



Wanjiru v SRM Githunguri & another; Runga'i (Interested Party) (Judicial Review Miscellaneous Application 385 of 2001) [2023] KEHC 22802 (KLR) (Judicial Review) (26 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 385 OF 2001
JM CHIGITI, J
SEPTEMBER 26, 2023**

BETWEEN

HENRY RUNGAI WANJIRU APPLICANT

AND

THE SRM GITHUNGURI 1ST RESPONDENT

THE CHAIRMAN GITHUNGURI LAND DISPUTES TRIBUNAL 2ND RESPONDENT

AND

FRANCIS KAGIRI RUNGA'I INTERESTED PARTY

RULING

1. The application before this court is the one dated 29th March 2022 wherein the Applicant is seeking the following orders;
 - a. That the Honourable court be pleased to vary, review and or set aside the orders made on 9th February, 2022 dismissing the suit for want of prosecution and reinstate the suit for hearing on its merits.
 - b. The Honourable court be pleased to enlarge time for the revival of the suit against the interested party.
 - c. The honorable court be pleased to allow for the re-instatement of the suit against the interested party and contemporaneously allow the substitution of the interested party, Francis Kagiri Rungai (now deceased), with Isabel Wanjiku Kagiri, being the administrator of the estate.



- d. That cost of this application be provided for.
2. The Respondents and the Interested Party filed their Grounds of Opposition dated severally dated 19th September, 2022 and 4th April, 2023 respectively.

The Applicants case:

3. On 9th February, 2012 the Court listed it for dismissal for want of prosecution under Order 17 Rule 2(1) & (4) Civil Procedure Rules.
4. The suit is an appeal under the Land Disputes Tribunal Act, wherein the Tribunal acted *ultra vires* in ordering the cancellation of a legally held title deed on the premise that the land was to be held by a male person, the son.
5. Upon the said orders, the land was transferred wholly, without any encumbrance to the Interested Party, the fact that the *Ex Parte* Applicant, his siblings, their grandmother and the Interested Party's siblings referred to this suit property as a matrimonial home notwithstanding.
6. It is his case that while the current proceedings were ongoing, the Interested party procured a forged Certificate of Confirmation Grant, alleging to be that of his mother; one Hannah Wambui Rung'ai and caused the transmission of the said title into his own name.
7. He submitted that, the Interested Party passed on in the year 2008, which led to the widow, Isabela Kagiri applying for transmission of the estate, including the suit property herein into her name.
8. While the family court confirmed the said Grant in Kiambu Magistrates's Court Succession Cause 210 of 2017, the *Ex Parte* Applicant herein successfully petitioned for the nullification of the said Grant, which was allowed by the same court on 25th April, 2023.
9. He argues that the estate of Hannah Wambui Rung'ai, in Githunguri Succession Cause 57 of 2002 shall be coming up for confirmation before the said court, wherein the suit property shall be a subject as a property forming part of the estate.
10. It is the Applicants case that the cause herein is currently being litigated by the third generation. The facts are still alive and no passage of time has in any way affected the resolution of the dispute herein hence the prayer for reinstatement of the suit herein.
11. According to the Applicant the above facts are the unique circumstances obtaining within the current proceedings. The matter is thus for the benefit of several generations and the righting of an illegality.
12. It is the Applicant's submission that the Respondents have not indicated any prejudice they would suffer were the matter to be reinstated.
13. In fact, the Interested Party shall benefit from the *ultra vires* orders of the 2nd Respondent and no hardship shall be meted to the parties were the matter to be reinstated.
14. The Applicant submits that the reinstatement of the matter herein shall be in the interest of justice for a whole lineage. It shall aid in righting a wrong committed against a woman of this country under the mistaken belief that a woman cannot own property.
15. The Applicant relies on The Supreme Court, in Westmont Holdings SDN BHD –v- The Central Bank of Kenya & 2 Others [2023] KESC 11 (KLR) held that;

“ 42. Courts being the entities empowered with the duty to adjudicate disputes and dispense justice, are required to be mindful of the spirit, values, and



principles of the Constitution; and stand guided by the principles prescribed under Article 159 of the Constitution while exercising their judicial authority. This ensures that justice is done to all irrespective of status and in a manner that protects and promotes the purpose and principles of the Constitution. the Constitution safeguards a person's right to have any dispute resolved by the application of law decided in a fair and public hearing as provided under Article 50 of the Constitution, thereby, ensuring a party's access to justice is not violated.”

