*

*7. The plaintiff is willing to comply with any orders that the court may impose as a condition to reinstating the suit.*

4. The application is supported by the affidavit of Isaac Macharia Wambui the managing director of the plaintiff/applicant sworn on the 16<sup>th</sup> May 2018.

5. The application is opposed. There is a replying affidavit sworn by Benson Wekesa Milimo, Advocate for the defendant/respondent sworn on the 27<sup>th</sup> July 2018.

6. On the 1<sup>st</sup> October 2018 the court directed that the application be canvassed by way of written submissions.

#### **The plaintiff's/applicant's submissions**

7. The plaintiff learnt that this matter was fixed for hearing by the court *suo moto* on 22<sup>nd</sup> March 2017 during the service week for the Environment and Land Court. The court in exercising its jurisdiction to set aside the order of dismissal for want of prosecution should be guided by the test as affirmed in the case of **Mwangi S Kaimangi vs Attorney General & Another [2014] eKLR**.

8. The notice was not served on the plaintiff's advocates but only on the defendants. It has put forward the case of **Martha Mwikali Nyamai & Another vs Barclays Bank of Kenya Ltd & Another [2017] eKLR**.

9. The reason for the delay in prosecuting this suit was due to the negotiations between the plaintiff and the defendant, with a view to settling the suit out of court. The plaintiff has at all times been ready and willing to prosecute this suit. The delay was neither intentional nor does it amount to an abuse of the court. The delay is not inordinate or inexcusable. It has put forward the cases of **Ivita vs Kyumbu [1984] KLR 441; Hartwell J M Mwazighe vs Attorney General [2018] eKLR**. The circumstances herein justify the grant of the orders sought.

10. The reinstatement of the suit will not cause any specific hardship and aggravated costs upon the defendants as it has not demonstrated what hardship it is likely to suffer if the suit is reinstated. On the other hand the plaintiff will suffer prejudice if the suit is not reinstated. The plaintiff will suffer irreparable and substantial loss if it is not given a chance to be heard. It prays that the application be allowed.

#### **The defendant's/respondent's submissions**

11. It is not a mandatory requirement under the law to serve notice upon the parties for dismissal of a suit for want of prosecution. The giving of a notice of dismissal through the courts official website or through the cause list constitutes sufficient notice for purposes of order 17 rule 2(1) of the rules. It has relied on the cases of **Mwangi J. Kaimenyi vs Attorney General & Another [2014]; Fran Investments Ltd vs G4S Security Services Ltd [2015] eKLR**.

12. As per paragraph 9 of the supporting affidavit, the suit was fixed for dismissal during the service week of the Environment and Land Court which confirms that the instant suit was among many others listed for dismissal for want of prosecution. On the 22/3/2017, a list was printed on the notice board and published on the judiciary website well before the due date. The plaintiff does not dispute this.

13. The principles governing the exercise of discretion to set aside orders dismissing a suit for want of prosecuting were emphasized in the case of **Anthony Kaburi Kario & 2 Others vs Ragati Tea Factory Company Ltd & 10 Others [2014] eKLR**. That the delay complained of is not inordinate. That the delay is inexcusable. That the defendant is not likely to be prejudiced by such delay. The plaintiff herein is guilty of inordinate delay. It failed to prosecute this suit since 28<sup>th</sup> October 2015, failed to show cause why the suit should not be dismissed for want of prosecution and presenting this application fourteen (14) months from the date of dismissal.

14. The delay is inexcusable. The plaintiff has failed to offer a valid reason for its failure to prosecute the suit since 15<sup>th</sup> October 2015 as well as bringing this instant application. The negotiations failed and the court was informed of the same on the 28<sup>th</sup> October 2015 where by the court directed that the matter be fixed for hearing at the registry.

15. The defendant is likely to be prejudiced by such delay. The suit was filed way back in 2009, has never been concluded whilst the plaintiff continues to enjoy temporary injunctive orders. It has relied on the case of **Governors Balloon Safaris Ltd vs Skyship Limited & Another [2013] eKLR**. Article 159 (2) (b) of the Court demands that cases should be disposed of expeditiously as justice delayed is justice denied.

16. The plaintiff/applicant has not demonstrated a case warranting the orders sought and the application ought to be dismissed with costs to the defendant/respondent.

17. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit, the written submissions of counsel and the authorities cited. The issue for determination is whether the delay herein has been explained such that the suit ought to be reinstated for trial.

18. I have gone through the court record. It is not in doubt that the negotiations failed and the court was informed on the 28<sup>th</sup> October 2015 whereby the court directed that the matter be fixed for hearing at the registry.

19. The plaintiff's claim that the reasons for the delay was the ongoing negotiations cannot stand. It has failed to demonstrate what steps it took from 28<sup>th</sup> October 2015. The court in its own motion fixed the matter for notice to show cause on 22<sup>nd</sup> March 2017.

20. Another reason given by the plaintiff is that the court file was not readily available. No evidence was adduced to support this averment. The plaintiff had the option of applying for reconstruction of the court file but it did not do so if indeed the same was missing.

21. Another reason given by the plaintiff is that the advocates were not served with the hearing notice for the notice to show cause.

Order 17 rule 2(1) of the Civil Procedure Rules provides that;-

***“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 not dismissed, and if cause is not shown to its satisfaction, may dismiss the suit”.*

22. In the case of **Fran Investments Ltd vs G4S Security Services Ltd [2015] eKLR**, the court described the phrase ‘give notice’ as used in Order 17 rule 2 (1) of the Civil procedure Rules as follows:-

***“Order 17 rule 2 (1) of the Civil procedure Rules does not require service of notice; it uses the word “give notice”. The court may give notice of dismissal through its official website or through the cause list. And these mediums will constitute sufficient notice for purpose of order 17 rule 2(1) of the Civil Procedure Rules. But nothing precludes the court from serving notice as per order 5 of the Civil Procedure Rules.”***

I am guided by the about authority in finding that the notice through the judiciary website and the cause list was adequate notice to the parties.

23. The principles governing the exercise of the discretion to set aside orders dismissing the suit to want of prosecution were emphasized in the case of **Anthony Kaburi Kario & 2 Others vs Ragati Tea Factory Company Limited & 10 Others [2014] eKLR** that the delay complained of is not inordinate, the delay is excusable and that the defendant is not likely to be prejudiced by such delay. I am guided by the above principles. The plaintiff in this case has failed to give sufficient reason why it did not prosecute the suit since 28<sup>th</sup> October 2015. The instant application has been brought after inordinate delay and the delay is inexcusable. It was the primary duty of the plaintiff to take steps to set down the suit for hearing. Article 159 (2) (b) of the constitution imposes on the court to dispose of the cases expeditiously as justice delayed is justice denied. The plaintiff has demonstrated lack of interest in prosecuting this matter to conclusion.

24. The defendant is likely to be prejudiced by this delay as the plaintiff obtained temporary injunctive orders.

25. In conclusion, I find no sufficient reasons have been advanced by the plaintiff/applicant to warrant the reinstatement of this suit. There are also no sufficient grounds to warrant this court to set aside and/or review the orders made on 22<sup>nd</sup> March 2017.

26. I find no merit in this application and the same is dismissed with costs to the defendant/respondent.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 31<sup>ST</sup> day of JULY 2019.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Ruto for Kirugu Kimani for the Plaintiff

No appearance for the Defendant

Kajuju - Court Assistant