

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 323 OF 2009

MECAP COMPANY LTD.....PETITIONERS/APPLICANTS

-VS-

1. P.S. MINISTRY OF STATE PUBLIC SERVICES

2. HON. ATTORNEY GENERAL.....RESPONDENTS

RULING

1. By Notice of Motion dated 26th June 2017 the Plaintiff seeks to have the Suit reinstated for hearing and disposal. the application is brought under Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and is premised on the grounds that the matter was listed before the Hon. Deputy Registrar on 24th February, 2017 who ordered the same to be mentioned before the Court on 21st March 2017 for parties to fix a hearing date. That on 21st March 2017, and without notice to the parties, the matters was dismissed for want of prosecution. The application is further supported on the grounds contained in the supporting Affidavit of Joseph Karanja Kanyi, Counsel for the Plaintiff/Affidavit sworn on 26th June, 2017 in which he has explained the circumstances in which the Suit was dismissed. The Applicant contends that it is still desirous of having this matter heard and determined on merits and that it is in the interest of justice that the orders sought herein be allowed.

2. The Application is opposed by Defendant/Respondent who filed grounds of oppositions dated 27th October 2017. It is the Defendant's contention that the Application is misconceived, frivolous, and vexatious and an abuse of the process of Court. The Defendant avers that the Applicant is guilty of material non-disclosure and misrepresentation hence not deserving of the orders sought.

3. In his submissions, Mr. Maundu, Counsel for the Applicant stated that when the matter was dismissed on 21st March 2017, the Plaintiff was not aware that the same was coming up in Court. He pointed out that there is no Affidavit on record to show that the Plaintiff or its Advocate was served and therefore the Plaintiff was condemned unheard. Relying on the case of **Morgan Mwita -v- Cooperative Insurances Services Ltd (2017) eKLR**, Counsel submitted that there is no Affidavit filed in response to the factual matters stated by the Plaintiff and that the material facts as stated by the Plaintiff are therefore uncontroverted.

4. In his submissions, Mr. Makuto, Counsel for the Defendant sought to distinguish the authority relied on. He submitted that the Applicant seeks to rely on a biter and not there *stare decisis* and should therefore be disregarded. Mr. Makuto pointed out that the matter was last in Court on 7th July 2014 when the Applicant was ordered to fix the matter for hearing but did not do so until the Court brought it up on 24th February 2017. It was the Defendant's submissions that the Suit was rightly dismissed for want of prosecution. Mr. Makuto submitted that under Order 17 Rule 2 of the Civil Procedure Rules, there is no requirement that a notice be issued to the parties and that the Court can move on its own motion and dismiss the matter. He urged the Court to dismiss the Application.

5. I have considered the Application and the submissions of Counsel. Order 17 Rule 2(1) of the Civil Procedure Rules provides as follows:

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 should not be dismissed, and if cause is not shown to its satisfaction may dismiss the suit.

It is clear from this provision of law that the Court is required to give notice to the parties to show because why the suit should not be dismissed.

6. I have looked at the Court record and there is no evidence that the notice was served on the parties. The Applicant has stated that it was never served with notice and was therefore not aware that the matter was due in Court on 21st March 2017 when there Suit was dismissed. There is no Affidavit filed in response to the factual matters stated by the Plaintiff. The material facts as stated by the Plaintiff are therefore uncontroverted and are supported by the Court record. The overriding objectives of the Court would also come to the aid of the Plaintiff.

7. For the foregoing reasons, I am satisfied that the Plaintiff's Application dated 26th June 2017 has merit. The Application is allowed. The order made herein on 21st March 2017 dismissing the Plaintiff's Suit is set aside and the case is reinstated for the Plaintiff to show cause why the Suit should not be dismissed as no Application has been made or step taken since 7th July 2014 until 24th February 2017. Costs of the Application shall abide the outcome of the notice to show cause.

Delivered, signed and dated at Mombasa this 27th February, 2018.

C. YANO

JUDGE