



REPUBLIC OF KENYA



KENYA LAW

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Muthemba & another (For and on behalf of the Estate of Louis Juguna Muthemba alias Lewis Njuguna Muthemba) v Muthemba & 4 others (Civil Case 300 of 2006) [2023] KEHC 19705 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19705 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 300 OF 2006

EC MWITA, J

JUNE 30, 2023

BETWEEN

ROSE WARUINU MUTHEMBA PLAINTIFF

AND

DESMOND PATRICK MUTHEMBA APPLICANT

**FOR AND ON BEHALF OF THE ESTATE OF LOUIS JUGUNA MUTHEMBA
ALIAS LEWIS NJUGUNA MUTHEMBA**

AND

JANE NJERI MUTHEMBA 1ST DEFENDANT

DAVID MUNGAI MUTHEMBA 2ND DEFENDANT

JOHN MUTHEMBA MUNGAI 3RD DEFENDANT

KENTAZUGA HARDWARE LIMITED 4TH DEFENDANT

THE ESTATE OF THE LATE ANDREW MUNGAI

MUTHEMBA 5TH DEFENDANT

RULING

Introduction

1. There are two applications before court, dated 2nd December 2021 and 18th February 2022, seeking leave to further amend the plaint and reinstatement of the suit. A brief background of this suit is necessary.



2. This suit was filed in 2006 after which parties litigated on applications for some time. On 13th March 2017 Ngetich, J. dismissed the suit for want of prosecution upon an oral application by counsel for the 3rd and 4th defendants.
3. The plaintiff later filed an application dated 4th May 2021 seeking to set aside the dismissal order. On 15th November 2021, this court allowed the application and reinstated the suit. The plaintiff was, however, directed to set down the suit for hearing within 90 days from that date, and in default, the suit would stand dismissed. The order was not complied with.

Applications

4. The plaintiff took out a notice of motion dated 2nd December 2021 for leave to further amend the plaint and another motion dated 18th February 2022, seeking to reinstate the suit.

Reinstatement of the suit

5. The motion for reinstatement of the suit is dated 18th February 2022. It is premised on the grounds that when the current firm of advocates took over the conduct of the suit from of O P Nagpal Advocate, it was found necessary to further amend the amended plaint to capture the real question in issue between the parties. There was also need to substitute the plaintiff, (Rose Waruinu Muthemba) with the applicant. This was because the plaintiff lacks capacity to sue following a diagnosis of frontotemporal dementia.
6. The plaintiff asserts that he obtained Letters of Administration Ad Litem on 24th February 2021 to enable him to continue these proceedings on behalf of the estate of Louis Njuguna Muthemba. An application dated 26th February 2021 for substitution was also filed and was allowed on 12th March 2021. Another application dated 30th March 2021, seeking leave to amend the plaint was also filed.
7. The plaintiff learnt that the suit had been dismissed on 13th March 2017 without his knowledge and that was why the application for reinstatement was filed. The plaintiff maintained that it was necessary to file an application for reinstatement as well as substitution and amendment of the plaint since all proceedings subsequent to the dismissal order and before the reinstatement of the suit were void.
8. The plaintiff argued that he took steps to have the suit set down for hearing, first; by filing an applications dated 2nd December 2021 amendment and 18th February 2022 for reinstatement and served them immediately.
9. The plaintiff stated that except for the pending applications for reinstatement and amendment, he is ready and willing to proceed with the hearing and has filed and served all necessary documents for that purpose.
10. The plaintiff relied on *Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others* (Civil Suit No. 131 of 2009) [2018] eKLR for the proposition that mistakes in the registry should not prejudice a litigant.
11. The plaintiff again relied on *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR, that there are reasonable grounds for re-instating the suit taking into account the prejudice that either party may suffer.
12. The plaintiff further argued that the beneficiaries to the estate stand will suffer prejudice if the suit is not reinstated given that the deceased's estate may be able to file a fresh suit due to limitation of time.



13. It is the plaintiff's view, therefore, that the defendants will not suffer prejudice as the plaintiff's claims are well-known and the disputes over the 4th defendant are of continuing nature. The 3rd defendant has even instituted two other suits touching on the management and control of the 4th defendant.

