



REPUBLIC OF KENYA



Wangari & 2 others v Mbogo & 7 others (Environment & Land Case 558 of 2009) [2023] KEELC 17053 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17053 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 558 OF 2009**

**LN MBUGUA, J
APRIL 20, 2023**

BETWEEN

**MERCY WANGARI 1ST PLAINTIFF
JAMES KIBE 2ND PLAINTIFF
PETER MWAURA 3RD PLAINTIFF**

AND

**HIRAM GITONGA MBOGO 1ST DEFENDANT
WALTER OKEO MBATA 2ND DEFENDANT
FRANCIS NGEMA WAITITU 3RD DEFENDANT
ANN WAMBUI GEMA 4TH DEFENDANT
JULIUS NGORO NGARI 5TH DEFENDANT
FERDINAND WAITITU 6TH DEFENDANT
MARTIN NJUGUNA MWANGI 7TH DEFENDANT
SALONE NAHILILE 8TH DEFENDANT**

RULING

1. Before me is an application dated 24.5.2022 where the plaintiffs are seeking orders that the firm of J.M Waiganjo & Company advocates be allowed to come on record for them and that the suit which was dismissed on 11.3.2020 be reinstated. The application is premised on the grounds set out in the application and the supporting affidavit of James Kibe Kuguru. (2nd plaintiff).
2. The applicants contend that vide the ruling dated 21.1.2020, they were required to pay throw away costs assessed at ksh. 20, 000 to defence advocates within 45 days failure to which the suit would stand



as abated. That the applicants duly paid this amount to their advocates for onward transmission to their then advocates. The applicants were to learn later that the cheque issued to the defence advocates had bounced and that their suit was dismissed on 11.3.2020. The applicants urge the court to note that the defendants did not file a defence in this matter, hence the application should be allowed.

3. I have not seen any response to the application hence the same is unopposed. Nevertheless, this court has a duty to interrogate the merits of the application See *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR.

4. The issue for determination is whether the suit which was apparently dismissed on 11.3.2020 should be reinstated. In the case of *Mwangi S. Kimenyi vs Attorney General and Another* [2014] eKLR the court stated that;

“The decision whether a suit should be re-instated for trial is a matter of justice and it depends on the facts of the case, See *Ivita V Kyumbu* [1984] KLR 441, Chesoni, J. (as he then was).
“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay.”

5. In arriving at a decision herein, this court has considered the age of the case, the litigation history and the conduct of the applicant before and after the dismissal of the suit. It is pertinent to note that the suit was brought forth by the applicants more than a decade ago in the year 2009. The suit marked time in court until 6.2.2017 when a Notice to Show Cause why the suit should not be dismissed for want of prosecution was issued and a date of 15.3.2017 was given. On that day of 15.3.2017, both parties were represented and the court gave directions for the filing of paginated trial bundles of pleadings, witness statements and documentary evidence within 2 months and the matter was given a hearing date of 12.10.2017.

6. Come the date of 12.10. 2017 and it emerged that the plaintiffs had not complied with the courts directions relating to preparation for the trial. The court still indulged the plaintiffs, giving them an opportunity to file their documents within 30 days and in default, the suit was to stand as dismissed. The matter was then given another mention date for 16.11.2017 when the plaintiff’s advocate sought for more time to comply with courts directions!, of which counsel for the defence decried how they were being taken in circles by the plaintiffs.

7. Eventually the defendants filed an application dated 13.5.2019 seeking orders to have the suit marked as abated or the same to be struck out. In a ruling delivered on 21.1.2020, the court declined to grant the orders sought in the said application, but gave strict orders which the plaintiffs were required to comply with, otherwise their case was to stand as abated. The foregoing analysis happens to be the basis upon which the suit was dismissed and the file closed on 11.3.2020.

8. It is important to note that after the dismissal of the case, the current application was only filed more than two years later in May 2022.

9. Courts have held that a case once filed belongs to the party. In *Mwangi Jachienge & 2 others v. Mwaura Githuku C* also known as *Bernard Mwaura J & another* [2019] eKLR, the court stated that;

“Where a litigant goes to sleep after filing a suit, he cannot blame his advocate for having not updated him on the position of the matter...”

10. In exercising its judicial authority this court has a duty to facilitate just and expeditious determination of proceedings. One of the cardinal principles in our constitution is “the expeditious delivery of justice” –see Article 159 (2) (b) of *the Constitution* of Kenya, which in effect codifies the 17th century maxim



“Justice delayed is justice denied”. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families. That is precisely why rights to speedy trials are incorporated in law worldwide.

11. In the case of *Fran Investments Limited vs G4S Security Services Limited* [2015] eKLR, it was stated that:

“The delay has not been satisfactorily explained and is a source of prejudice to the Respondent as well as to the fair administration of justice. These are sufficient reasons to refuse to reinstate a suit and let it lie in peace in judicial grave. The amount of time which has passed by will not allow any and is not conducive to having a fair trial in this matter.”

12. In *Kestem Company Ltd vs Ndala Shop Limited & 2 others* [2018] eKLR, the court held that: -

“On whether setting aside the dismissal will prejudice the fair hearing of the case, I have found that the delay of 10 years has not been satisfactorily explained and is and do further find that delay is a source of prejudice to the Respondent as it affects the fair administration of justice. Article 47 of *the constitution* of Kenya 2010 provides for the right to administrative action that is expeditious, lawful, reasonable and procedurally fair. Article 159 of the said constitution provides that justice shall not be delayed. Failure to set down the suit for hearing for 10 years was a clear infringement of Article 159 of *the Constitution* of Kenya, 2010 as the failure delayed justice in this matter.”

13. It is quite clear that the plaintiffs had not only been given adequate time to prosecute their case, but they had been put on notice, not once but severally that their case faced imminent dismissal going by the self executing orders of the court given on 12.10.2017 and on 21.1.2020. A grim picture has been painted of the applicants’ conduct throughout the lifespan of the suit. The delay thereof is a source of prejudice not only to the defendants but to the fair administration of justice.
14. In the final analysis, the court allows the new advocates to come on record for the plaintiffs but declines the prayer for the reinstatement of the suit. The application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of

Mr. Ondara holding brief for Mr Nyandieka for 1st - 5th Defendants.

Mr. Mburu for Plaintiffs

Court assistant: Joan