16. The application for the reinstatement of a Judicial Review appeal, wherein a Land Disputes Tribunal ordered for the cancellation of a title and had registered in the son's name on the premise that the mother, being a woman was not supposed to hold any title to land in her own name is a constitutional rights issue.
17. He relies on the case of John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR as quoted in Joseph Kinyua v GO Ombachi [2019] eKLR to be *inter alia* that:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”
18. The Applicant also relies on High Court in Mwangi S. Kimenyi v Attorney General & another [2014] eKLR set down the guiding principles in determining such a matter as being:
 - i. Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
 - ii. Whether the delay is intentional, contumelious and, therefore, inexcusable;
 - iii. Whether the delay is an abuse of the court process;
 - iv. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
 - v. What prejudice will the dismissal occasion to the plaintiff?
 - vi. Whether the plaintiff has offered a reasonable explanation for the delay;
 - vii. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?
19. The Court of Appeal in James Ndubiu Macharia v Mwotia Macharia [1986] eKLR, further set conditions that a court should consider when sitting to consider an application for setting aside *Ex*



Parte Orders as those herein, as was set out by Harris J in *Jesse Kimani v McConnell*, [1966] EA 547, 555 F (K), which are:

- i. The facts and circumstances, both prior and subsequent;
 - ii. the respective merits of the parties;
 - iii. any material factors that might have influenced the judgment due to the matter being *Ex Parte*;
 - iv. whether it would be just and reasonable to set aside the judgment, upon terms imposed.
20. Chesoni J in *Ivita v Kyumbu* [1984] KLR 441, as quoted in *Mwangi S. Kimenyi* [*supra*], held:

“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 he 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.”

1st & 2nd Respondents’ case:

21. The Respondents in opposing the Application argue that no action had been taken to prosecute the instant matter from 8th October, 2007 to 9th February, 2012 when the Court listed it for dismissal for want of prosecution under Order 17 Rule 2(1) & (4) *Civil Procedure Rules*.
22. The explanation for the delay given by the Applicant is not reasonable or plausible and the same amounts to false information.
23. The Applicant’s application dated 29th March, 2022 was made over 10 years after the court’s decision to dismiss the *Ex Parte* Applicant’s application and the Applicant has not adduced any evidence to show how he will be prejudiced if the matter is not re-instated.
24. Additionally, with the various steps including technological advancements that have been taken by the judiciary to aid expeditious disposal of suits this application is just an afterthought and therefore the same should not be allowed by this Honourable court.
25. The Applicant has not shown any interest in the matter for almost 16 years.
26. In the case of *Utalii Transport Company Limited & 3 others v NIC Bank & Another* [2014] eKLR the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones that dragged the defendant to court.
27. The discretion of the court can only be unlocked by a cogent, full, honest and plausible disclosure for the reason of the delay.
28. The Court of Appeal in the case of *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR held, *inter alia* that while mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence.



29. The submit that the mistake of counsel is excusable, if it is accompanied by a litigant's inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned.

The interested party's case:

30. The *Ex-parte* Applicant avers that he was not aware of the dismissal and he was not aware the advocate who was in conduct of the matter was deceased thus the reason it took too long for him to file the instant application.
31. The *Ex-parte* Applicant has approached this Court over 10 years after the suit was dismissed for want of prosecution.
32. The original *Ex-parte* Applicant Hannah Wambui Rung'ai died on 14th May, 2002. The Applicant ought to have gotten on the driver's seat as a litigant and there is no explanation as to why no action was taken from 8th October, 2007 to 9th February, 2012 when the matter was dismissed for want of prosecution.
33. It's only in March 2022 when the *Ex-parte* Applicant moved this court. And the delay that occasioned this application was prolonged and inexcusable.
34. In the case of *NileshPremchandMulji Shah & Another Ketan Emporium u M.D. Popat and others& another* [2016] eKLR, the court stated as follows:
- “Nonetheless, Article 159 of the *Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.
35. The interested party is prejudiced since the indefinite delay in the prosecution of the suit occasioned to loss of memory of the substantial matters of the case and now seeking to reinstate the suit is in bad faith since the person with the all the facts is deceased.
36. The Applicant has also blamed his inaction on the conduct of his previous advocate who is now deceased. The suit belongs to a litigant and not his advocate and as such, a litigant has a duty to pursue the prosecution of their case.
37. In any case, In *George Peter Mutiso v- Limack Engineering Workshop Nairobi* ELRC Cause No.726 Of 201 (2017) eKLR Justice NdumaNderi declined to reinstate a suit that had been dismissed for want of prosecution due to inordinate delay.
38. The Applicant did not allege discovery of new and important evidence which he discovered after the order he's seeking to be reviewed had been passed.
39. The Applicant claims that the interested party forged a grant claiming to be that of the original *Ex-parte* Applicant. It is important to keep track that the alleged forgery took place in 2003 and was gazetted in the year 2005. The *Ex-parte* Applicant has not claimed anywhere in the application or in his affidavit that he was not aware of that information if indeed it is true and unfortunately, the party being blamed for the forgery died in the year 2008.



40. The Applicant's allegations are just that, allegations that he had with him before the matter was dismissed for want of prosecution and the delay and failure to have any action on the file since the year 2007 and even after the death of the Interested party in 2008 led to indefinite abeyance and it's just now that the Applicant has seen the perfect opportunity to blame a deceased person knowing well his estate is not familiar with what their kin is accused off and cannot defend his memory.
41. The Applicant claims that the advocate who was on record one Karago Stephen Ndichu is deceased, he does not tell this honorable court when he got the information of the advocate's demise but from the attached search from the Law Society of Kenya portal dates the search to 29th March, 2022 and blaming the deceased advocate for his delay in filing the application.
42. In the case of *David Kiptum Korir v Kenya Commercial Bank & another* [2021] eKLR where the learned Judge declared that;

“The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party.”

Analysis and determination

43. I have carefully considered the Application, the grounds in support of the Application, the affidavit and respective parties' rival submissions and the issues falling for determination are;
- a. Whether this court can vary, review and or set aside the orders made on 9th February, 2022 dismissing the suit for want of prosecution and reinstate the suit for hearing on its merits.
 - b. Whether this court can enlarge time for the revival of the suit against the interested party.
 - c. Whether this court can re-instate the suit against the interested party and contemporaneously allow the substitution of the interested party, Francis Kagiri Rungai (now deceased), with Isabel Wanjiku Kagiri, being the administrator of the estate
 - d. Whether this court can vary, review and or set aside the orders made on 9th February, 2022 dismissing the suit for want of prosecution and reinstate the suit for hearing on its merits.
44. Section 80 of the *Civil Procedure Act* provides that any person who considers himself aggrieved:
- a. by a decree or order from which an appeal is allowed by this act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit’.
45. Order 45 rule 1 (1) of The *Civil Procedure Rules* provides as follows:
- “ Any person considering himself aggrieved:
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by



him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay".

46. In the case before me, there is no better way to capture the facts and circumstances, both prior and subsequent that have unfolded over time than through the *Ex parte* Applicant's submissions where he submitted as follows:

He prays that the honorable court be pleased to allow for the re-instatement of the suit against the interested party and contemporaneously allow the substitution of the interested party, Francis Kagiri Rungai (now deceased), with Isabel Wanjiku Kagiri, being the administrator of the estate.

"The suit is an appeal under the Land Disputes Tribunal Act, wherein the Tribunal acted *ultra vires* in ordering the cancellation of a legally held title deed on the premise that the land was to be held by a male person, the son.