Responses

14. The defendants filed replying affidavits and submissions opposing the application. They admitted that indeed the suit was dismissed on 17th March 2017 and that the suit was reinstated on 15th November 2021 on condition that the plaintiff set down the suit for hearing within 90 days and in default, the suit would stand dismissed. The condition was not complied with.
15. The defendants pointed out that prior to the reinstatement of the suit on 15th November 2021, the plaintiff had not demonstrated reasonable intent to prosecute the suit. The defendants asserted that according to the order of 15th November 2021, the suit stands dismissed and reinstating it would be prejudicial to them because of the age of the case.
16. The defendants argued that the plaintiff had not offered a satisfactory explanation for the delay in prosecuting the suit. They relied on *Shah v Mbogo & Another* [1967] EA for the argument that the court's discretion to reinstate the suit ought to be exercised in a just manner.
17. The defendants again relied on *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* (Civil Case No. 205 of 1999) [2004] eKLR, that litigation ought to be conducted expeditiously and efficiently and *Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others* (*supra*), that in deciding whether or not to reinstate the suit, the court ought to consider the length of the delay and whether justice can be done despite the delay.
18. Reliance was also placed on *Quality Group Limited v General Motors East Africa Limited* (Civil Case 30 of 2009) [2012] eKLR and *S. Kimenyi v Attorney General & another* [2014] eKLR.

Determination

19. I have considered the application, response and submissions. The applicant seeks to set aside the order made on 15th November 2021 on the dismissal of the suit should the plaintiff not fix the suit for hearing within 90 days.
20. As earlier adverted to, this suit was first dismissed on 13th March 2017 for want of prosecution. On 15th November 2021, this court exercised its discretion in favour of the plaintiff and set aside the dismissal order. In doing so, the court allowed the plaintiff an opportunity to have her day in court on condition that the suit be set down for hearing within 90 days. In default, the suit would stand dismissed.
21. The default part of the order was made taking into account the age of the case. As it turned out, the order to set down the suit for hearing was not complied with the result that the suit stood dismissed.
22. The defendants opposed the application on grounds that the plaintiff had not shown good reason for not complying with the court order to fix the suit for hearing as ordered by the court.
23. This suit was filed in 2006. By 2017 when it was dismissed, no hearing had taken place. The application to set aside the dismissal order was made on 4th May 2021. The court exercised discretion in favour of the plaintiff and set aside the dismissal order, thus gave the plaintiff a conditional reprieve. Even then, the plaintiff did not comply with the court order.
24. Court orders and directions are not suggestions. They are meant to be complied with by parties. The plaintiff has not explained why the suit was not fixed for hearing as the court had directed. The



- argument that counsel realised that there was need to amend the plaint is not good reason. Counsel was aware of the directions of the court, including the default order.
25. The plaintiff had amended the plaint in 2015, but the suit was dismissed two years later, in 2017 because it had been set down for hearing. The plaintiff's counsel argued that they took over the case from another firm advocates but did not know that the suit had been dismissed. That was why the application to set aside the dismissal order was filed leading to the order of 15th November 2021.
 26. Counsel did not disclose when they took over the suit from the previous advocates. Where an advocate accepts instructions to act for a client without perusing the court file to acquaint himself with the status of the suit, he is presumed to be aware of the position of the case at the point of accepting instructions. He cannot come out later to say, like in this case, that he was not aware that the suit had been dismissed (on 13th March 2017).
 27. This court has been called upon to exercise its discretion in this matter. The law is that any discretion should be exercised judicially and on terms that are just.
 28. In *Shah v Mbogo (supra)* the court stated:

The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.
 29. In *Securicor Courier (K) Ltd v Owino* [1993] eKLR, the court stated with regard to exercising discretion to aside *ex parte* judgment:

Courts have been very liberal on applications of this nature and more often than not they would rather have the parties get full opportunity to be heard on the case for the ends of justice to be met.... In this regard, the main concern of the Court is to do justice to the parties and it will not impose conditions on itself to fetter the wide discretion which the Civil Procedure Rules gives to it. (See *Patel v E A Cargo Handling Services Ltd*, [1974], EA 75 at page 76C and E.)
 30. The court should not turn away from the conduct of an applicant who seeks the court's discretion and the prejudice that other side would suffer if the application was granted. The applicant's quest for justice should be seen in the context of the defendants who also cry for the same justice and the court exercise discretion where sufficient cause has been shown.
 31. That is what Chesoni, J. (as he then was) had in mind when he stated in *Ivita v Kyumbu* [1984] KLR 441, that Justice is justice to both the plaintiff and defendant so that both parties to the suit must be considered.
 32. In this case, the suit has been in court since 2006. From the assertions by the defendants, there has been demonstrable inactivity on the part of the plaintiff to have the suit heard. The plaintiff's quest for the court's discretion should not blind the court of the defendant's cry for the same justice, more so, where the plaintiff disregarded clear orders of the court.
 33. Having considered the application and responses, as well as the record, the conclusion I come to is that the plaintiff has not demonstrated good reason why the court should exercise its discretion in their favour. Reopening the case would be prejudicial to the defendants.



Leave to Amend

34. The motion for leave to further amend dated 2nd December 2021, cannot stand for the reason that the application for reinstatement has failed. In that regard, there would be no suit to sustain such an application.
35. In the circumstances, the court declines to exercise its discretion in favour of the plaintiff. The application dated 18th February 2022 is dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2023

E C MWITA

JUDGE

