



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1137 OF 2007

ERNEST KAMAU KINUTHIA PLAINTIFF

VERSUS

HEZEKIAH KIUGU KINUTHIA DEFENDANT

RULING

1. The plaintiff instituted this suit on 25/8/2003 through a plaint dated 14/8/2003. On 14/10/2003, the defendant filed a statement of defence dated 14/10/2003. A statement of issues was filed on 28/6/2007. Between July 2007 and November 2011, there was total inaction on part of the plaintiff, prompting the court to issue a notice to show cause why the suit should not be dismissed for want of prosecution under ***Order 17 Rule 2 of the Civil Procedure Rules***.

2. The Notice to Show Cause was dated 22/11/2011 and was slated for hearing on 16/12/2011. When the notice to show cause came up for hearing on 16/12/2011 before Koome, J [*as she then was*] there was no attendance on part of the plaintiff. The court proceeded to dismiss the suit. On 6/6/2013, the plaintiff brought a Chamber Summons application dated 6/6/2013, seeking reinstatement of the suit. That Chamber Summons Application is the subject of this Ruling.

3. The Application is supported by the plaintiff's affidavit sworn on 6/6/2013. The plaintiff contends that he was not aware that his advocates on record, M/s Amena Amedi J & Co Advocates were not taking steps to prosecute the suit. He further contends that his failure to attend court on the hearing of the notice to show cause was not intentional.

4. In written submissions dated 27/3/2017, the plaintiff argues that he did not envisage his advocate's failure to attend court. He contends that his counsel's failure to attend court or prosecute this suit should be treated as an excusable mistake. Counsel for the plaintiff argues that the delay in prosecuting the suit and in filing the present application were as a result of negligence and indolence on part of the plaintiff's advocate and that the plaintiff should not be punished for that.

5. I have carefully gone through the court file. There is no response by the defendant to the plaintiff's application. From the court record, there were two sets of notice to show cause. One set was addressed to **M/s A.W Kinuthia & Co, Victoria Court, 1st floor, Tom Mboya Street, P. O. Box 317 – 00502 Nairobi**. This particular notice was served and received on 5/12/2011 by **A. W Wambugu (Mrs) Advocate of P. O. Box 63752**. The second set of notice to show cause was addressed to **M/s Amena Amedi J & Co Advocates, Ole Odume road, off Ngong Road**. There is no evidence of service of this particular notice.

6. The dismissal order was made within the framework of ***Order 17 Rule 2 of the Civil Procedure Rules*** which provides as follows:

“(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.”

7. A key ingredient of the above legal framework is that a written notice to show cause ought to be given to the affected party before a dismissal order is made. The written notice can be in form of a notice to show cause or a general notice published in an appropriate forum accessible to the affected parties. In the absence of evidence to the effect that the plaintiff was given written notice in tandem with the requirements of **Order 17 Rule 2 of the Civil Procedure Rules**, the court should be inclined to invoke its judicial discretion to reinstate the suit. In so doing, the court is informed by the need to achieve substantive justice to the parties.

8. I would have gone a step further to consider the merits of the present application on the basis of the well settled guiding principles on reinstatement of dismissed suits had the requirement for giving written notice been met. In the present suit, the notice was served on the defendant’s counsel. The plaintiff’s counsel was not served with the notice. In essence, there is no evidence that written notice was given to the plaintiff prior to the dismissal order.

9. The upshot of the foregoing is that the plaintiff’s suit is hereby reinstated. The plaintiff shall file and serve a bound, paginated and indexed bundle of pleadings, witness statements, documents and statement of issues within 30 days. In default, this suit shall stand dismissed. The defendant shall file a similar bundle within 30 days from the date of service of the plaintiff’s bundle. This matter shall proceed to pre-trial on a date to be set at the time of reading this Ruling.

Dated, signed and delivered at Nairobi on this 22nd day of September, 2017.

B. M. EBOSO

JUDGE

In the presence of:

..... Advocate for the Plaintiff

..... Advocate for the Defendant

..... Court Clerk