Upon the said orders, the land was transferred wholly, without any encumbrance to the Interested Party, the fact that the *Ex Parte* Applicant, his siblings, their grandmother and the Interested Party's siblings referred to this suit property as a matrimonial home notwithstanding.

While the current proceedings were ongoing, the Interested party procured a forged Certificate of Confirmation Grant, alleging to be that of his mother; one Hannah Wambui Rung'ai and caused the transmission of the said title into his own name.

As fate would have it, the Interested Party passed on in the year 2008, which led to the widow, Isabela Kagiri applying for transmission of the estate, including the suit property herein into her name.

While the family court confirmed the said Grant in Kiambu Magistrates' Court Succession Cause 210 of 2017, the *Ex Parte* Applicant herein successfully petitioned for the nullification of the said Grant, which was allowed by the same court on 25th April, 2023.

The estate of Hannah Wambui Rung'ai, in Githunguri Succession Cause 57 of 2002 shall be coming up for confirmation before the said court, wherein the suit property shall be a subject as a property forming part of the estate.

The cause herein is currently being litigated by the third generation. The facts are still alive and no passage of time has in any way affected the resolution of the dispute herein hence the prayer for reinstatement of the suit herein."

47. The Applicant has himself articulated and highlighted the effects of the delay in very clear terms. One of the legal basis of the doctrine of laches is ensuring that legal claims are brought forth in a reasonable timely period so that evidence and reliable witnesses are can be found.
48. The indefinite delay in the prosecution of the suit has occasioned the loss of memory of the substantial matters of the case and now seeking to reinstate the suit is in bad faith since the person with the all the evidence is deceased.
49. In the case of *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR the court set down the guiding principles in determining such a matter as being:



- i. Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
 - ii. Whether the delay is intentional, contumelious and, therefore, inexcusable;
 - iii. Whether the delay is an abuse of the court process;
 - iv. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
 - v. What prejudice will the dismissal occasion to the plaintiff?
 - vi. Whether the plaintiff has offered a reasonable explanation for the delay;
 - vii. Even if there has been delay, what does the interest of justice dictate:
50. I find that the delay in moving the court was intentional and inordinate. The delay is an abuse of the court that is going to prejudice the Respondent and the Estate of the interested party. The explanation that the Applicant has tendered is not plausible or convincing in any way whatsoever. The interests of justice will be served if the orders sought are declined which I hereby do.
51. In the case of *Abigail Barma v. Mwangi Theuri* ELC No.393 of 2013, the court made reference to “*Snell’s Equity, 30th Edition at p 33 para 3-16* (quoting Lord Camden L.C in *Smith v Clay* (1767) 3 Bro. C.C. 639n. at 640n) where it was asserted that a court of equity
- “has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing.”
52. In the Court of Appeal *Case No.16 of 2012 Nairobi (Civil Application)*, reference was made to Lord Selbourne L.C. delivering the opinion of the Privy Council in *The Lindsay Petroleum Co v Hurd* (1874) L.R. 5 P.C. 221, where at page 240 it was stated thus:
- “Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material...”
53. The Applicant is also putting the blame for the delay an advocate who is deceased. The Applicant has simply thrown a general statement about the so-called conduct of his previous advocates and his untimely demise. The applicant has not informed the court in what way the late advocate’s conduct caused him not to follow up on the case. He has not tendered any evidence to show continuous or any follow up regarding the case with the late advocate on record before his demise. He has thrown his advocate under the bus at a time when counsel cannot even defend himself. May his soul rest in peace.
54. In the case of *Rajesh Rughani v Fifty investments Limited & Another* (2016) eKLR the court had this to say:-
- “The above line of thinking no longer holds water and in my view it is the duty and right of any litigant to put pressure on his counsel to have the suit prosecuted earliest possible. If counsel can’t rise to the task, the Plaintiff has the power and the right to dismiss such an



advocate and get the services of another. It must always be remembered it is the Plaintiffs' suit, not the Advocates' which risks dismissal for want of prosecution. Put differently, it is not acceptable for a Plaintiff to hide behind his counsel's inaction, for such a defence is tantamount to an admission or collusion with his advocate, not to prosecute the suit as required by law. The *Ex-parte* Applicant has approached this Court after 10 years after the suit was dismissed for want of prosecution. The delay is has not been satisfactorily explained. A delay of ten years of a case in the digital era is inordinate. I have expressed myself on that lame excuse"

