



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO. 38 OF 2006**

**CITY COUNCIL OF NAIROBI.....PLAINTIFF**

**VERSUS**

**SIMON KIMONDO MUBEA .....DEFENDANT**

**RULING**

On 29<sup>th</sup> May 2015 this court dismissed this suit for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules. The order was made after the parties had been served with a notice to show cause why the suit should not be dismissed and they failed to do so as none of the parties appeared in court. The plaintiff has now moved the court with an application by way of Notice of motion dated 12<sup>th</sup> June 2015 seeking to set aside the said order of dismissal of the suit. The application has been brought on the grounds that the plaintiff was prevented by sufficient cause from showing cause why the suit should not have been dismissed and that, there are good reasons why there has been a delay in the prosecution of the suit.

As for the reason why the plaintiff did not appear in court to show cause why the suit should not be dismissed, the plaintiff's advocate, Ms. Anjela Maina has sworn an affidavit in which she has stated that the notice to show cause was served upon their firm on 28<sup>th</sup> May 2015 to appear in court and show cause on 29<sup>th</sup> May 2015 why the suit should not be dismissed on which day she happened to have four (4) other matters in different courts. She has deposed that by the time she appeared before Angote J. before whom the matter had been listed for notice to show cause, the matter had already been dealt with and the suit dismissed. With regard to the reason why the suit has not been prosecuted, the plaintiff's advocate aforesaid deposed that this suit was stayed by Angawa J. on 29<sup>th</sup> May 2007 pending the hearing and determination of Nairobi HCCC No. 2012 of 1999 which suit has not been determined to date.

The Plaintiff's application was opposed by the defendant through grounds of opposition dated 7<sup>th</sup> October 2015. The defendant contended that the application is incompetent, bad in law and fatally defective. The defendant contended further that no good reason has been advanced to justify the setting aside of the order that was made herein on 29<sup>th</sup> May 2015. The defendant has contended further that this suit is an abuse of the process of the court and as such no useful purpose would be served by reinstating it. The defendant contended that the reinstatement of the suit would cause him great prejudice.

The application was argued before me on 8<sup>th</sup> October 2016 when Ms. Maina appeared for the Plaintiff and Ms. Wanjohi appeared for the defendant. In her submissions, Ms. Maina reiterated the contents of her affidavit that was filed in support of the application which I have highlighted above. On her part, Ms. Wanjohi also relied wholly on the defendant's grounds of opposition that was filed herein in opposition to the application. I have considered the application together with the affidavit filed in support hereof. I have also considered the grounds of opposition filed by the defendant and the submissions of counsel. The order that is sought to be set aside was made by the court ex parte in the absence of the parties. Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte. Section 3A of the Civil Procedure Rules also gives the court inherent power to make such orders as may

be necessary for the ends of justice to be met. The powers donated to the court under section 3A of the Civil Procedure Act and Order 51 Rule 15 of the Civil procedure Rules aforesaid are discretionary. Like any other discretionary power, the same has to be exercised judiciously and not capriciously with the sole aim of ensuring that justice is done to the parties.

On the material before me, I am satisfied that the plaintiff has laid a basis for the exercise of this courts discretion in its favour. The plaintiff has given reasonable explanation backed by documentary evidence as to why it failed to appear in court on 29<sup>th</sup> May 2015 to show cause why this suit should not be dismissed. The plaintiff has also given reasonable excuse why there has been a delay in the prosecution of this suit. I have noted from the record that this suit was stayed by Angawa J. on 29<sup>th</sup> May 2007 pending the hearing and determination of Nairobi HCCC No. 2012 of 1999. It is common ground that although HCCC No. 2012 of 1999 has been heard, the same has not been determined.

The defendant has confirmed that judgment in the matter is pending before Nyamweya J. In the circumstances, I cannot see how the plaintiff would have prosecuted this suit while the stay order aforesaid is still in force. I have considered the grounds that have been put forward by the defendant in opposition to the application. In my view, the same do not answer the application. They are concerned with the merit of the plaintiff's case which is not before me for consideration. In any event, the defendant has not placed any material before the court in proof of his contention that this suit is an abuse of the process of the court.

For the foregoing reasons, I am satisfied that the Plaintiff's application dated 12<sup>th</sup> June 2015 is well founded. The same is allowed as prayed. The costs of the application shall be in the cause.

**Delivered, Dated and Signed at Nairobi, this 29<sup>th</sup> day of January, 2016**

**S. OKONG'O**

**JUDGE**

In presence of

Ms. Maina for the Plaintiff

Mr. Mwangi h/b for Macharia for the Defendant