



**Kimani v Githua & another (Civil Case 1499 of 1988)  
[2024] KEHC 13512 (KLR) (Civ) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13512 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 1499 OF 1988**

**AN ONGERI, J**

**OCTOBER 30, 2024**

**BETWEEN**

**NJUGUNA KIMANI ..... PLAINTIFF**

**AND**

**JAMES WARA GITHUA ..... 1<sup>ST</sup> DEFENDANT**

**TERESIAH WANJIRU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application coming for consideration is the one dated 15/2/2024 brought under Sections 1A, 3A of the *Civil Procedure Act*, Cap 21, Order 12 rule 7 of the *Civil Procedure Rules* and Articles 50 and 159 of the *Constitution* of Kenya, 2010 seeking the following orders;
  - i. Spent
  - ii. That the honourable court be pleased to set aside the orders made on 29<sup>th</sup> January, 2024 dismissing the plaintiff's suit and all other consequential orders thereto;
  - iii. That the honourable court be pleased to reinstate the plaintiff's suit.
  - iv. That the application filed herein be heard with due urgency.
  - v. That the costs of and incidental to this application do abide the result of the suit.
2. The application is based on the following grounds;
  - i. On 22<sup>nd</sup> December, 2023 when the matter last came up for mention, the court had issued directions that a notice to be that the court through an order issued on 29<sup>th</sup> January, 2024 dismissed the plaintiff's suit for want of prosecution.



- ii. That this matter had been scheduled to come in court on 22<sup>nd</sup> December, 2023 and unfortunately the firm of advocates representing the plaintiff had closed offices for the December holidays on 20<sup>th</sup> December, 2023 and thus inadvertently failed to note the date leading to non-attendance on 29<sup>th</sup> December, 2023.
  - iii. That by due diligence, the plaintiff's advocates came to know that the matter was further slated for mention on 29<sup>th</sup> January, 2024. issued to the plaintiff. Unfortunately, no notice was issued by the court or the defendants to the plaintiff and thus the plaintiff's advocates were unable to attend court on 29<sup>th</sup> January, 2024
  - iv. That prior to the dismissal the plaintiff had faithfully prosecuted the matter for the court. The matter previously came before the court on 31<sup>st</sup> July, 2023 and 29<sup>th</sup> June, 2023 where the plaintiff appeared and took directions from the court.
  - v. That the plaintiff had in fact through a Notice of Motion Application dated 9<sup>th</sup> December, 2022 moved the court seeking the matter be transferred to the Environment and Land Court noting that the subject matter in the suit was a land issue.
  - vi. That the parties had filed their respective written submissions and were awaiting a ruling from the court. The plaintiff filed its submissions on 9<sup>th</sup> July, 2023 in compliance with orders of the court.
  - vii. That the ruling on the plaintiff's motion to transfer the suit to the Environment and Land Court is yet to be issued and that was what was pending before the court.
  - viii. That failure to attend court on 22<sup>nd</sup> December, 2023 and 29<sup>th</sup> January, 2024 was out of genuine inadvertence. The plaintiff has diligently prosecuted its case before the court without fail.
  - ix. That the dismissal has occasioned the plaintiff great hardship considering the fact that the subject matter is land which is the main factor of production and source of livelihood for many people in Kenya. Justice will only be served by allowing the parties to canvass the case on merit and settle the issues in the appropriate court without making a party feel that it lost its land through technical justice.
  - x. That no prejudice will be occasioned on the Defendants should this Application be allowed. Conversely, if this application is not heard expeditiously, the Plaintiff/Applicant will be prejudiced as he stands to lose his right to prosecute this suit on its merits.
  - xi. That 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
  - xii. That this application has been originated without undue delay.
3. The application is supported by the affidavit of Josephat Muiruri Kiiru sworn on 14/2/2024 as follows;
  4. That he is an advocate of the High Court of Kenya and practicing as such in the firm of Waweru Gatonye & Company Advocates who have the conduct of this matter on behalf of the Plaintiff herein and being duly conversant with the facts and circumstances giving rise to this application, he is therefore competent to swear this affidavit
  5. That the court through an order issued on 29<sup>th</sup> January, 2024 dismissed the plaintiff's suit for want of prosecution.