55. Whether this court can enlarge time for the revival of the suit against the interested party.
56. The Applicant also prays that the Honourable court be pleased to enlarge time for the revival of the suit against the interested party Francis Kagiri Rungai (now deceased). The applicant brought to the court evidence that litigants are dead, land has changed hands with new titles being generated, grants have been confirmed. This evidence works against the Applicant. The evidence is demonstrating how the delay has impacted on the parties and the Estate in dispute.
57. The Applicant has not tendered cogent evidence nor explained the inordinate delay in acting in this matter. The enlargement of time and the reinstatement of the suit will not achieve any useful purpose. It will instead prejudice the stability of the diligent title holders who have moved on during the time the Applicant acted in indolence. This application is not allowed.
58. Whether this court can re-instate the suit against the interested party and contemporaneously allow the substitution of the interested party, Francis Kagiri Rungai (now deceased), with Isabel Wanjiku Kagiri, being the administrator of the estate.
59. The application is asking the court to issue an order to re-instatement of the suit against the interested party and to allow the substitution of the interested party, Francis Kagiri Rungai (now deceased), with Isabel Wanjiku Kagiri, being the administrator of the Estate.
60. Matters of substitution of parties fall within the *Law of Succession Act* and the same is an issue that subordinate court or the Family Division of the High Court is seized of.
61. The Applicant has introduced succession cases where this court believes would be the right place to seek the orders for substitution being Kiambu Magistrates' Court Succession Cause 210 of 2017 where the *Ex Parte* Applicant herein successfully petitioned for the nullification of the said Grant, which was allowed by the same court on 25th April, 2023 or in the estate of Hannah Wambui Rung'ai, in Githunguri Succession Cause 57 of 2002 *inter alia*.
62. To ask the Judicial Review Court that is regulated by Order 53 of The *Civil Procedure Rules* to attend to and determine matters that will require *viva voce* evidence is a tall order. This court lacks the legislative framework to issue such orders and I so hold.
63. I decline the prayer for the substitution of the interested party, Francis Kagiri Rungai (now deceased), with Isabel Wanjiku Kagiri, being the administrator of the estate. This prayer can be pursued in the right court.

Disposition:

64. The doctrine of 'laches' is an equitable defence. Rooted in the Latin phrase *Vigilantibus non dormientibus aequitas subvenit* – or "equity assists those who are vigilant, not those who slumber on their rights" – this approach stands to ensure all parties remain fair-minded and conscientious when seeking justice.



65. The Court strives to ensure fairness when it comes to pending claims and litigants must at all times ensure that they take prompt and appropriate steps to safeguard the equitable resolution of their case. Article 47 of the Constitution guarantees all litigants to the right to Fair Administrative Action Act. This serves the same purpose with the defence under the doctrine of laches.
66. In declining to grant the orders sought, this court has considered the length of the delay and the fact that the interested party will be prejudiced by the inordinate delay in the prosecution of the suit that occasioned the loss of memory of the substantial matters of the case and the person with the all the evidence is deceased.
67. The long delay has the effect of generating an implication of an acquiescence on the part of the Applicant. During the prolonged slumber, the Respondent and the interested party have moved on with their lives and to destabilize such an equilibrium will go against Section 4 (1) of the Fair Administrative Action Act which stipulates that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Litigation must come to an end and I need not say more.
68. Costs follow the events of the suit and under Section 27(1) of the Civil Procedure Act. However, owing to the fact that this is a family matter I direct each party to bear their costs.

Order:

The application dated 29th March, 2022 lacks merits and the same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2023

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J. CHIGITI (SC)

JUDGE

In presence of:

Court Assistant – Nyabuto/Abdinassir

Applicant –

Respondent –

