



**Republic v Attorney General (on behalf of the Uasin Gishu Land
Disputes Tribunal) & 2 others; Kosgei (Exparte Applicant) (Judicial
Review 14 of 2010) [2023] KEHC 3528 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
JUDICIAL REVIEW 14 OF 2010
RN NYAKUNDI, J
MARCH 27, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**ATTORNEY GENERAL (ON BEHALF OF THE UASIN GISHU LAND
DISPUTES TRIBUNAL) 1ST RESPONDENT**

CHIEF MAGISTRATE’S COURT ELDORET 2ND RESPONDENT

WILLIAM ARAP SILE 3RD RESPONDENT

AND

PHILIP KOSGEI EXPARTE APPLICANT

RULING

1. The applicant approached this court vide an application dated June 2, 2021 seeking the following orders;
 - a. Spent
 - b. The Order dismissing this suit on July 7, 2015 under Order 42 Rules 35 (2) of the [Civil Procedure Rules](#) be and is hereby set aside;
 - c. This Honourable Court be and is hereby pleased to reinstate this suit for hearing on its merits;
 - d. Costs of the application be in the cause

6. The application is premised on the grounds set out therein and the contents of the affidavit in support of the same.



Applicant's Case

7. The applicant's case is that on or about March 22, 2010 it received instructions from the ex-parte Applicant to institute this suit against the Respondents seeking to quash the decision and award of Uasin Gishu Land Disputes Tribunal dated October 9, 2009 and which was adopted as Judgement and the decree of the Eldoret Chief Magistrate's court on February 18, 2010. The respondent acted upon the instructions and the court granted leave to institute the proceedings.
8. The matter did not proceed several times and the file went missing but was traced in May 2021. Upon perusal of the file they discovered that the suit had been dismissed under Order 42 Rule 35(2) of the [Civil Procedure Rules](#) vide an order dated July 7, 2015.
9. The applicant contends that the notice to show cause was never served and therefore there is an apparent error on the proceedings leading to the dismissal of the suit. Counsel urged that the application be allowed in the interest of justice and fairness.

Ex Parte Applicant's case

10. The ex parte applicant filed submissions dated October 14, 2022. It was his case that that the firm of M/s Martim & Company Advocates are not properly on record for the 3rd Respondent and consequently, all documents/pleadings filed by Martim & Company Advocates are amenable to be expunged/struck out from the court record. He urged the court to expunge all documents/pleadings filed by M/s Martim & Company Advocates for contravening the mandatory procedure in civil cases and proceed to determine the application as unopposed by the 3rd Respondent.
11. Learned counsel submitted that the Applicant has categorically stated that no notice to show cause notice was ever served upon his Advocates on record. Had such a notice been brought to the Advocates attention the Advocate would have immediately attended court and explained why the drastic action should not have been taken. It was his position that it is in the best interests of justice and fairness that the dismissal order of 7/7/2015 be set aside and this case be determined on merit.

He urged that the appeal be allowed with costs in the main suit.

1st & 2nd Respondent's Case

12. The 1st and 2nd respondent s opposed the application vide a grounds of opposition dated July 14, 2021, stating that the Application is fatally defective, incompetent, malapropism and untenable both in substance and form and for striking out, in that the applicant is guilty of laches and does not deserve the orders of this court. They contended that the application is devoid of merit as no plausible explanation has been offered as to why the applicant has waited to make this application 6 years down the line. Further that application is premised on misleading assumption as there is no evidence tendered to support the allegations that indeed the court file has been missing as alleged.
13. The respondents stated that if an order of reinstatement is issued as prayed, the respondents and more so the 1st respondent who has since been disbanded will be highly prejudice in defending the suit. They urged that the application be dismissed with costs.

3rd Respondents Case

14. The 3rd respondent opposed the application and submitted that the application is devoid on merit as no plausible explanation has been offered by the applicant and or his advocates as to why he failed to attend court on date of dismissal despite matter being cause listed for dismissal and further, that there



was inordinate inexcusable delay on the part of the applicant to bring the present application in court. He urged that the application for reinstatement has been made 6 years after the dismissal of the suit for warrant of prosecution. That there has been an unreasonable delay in the making of the present application and no sufficient reason has been adduced to excuse the delay and such guilty of laches.