6. That this matter had been scheduled to come in court on 22<sup>nd</sup> December, 2023 and unfortunately the firm of advocates representing the plaintiff had closed offices for the December holidays on 20<sup>th</sup> December, 2023 and thus inadvertently failed to note the date leading to non-attendance on 29<sup>th</sup> December, 2023.
7. That the by due diligence, the plaintiff's advocates came to know that the matter was further slated for mention on 29<sup>th</sup> January, 2024.
8. On 22<sup>nd</sup> December, 2023 when the matter last came up for mention, the court had issued directions that a notice to be issued to the plaintiff. Unfortunately, no notice was issued by the court or the defendants to the plaintiff and thus the plaintiff's advocates were unable to attend court on 29<sup>th</sup> January, 2024.
9. That prior to the dismissal, the plaintiff had faithfully prosecuted the matter for the court.
10. That the plaintiff had in fact through a Notice of Motion Application dated 9<sup>th</sup> December, 2022 moved the court seeking the matter be transferred to the Environment and Land Court noting that the subject matter in the suit was a land issue.
11. That the parties had filed their respective written submissions and were awaiting a ruling from the court. The plaintiff filed its submissions on 9<sup>th</sup> July, 2023 in compliance with orders of the court.
12. That the ruling on the plaintiff's motion to transfer the suit to the Environment and Land Court is yet to be issued and that was what was pending before the court. A perusal of the e-filing system indicates that the ruling is yet to be delivered.
13. That failure to attend court on 22<sup>nd</sup> December, 2023 and 29<sup>th</sup> January, 2024 was out of genuine inadvertence. The plaintiff has diligently prosecuted its case before the court without fail.
14. That the dismissal has occasioned the plaintiff great hardship considering the fact that the subject matter is land which is the main factor of production and source of livelihood for many people in Kenya. Justice will only be served by allowing the parties to canvass the case on merit and settle the issues in the appropriate court without making a party feel that it lost its land through technical justice.
15. That no prejudice will be occasioned on the Defendants should this Application be allowed. Conversely, if this application is not heard expeditiously, the Plaintiff/Applicant will be prejudiced as he stands to lose his right to prosecute this suit on its merits.
16. That 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.
17. That the plaintiff has been prejudiced by the order granted by this court and seek to reinstate the suit.
18. That this application has been originated without delay and the plaintiff prays that the court humbly exercises its discretion to its favour.
19. The 2<sup>nd</sup> respondent filed grounds of opposition dated 4/4/2024 as follows;
20. That the application is misconceived and bad in law.
21. That the application is frivolous, vexatious and an abuse of the process of this Honourable Court.
22. That the Plaintiff has not adduced any reasonable grounds to warrant the Court to grant the prayers sought.



23. That the application has no legal basis.
24. That the deponent in the application is not a party to the suit.
25. The parties filed written submissions in the application dated 15/2/2024 which I have duly considered.
26. The sole issue for determination is whether the plaintiff's application dated 19/12/2022 should be reinstated for hearing.
27. The plaintiff applicant's application dated 9/12/2022 was seeking to transfer this suit to the ELC Division.
28. The plaintiff did not prosecute the application and the same was dismissed for want of prosecution.
29. I find that this case was filed in the year 1988 long before the Constitution of Kenya 2010 established the 3 divisions of the superior courts.
30. I find that the suit was properly filed in this court and I find that it is not in dispute that on 22nd December, 2023 when the matter last came up for mention, the court had issued directions that a notice to be served upon the plaintiff.
31. Further, that the court through an order issued on 29th January, 2024 dismissed the plaintiff's suit for want of prosecution.
32. The applicant submitted that this matter had been scheduled to come in court on 22nd December, 2023 and unfortunately the firm of advocates representing the plaintiff had closed offices for the December holidays on 20th December, 2023 and thus inadvertently failed to note the date leading to non-attendance on 29th December, 2023.
33. The applicant further submitted that by due diligence, the plaintiff's advocates came to know that the matter was further slated for mention on 29th January, 2024, unfortunately, no notice was issued by the court or the defendants to the plaintiff and thus the plaintiff's advocates were unable to attend court on 29th January, 2024.
34. That prior to the dismissal the plaintiff had faithfully prosecuted the matter for the court and that the matter previously came before the court on 31st July, 2023 and 29th June, 2023 where the plaintiff appeared and took directions from the court.
35. I find that this case was dismissed due to the mistake of the plaintiff's Advocates.
36. The court has the unfettered discretion to reinstate a suit that has been dismissed for want of prosecution.
37. The guiding provision is Order 12 Rule 7 of the Civil Procedure Rules which provides as follows;

“Where under this Order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just.”
38. The factors to be considered for the purpose of reinstatement of suits are numerous, and were addressed in Ivita v. Kyumbu [1984] KLR 441 (Chesoni J), where the court stated as follows;

“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”.

39. I allow the application dated 15/2/2024 on the following conditions;
- i. That the plaintiff pays the defendants thrown away costs of Kshs. 20,000 before the application dated 9/12/2022 is heard.
  - ii That the application is prosecuted within 30 days of this date.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 30<sup>TH</sup> DAY OF OCTOBER, 2024.**

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

