



Muthoka (Suing as personal and legal representative of the Estate of Earnest Mweu Daudi (Deceased)) v Mbugua & 2 others (Civil Suit 5 of 2015) [2023] KEHC 19334 (KLR) (27 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19334 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 5 OF 2015
FR OLEL, J
JUNE 27, 2023**

BETWEEN

**MICHEAL MUTHOKA PLAINTIFF
SUING AS PERSONAL AND LEGAL REPRESENTATIVE OF THE ESTATE OF
EARNEST MWEU DAUDI (DECEASED)**

AND

**SIMEON NGANGA MBUGUA 1ST DEFENDANT
STEPHEN NDIRANGU 2ND DEFENDANT
KEVIN NJOROGE 3RD DEFENDANT**

RULING

1. By a Notice of Motion dated 9th November, 2022, the applicant herein seeks the following orders:
 1. That this application be certified urgent.
 2. That an order of this Honourable court do issue setting aside and/or varying the orders of Justice G.V.Odunga (As he was then) of the 28th June 2021 dismissing this matter for want of prosecution.
 3. That this matter be thereafter be transferred to the chief Magistrate court, Machakos for hearing on a priority basis.
 4. That the costs of this Application be in the main cause.
2. According to the Applicant, this suit was dismissed for want of prosecution on 28th June 2021. In the said suit he was represented by one P Kiiru Kamau Advocate, he was elderly and unwell, thus was not in constant touch with his advocate. Eventually when he went to check on the status of



his file in court, and was informed that this matter had been dismissed for want of prosecution. He went to his advocate's office to inquire if his advocate knew about, the obtaining status, but the said advocate informed him, that he never received any dismissal notice from court. The matter was therefore dismissed without his knowledge and/or the knowledge of his advocate.

3. The applicant further submitted immediately he got to know of the dismissal he filed this instance application. The applicant also submitted that he was desirous of prosecuting this matter and that it was evident from the proceedings that he had request for judgment as against the defendants when they failed to enter appearance. The matter had also delayed owing to several applications filed in this matter and their determination caused further delay.
4. Finally, if the order of reinstatement was made, the applicant pleaded that the suit should be transferred to Machakos chief magistrate court for hearing and determination as the expected quantum payable could not possibly exceed the sum of Ksh 20,000,000/=. The applicant also stated that, they will suffer irreparable loss and damage unless the orders sought are granted, and it was in the interest of justice to allow this application and have the suit heard on merit.
5. The interested party opposed this application vide their replying affidavit dated 13th March 2023. The respondent submitted that the suit was dismissed after a proper notice to show cause was served upon the applicant counsel and the application to reinstate the suit had been filed one year and six months late, which delay was prolonged, inexcusable and constituted an abuse of the process of court. Further there was no good reason advanced as to why the court should exercise its discretion to reinstate the suit. The application as filed was unmerited and it was in the interest of justice to dismiss the said application.
6. The interested party further did file written submissions and stated that it was the duty of the court, litigants as well as advocates to ensure that matters are concluded expeditiously, without inexcusable delay so as to give effect to the overriding objective specified under sections 1A, 1B and 3A of the *civil procedure Act*, Cap 21, laws of Kenya. Reinstatement of the suit is at the discretion of the court, which discretion had to be exercised in a just manner to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. Reliance was placed on *Bilba Ngongo Isaac vs Kembu Farm Ltd & Another* {2018} eKLR and *Shah v Mbogo & Another* (1967) EA 116, In *Mobile Kitale Service Station v Mobile oil Kenya Limited & another* {2004}.
7. Further the interested party submitted that in *Ivita vs Kyumbu* { 1984} KLR 441 { Chesoni J }, it was held that the test is whether the delay is prolonged and inexcusable, and if it justice can be done despite such a delay. The court had to consider the position of both parties to the suit before making a determination. The interested party also submitted that they will be immensely prejudiced if the suit is reinstated as they were always ready to proceed but the same cannot be said of the applicant and his counsel. The interested party prayed that this application be dismissed with costs.

Determination

8. I have considered the application, the affidavits, both in support of and in opposition thereto and the submissions filed.
9. The Court of Appeal in *Murtaza Hussein Bandali T/A Shimoni Enterprises v. P. A. Wills* [1991] KLR 469; [1988-92] held that there is inherent power to restore a case for hearing after it has been dismissed. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence



but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See *Gharib Mohamed Gharib v. Zuleikha Mohamed Naaman* Civil Application No. Nai. 4 of 1999.

10. The circumstances under which a court sets aside its default orders were also set out in *Shah v. Mbogo* (1967) EA 166 in which the Court stated that:

“this discretion to set aside an ex-parte judgment is intended 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 cause of justice.”

11. It is now settled that wherever there is a delay, even for one day, there must be some explanation for it otherwise an extension may not be granted. See *Kenya Ports Authority v. Silas Obengele* Civil Application No. Nai. 297 of 2004; *Reliance Bank Limited (In Liquidation); Grand ways & 2 Others v. Southern Bank Corporation Limited* Civil Application No. 118 of 2007; *Business and Economic Research Company Limited & 2 Others v. Jimba Credit Corporation Limited* Civil Application No. Nai. 281 of 2006.
12. In this case, the applicant alleges that his advocate was not served with the dismissal notice and it was not within his knowledge that the matter was dismissed until he visited the court and was notified of the same. After it came to his knowledge that the suit had been dismissed, he subsequently filed this application, which was filed one year, six months later. The respondent objected to this application and stated that the application was filed late, after a prolonged delay and the said delay was inexcusable.
13. I have perused the court file. The applicants advocate was indeed served by EMS. All other advocates on record too were served by the same means. On 28.06.2021 the applicant's advocate did not attend court and the suit was dismissed. The reason advanced that the applicants advocate was not served is not plausible and/ or valid. The said advocate also ought to have filed a supporting affidavit in support of this application but opted not to do so. The excuse that the applicants advocate was not served, therefore cannot hold. No good reason has been advanced as to why the applicant delayed for one and half years before he moved court to set aside the said dismissal order. There is no evidence place before the court to show that he is elderly or has been unwell for a long period of time to enable the court exercise discretion in his favour.
14. As stated by (Warsame J), as he was then In *Mobile Kitale service station v Mobile oil Kenya Limited & another* (2004)

“I must say that the courts are under a lot of pressure from backlogs an increased litigation, therefore it is in the interest of justice that litigation must be concluded expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to laxity, indifference and/or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequence must be placed on their shoulders.”



Disposition

15. In the premises, I find that the applicant has not made out a case to warrant favourable exercise of discretion in his favour. The Motion dated 9th November 2021. fails and is dismissed but with no order as to costs.

16. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 27TH DAY OF JUNE 2023.

RAYOLA FRANCIS OLEL

JUDGE

Ruling delivered on the virtual platform, Teams this 27th day of June, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

