



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 663 OF 2009

IBRAHIM ATHMAN SAID..... PLAINTIFF

(Suing in his capacity as Administrator Ad Litem of

the estate of the late Hussna Binti Said also known as Hussna Said Ali)

VERSUS

IBRAHIM ABDILLE ABDULLAH..... 1ST DEFENDANT

MUKTAR SAMAN OLOW 2ND DEFENDANT

RULING

By a Notice of Motion dated 8th May 2013 made under order 12 Rule 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and the inherent jurisdiction of the court the plaintiff seeks orders that:-

1. That the Honourable court be pleased to set aside the orders made on 3rd February, 2012 dismissing the plaintiff's suit and all other consequential orders thereto.
2. That the Honourable court be pleased to reinstate the plaintiff's suit.
3. That the costs of the application be in the cause.

The application is grounded on the grounds set out on the face of the application namely:-

- a. **Under article 159 of the constitution and section 1A and 2A of the Civil Procedure Act, it would be fair expedient and in the best interest of justice to reinstate the suit.**
- b. **The suit was dismissed on 3rd February 2012 for non attendance by counsel for the Applicant herein who was not present.**
- c. **Counsel for the plaintiff was not served with the Notice to show cause and hence was not aware that the matter was listed for that day.**
- d. **The plaintiff has an arguable case with high chances of success and it is in the best interest of justice that this suit be reinstated so that it can be heard and determined on merit.**

The application is further supported on the grounds contained on the supporting affidavit of **Ibrahim Athman** Said the plaintiff herein sworn on 8th May 2013. The applicant depones that his Advocate on record informed him that the suit came up on 3rd February 2012 for Notice to show cause why the suit should not be dismissed for want of prosecution at the instance of the court but however the Advocate had

not been served with the notice and was not aware that the matter was listed on that day. The applicant further depones that his Advocate only came to learn of the dismissal of the suit on 3rd February 2012 when he sought to file an application under a certificate of urgency. The Applicant avers that he has an arguable case and in the interest of justice the suit should be reinstated so that the same is heard and determined on merit.

The 2nd Defendant **Muktar Saman Olow** has sworn a replying affidavit in opposition to the applicants application to have the suit reinstated. In the replying affidavit the 2nd Defendant outlines the history of the

matter since the same was filed by the plaintiff/applicant no doubt with the objective of demonstrating the plaintiff has been lax in his handling of the case he filed. As regards the dismissal of the suit by the court on 3rd February 2012 the 2nd Defendant depones that the court vide a letter dated 23rd December 2011 addressed to both the plaintiff's and the Defendants Advocates issued a notice to show cause why the suit should not be dismissed and the notice was to be heard on 3rd February 2012. The suit was on 3rd February 2012 listed in the Daily cause list before **Lady Justice Mwilu** for notice to show cause when the plaintiff's Advocate failed to appear and the court proceeded to order the suit dismissed. The court record shows that **Mr. Kabucho Advocate** appeared for the 2nd Defendant and he is recorded as stating "**suit may be dismissed with costs**" and the court obliged and dismissed the suit.

The court record does not show whether there was an inquiry as to whether or not the plaintiff's Advocate was served with the Notice to show cause. There is no return of service and/or any evidence that the Notice of 23rd December 2011 was served on the plaintiff's Advocates. There is not even a stamped copy of the Notice to show cause to show that the same was received at the plaintiff's Advocates offices. The plaintiff's Advocate on record claims he was never served with any such notice and indeed the said Advocates act of attempting to file an application on 11/4/2013 under a certificate of urgency seeking to be granted leave to amend the plaint is consistent with their denial that they had been served with the Notice to show cause and the court is inclined to accept that they infact may not have been served with the Notice to show cause to attend court on 3rd February 2012 in the absence of any evidence that they indeed were served.

It is evident however that the plaintiff has been dilatory in prosecuting his case but perhaps if he had been served with the notice to show cause the same may have woken him up from the slumber to pursue his case with more vigor and diligence. The application the plaintiff was seeking to make on 11/4/2013 to amend his plaint is indicative of the fact that he wished to proceed with the suit save for the "**dismissal barrier**" which apparently he was unaware of.

Order 17 rule (1) of the Civil Procedure Rules pursuant to which the Notice to show cause was issued to the parties advocates envisages that such notice is served on the parties.

Order 17 Rule (1) provides:-

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.

My view is that before the court can proceed to make an order pursuant to the above provision the court has to make inquiry and has to be satisfied that indeed the notice issued was served on the parties. I accept the observations by **F. Azangalala, Ag. Judge** in the case of **ASSOCIATED WAREHOUSE CO. LTD & OTHERS – VS- TRUST BANK LTD HCCC NO. 1266 of 1999** (unreported) where he stated:-

“Rule 2 (1) of order 16 (repealed Civil Procedure Rules) presupposes service before dismissal. It is also clear under this rule that even where cause is not shown, dismissal is not mandatory as the rule is permissive. In this case the plaintiffs were not given a chance to show cause why their suit should

not be dismissed. The plaintiffs have this persistent complaint regarding alleged “Bearer certificates of Deposit”. The plaintiffs may have misinterpreted the effect of the interlocutory order made by Gacheche, Commissioner of Assize as she then was. This reason for delay in prosecuting this suit may be unsatisfactory, but I will not hold it against the plaintiffs. In any event the Defendant has not demonstrated the prejudice it will suffer.

As I have held that there is no evidence that the plaintiff’s Advocate was served with the Notice to show cause it is my view that the order of dismissal of the suit made on 3rd February 2012 cannot stand as the essence of requiring a notice to be given is so that a party may be able to appear and if he is able demonstrate and show cause to the court why the suit should not be dismissed. The plaintiff was not afforded that opportunity and in my view an order ought to be made only after the parties have been afforded the opportunity to show cause, if it is shown that an affected party did not get the opportunity to show cause such an order will be set aside at the instance of the affected party.

In the premises I accordingly set aside the court’s order made on 3rd February 2012 dismissing the plaintiff’s suit and order the suit reinstated. The Plaintiff shall pay the Defendants the costs of the application. I further make directions that the parties to this suit make compliance with the provisions of order 11 of the Civil Procedure Rules within the next 90 days from the date of this ruling to facilitate the expeditions disposal of the suit.

It is so ordered.

Ruling signed dated and delivered this...14thday of...March.....2014.

J. M. MUTUNGI

JUDGE

In presence of:

.....for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant