



Waimiri & Muthoni & 6 others v Lepri & 2 others (Civil Suit 8 of 2020) [2024] KEHC 9185 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 8 OF 2020
SM GITHINJI, J
JULY 30, 2024**

BETWEEN

**JOHN WAIMIRI & EMMA MUTHONI 1ST APPLICANT
JULIUS NJUGUNA NJOROGE 2ND APPLICANT
EUGENIO FIORA VANTI 3RD APPLICANT
DE MARTINO MELAKE 4TH APPLICANT
ROBERT OCHOKI NYAMORI/SIRIO LTD 5TH APPLICANT
CARLA TARLAZZ 6TH APPLICANT
ALEM DIRAR 7TH APPLICANT**

AND

**FRANCESCO LEPRI 1ST RESPONDENT
DEVIS DUZZINI 2ND RESPONDENT
SUNNY MANAGEMENT & CONSULTING LIMITED 3RD RESPONDENT**

RULING

1. The subject application is the Motion by the Applicants dated 9/2/2023 and filed on 13/2/2023, seeking reinstatement of the suit, which was dismissed for want of compliance with the court’s orders, on 9/2/2023. The basis of the application as deposed in the supporting affidavit sworn by counsel Elias Mutuma Gichuru on the even date, is that on 9/2/2023 the suit came up for mention to confirm compliance with regard to mediation between the parties. Counsel stated that he logged into the virtual court platform at exactly 9.00am when there was no activity. This prompted him to seek directions on the platform’s chat section where he was informed that there was a power outage in Malindi that had affected the court virtual session. Counsel narrated that he remained logged into the session until the



call dropped and was unable to gain admission. He immediately got in touch with the court assistant who informed him that the matter had been dismissed.

2. In response, the 1st and 2nd Respondents filed a Replying Affidavit sworn by Eunice Wanjiru Kamau on 23/5/2023 wherein she stated that on 6/4/2021 the Applicants were ordered to prosecute the main suit within 45 days thereof and having failed to do so, the suit stood dismissed for disobedience of court orders. She expressed that the Applicants have never been keen on prosecuting the matter to its logical conclusion as they have always been seeking time to pursue negotiations which have never borne any fruits. To the deponent, the Applicants have only been taking advantage of this pending suit to not pay service charge which had accumulated to Kshs 4, 448, 679 as of December 2022, and are therefore not entitled to any assistance of this court.
3. Quoting clause 5.5 of the lease agreement between the parties, the deponent stated that the court does not have jurisdiction to reinstate the suit since the said clause makes provision for arbitration, which was the reason why the parties were granted 45 days within which to prosecute the matter. The deponent added that there was no sufficient reason to reinstate the suit and she urged that the application be dismissed with costs to the Respondents.
4. Following the court's directive that the application be canvassed by way of written submissions, only the Respondents filed the same on 1/12/2023. I have carefully considered the Respondents' submissions and authorities cited. The only issue for me to determine is whether this suit ought to be reinstated.

Analysis and Determination

5. The application herein seeks to reinstate the suit. It is trite that the decision on whether a suit should be reinstated for trial is a matter of judicial discretion and it depends on the facts of each case. It is also trite that such discretion ought to be exercised in a just manner. Such discretion is donated by section 3A of the [Civil Procedure Act](#) which reads: -

“Saving of inherent powers of court, nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

6. The principles that should guide the court when dealing with such an application were well laid out in the case of [Ivita v Kyumbu](#) [1984] KLR 441 where Chesoni J expressed: -

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”



7. It is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without unreasonable delay. Article 159 of *the Constitution* and Sections 1A and IB, of the *Civil Procedure Act*, Cap 21, Laws of Kenya, are relevant with regard to this.
8. On the issue of the delay and whether the same is prolonged and inexcusable, the matter was dismissed on 9/2/2023 and the application was filed on 13/2/2023; a period of 4 days, which is in my view not prolonged and is excusable in the circumstances. However, it is pertinent to note that the Applicants filed this suit in the year 2020. In a ruling delivered on 6/4/2021, the court observed and emphasized the need to ensure expeditious hearing and determination of the suit and ordered the Applicants herein to prosecute the suit within 45 days thereof. About a year later on 15/2/2022, Mr. Kimathi holding brief for Mr. Juma, counsel for the Applicants, indicated that the parties had agreed to settle the matter out of court and they prayed for 30 days to give room for negotiations. Thereafter, the matter was mentioned four times on various dates- on 22/3/2022, 17/5/2022, 7/6/2022 and on 28/6/2022. Notably, during that entire period, no consent or settlement was recorded and neither was the matter fixed for hearing as ordered. On 28/6/2022 this court's deputy registrar ordered that the matter be mentioned on 7/11/2022 before me for final orders. Court did not sit on the said date and the mention was rescheduled to 9/2/2023. It is not disputed that the Applicants were aware of this mention date when the suit was dismissed. Their contention is that they experienced technical hitches joining the virtual forum.
9. While I appreciate the technicalities and unforeseen trouble that come with virtual courts, I note that the Applicants have not given any reason as to why they failed to prosecute the matter within the 45 days ordered by the court or offered any explanation for failure to arrive at a consent even after pleading for time to pursue out of court negotiations. In the circumstances, I am not convinced that reinstatement of this matter would be in the interest of justice.
10. The outcome is that the application dated 9/2/2023 is unmerited. It is hereby dismissed with costs.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 30TH DAY OF JULY, 2024.

S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Mutuma for the Applicants – absent

M/s Metto for the Respondent

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