15. The 3rd respondent submitted that the applicant in his supporting affidavit alluded to the current file as missing. He noted that the correspondences that were made between the years 2020 and 2021 were 5 years & 6 years after the matter had been dismissed. No evidence has been tendered by the applicant to show the effort they made and or steps taken to trace the files at the registry before the present application was made. He cited the case of *James Yanga Yeswa vs Bole Morgan Services Limited* (2019) eKLR on the principles to be followed when considering reinstatement of a suit and stated that the allegation that the file was missing is unsupported.
16. On the issue of notice upon the applicant, the 3rd respondent submitted that Order 17 Rule 2 (1) of the *Civil Procedure Rules* does not require service of notice, it uses the word 'give notice'. The court may give notice of dismissal through its official website or through cause list and it is not mandatory that it serves. The mediums constitute sufficient notice for purposes order 17 Rule (2). Further, that the said provision grants court power to dismiss a suit in which no step has been taken for over one year. The said order also requires the court to give notice to the party concerned to show cause why the suit should not be dismissed for warrant of prosecution and dismiss the suit. The 3rd respondent urged that no reasonable explanation has been given by the applicant as to why the suit ought to be reinstated.
17. Learned counsel submitted that the issue of representation is well captured by the provision of Order 9 Rule 9 of the *Civil Procedure Rules 2010*. Further, that although the dismissal concluded the suit, it did not amount to a judgment being entered as envisaged by Order 9 Rule 9 of the *Civil Procedure Rules*. It was his case that the firm of Martim & Company Advocates is properly on record having been appointed vide notice of appointment filed in court on August 26, 2020.
18. In his replying affidavit the 3rd respondent intimated to the court that the reinstatement would be an academic exercise as he has already enforced his rights under the law, a fact evidenced by the letter dated August 17, 2020 giving notice for vacation of the subject parcel of land.

Counsel urged that the application be dismissed with costs.

Analysis and Determination

19. Upon considering the application, responses thereto and attendant submissions, the following issues arise for determination;

Whether the Suit Should be Reinstated

20. The suit was dismissed pursuant to Order 42 Rule 35(2) of the *Civil procedure rules* which stipulates as follows;
 - (2) "If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."
21. The discretion of court to set aside an order for dismissal ought to be exercised judiciously. When a suit is dismissed for a want of prosecution it is due to the fact that the parties failed to aid the court in meeting its Overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion.



22. The applicant contends that the reason there was a failure to prosecute the suit was due to a missing file, the file only being retrieved in May 2021. Further, that various attempts were made to set down the file for hearing but the same were futile as the file was missing. I have perused the annexures to the application and it emerges that the efforts to trace the file were made on August 20, 2020, September 28, 2020 and March 2021. The impugned dismissal order was given on July 7, 2015. From the evidence on record it is clear that the applicant sought to trace the file five years or thereabout after the same was dismissed. Further, the leave to institute the proceedings was granted on March 24, 2010 and there is no evidence that the applicant made any efforts to prosecute the suit further since then.
23. The application is also based on the premise that the applicant was not served with a notice to show cause as to why the suit should not be dismissed. Notice to Show Cause as to why a suit should not be dismissed is a provision under Order 17 Rule 2 of the *Civil Procedure Rules* which states;
- (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.
 - (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
 - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
 - (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
 - (5) A suit stands dismissed after two years where no step has been undertaken.
 - (6) A party may apply to court after dismissal of a suit under this Order."
24. The issue of service has been discussed extensively over various decisions by this court. In the case of *Josphat Oginda Sasia Versus Wycliffe Wabwile Kitiya* [2022] eKLR, the court held
- "But as has been held time and again before, all the court needs to do when a party does not take steps to prosecute his matter is for it to "give notice" of the intent to dismiss the matter. Such notice can be by way of publishing the intent through the Cause Lists, Websites or even court notice boards."
25. In *Fran Investments Limited v G4S Security Services Limited* [2015] eKLR, the court pronounced itself on the issue as follows;
- "Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word "give notice". The court may give notice of dismissal through its official website or through the cause-list. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2 (1) of the Civil Procedure Rules."
26. It follows that there was no requirement that the applicant be served with the notice to show cause. Thus, in the circumstances, the same was determined in the proper manner.



27. The principles to be considered for reinstatement of suits were addressed in *Ivita vs Kyumbu* [1984] KLR 441 (Chesoni J), where the court stated:

“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.”

28. It is clear that there was a delay of five years in seeing reinstatement of the suit. The applicant has not sufficiently explained the delay in seeking reinstatement of the suit. It is not enough to claim that the file was missing, the applicant was required to show that efforts were made to trace the file even at the point leave was granted to institute the proceedings.

29. In the premises, it is my considered view that the application is unmerited and I hereby dismiss the same with costs to the respondents. It is so ordered.

DELIVERED DATED AND SIGNED AT ELDORET ON THIS 27TH DAY OF MARCH 2023

R.NYAKUNDI

JUDGE

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