**Mutai v Kipsigis Tugen Farm & another (Civil Appeal 98 of 2000)**
**[2023] KEHC 24059 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24059 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL 98 OF 2000**

**HM NYAGA, J**

**OCTOBER 25, 2023**

**BETWEEN**

**STANLEY KIPRONO MUTAI ..... APPELLANT**

**AND**

**KIPSIGIS TUGEN FARM ..... 1ST RESPONDENT**

**MWANGI KINUTHIA ..... 2ND RESPONDENT**

**RULING**

1. Vide an Application dated 7th September, 2022 brought under Section 3A of the *Civil Procedure Act*, Order 24 Rules 3(1), (2) and 9 of the *Civil Procedure Rules*, Article 159(2)(d) of *the Constitution*, the Legal Administrator of the Appellant's estate one Emily Cherono Mutai seeks for orders: -

    i. That this Honourable Court be pleased to extend time for substitution of the Appellant.

    ii. That the Honourable Court be pleased to substitute the Appellant, Stanley Kiprono Mutai (now deceased) with Emily Cherono Mutai as the Appellant

    iii. That this Honourable Court be pleased to set aside its orders of 10th December,2018 dismissing the Appellant's Appeal for want of prosecution and reinstate the same for hearing and determination on merits.

    iv. That the costs of this application be in the cause.

2. The Application is premised on the grounds on its face and supported by an affidavit of Emily Cherono Mutai sworn on the even date.

3. She avers that she is a widow and legal administrator of the estate of the Appellant who passed away on 14th February,2007.

4. She depones that she was not aware of the dismissal of the instant appeal as the firm of advocates representing the late Appellant was Kiplenge, Ogola & Mugambi which later split up into three separate firms and it became difficult to follow up on which firm was handling the matter as none of the law firms shared any information with her.

5. She deposes that her failure to prosecute the appeal was occasioned by confusion on which advocate took over the conduct of the matter and lack of knowledge on the progress of the matter.

6. She states that after several unsuccessful visits to the court registry, she only became aware of the dismissal when her son Wycliff Torongei managed to trace the court file and peruse it in September 2022 only to discover that it had been dismissed for want of prosecution on 19th December,2018.

7. She asserts that the delay in pursuing the appeal was not intentional and respondents will not be prejudiced since the matter is yet to be heard on merits.

8. In opposing the Application, the 1st respondent filed a Replying affidavit and grounds of opposition dated 17th April, 2023 and 2nd May,2023 respectively. The grounds of opposition are: -

    i. That the appeal abated 15 years ago following the death of the Appellant and it would occasion great injustice to revive such an appeal.

    ii. That the abated Appeal suffered a second death when it was dismissed on 10th December,2018 and should be left in the legal grave that it was buried as to revive it would cause untold miseries to other parties.

    iii. That litigation must come to an end.

    iv. That no reasonable excuse provided under the Law has been given for the prolonged delay in moving the court for substitution of the Appellant and or reinstatement of the dismissal appeal.

    V. That it is the responsibility of a Party to follow up on the status of their case and cannot be heard to blame his or her advocate.

    VI. That the delay in this matter is inexcusable.

    VII. That the Appeal has been in court for 23 years and it would be highly prejudicial to revive it.

9. In its replying affidavit sworn by its chairman one Joseph Sang, he avers that the appeal herein was filed on 24th August,2000 following a judgement delivered on 27th July,2000 and that the Appellant before passing away on 14th February,2007 had not fixed and was not willing to fix the matter for hearing.

10. He asserts that the applicant is being investigated for bribery claims over a number of suit claims some filed by her over the land properties she claimed to have been given to the deceased by the 1st respondent herein that is in Nakuru Chief Magistrate Court ELC No. 51,52,53,54 and 55 of 2020 *Emily Mutai and two others v Alexander Chepgoimet and others* and also in Nakuru ELC Case no. E210 of 2021 *Emily Cherono v Alexander Chepgoimet and others*.

11. He asserts that one of other suit has been filed by Sitienei where she has been accused of illegally and maliciously transferring title to herself and her two sons as was published in the Standard (Newspaper) dated 11th February, 2023 and believes that this application may be a backdoor attempt to justify or validate some illegal conduct.

12. It is his further averment that many parties who dealt with this matter have since died e.g. Mungai Mbugua Advocate, Wilson Rotich Advocate, Juma Kiplenge Advocate, Hon Stella Muketi, The Appellant, Bernard K. Bargurei ,the 1st secretary to the board and Mr. Chelule Advocate.

13. He further avers that others like Methusellah Orina Masese relocated to America more than two decades ago.

14. He believes that the application is grossly incompetent, an abuse of the court process and has no merit and should thus be dismissed with costs.

15. The 2nd respondent despite being duly served with the application did not file any response.

16. The application was argued through written submissions.

**Applicant's Submissions**

17. The applicant submitted that the delay in filing the application to substitute the appellant was not occasioned through any fault on her part but on the part of Appellant's advocates which fault should not be visited upon her. To bolster her case, she cited the case of *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR where the court stated that;

> " A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (*Smith v Middleton* [1972] SC 30) 8. The respondent could have been compensated by costs for the delay occasioned by his advocate's dilatoriness and the appellant should not have been denied a hearing because of his advocate's mistake even if it amounted to negligence, in the circumstances of this case. (*Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48,51 and Hancox J (as he then was) in *Gurcharan Singh s/o Kesar Singh v Khudadad Khan t/a Khudadad Construction Company* Nairobi HCCC 1547 of 1969). 9. That the dispute between the parties was not a trivial one, that a defence had been filed in time, that the respondent could have been compensated with costs and that the appellant should not have been denied the hearing because of the mistake of his advocate, were all matters which the magistrate failed to take into consideration in exercising his discretion and this entitled the judge to interfere with the decision, which he didn't..."

18. The applicant thus urged the court to allow the Application.

**1st Respondent's Submissions**

19. On whether the appeal should be reinstated, the applicant submitted that it is trite law that the decision on whether to reinstate a suit for trial is matter of judicial discretion and it depends on the facts of each case. Regarding the principles that should guide the court when dealing with such an application, the 1st respondent stated that the same was laid out in the case of *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others* [2021] eKLR where the court quoted the case of *Ivita v Kyumbu* [1984] KLR 441, where Chesoni J stated them to be; whether the delay is prolonged and inexcusable, the reasons for delay and if justice can still be done despite the delay.

20. On whether the delay is long and excusable, the 1st respondent submitted that the appellant herein even before his death demonstrated indolence and lack of interest in pursuing the appeal as seven years after the filing of the appeal, he had not prosecuted the same until the time of his death. The court was referred to the case of *Salim Said & 2 others v Jedidah Wangui Gachie & another (legal administrator of the Estate of the Late Stephen Wangui Gachie)* [2021] eKLR where the court stated

that "the Appellants' behaviour from the time of filing the appeal demonstrates indolence and a lack of interest in pursuing their appeal therefore sleeping on their right to appeal. As it was rightly stated in *Simon Wachira Nyaga v Patricia Wamwirwa* (2018) eKLR that;

> 'Equity helps the vigilant but not the indolent. The law encourages a speedy resolution for every dispute. A court of equity has always refused its aid to stale demands, where a party has slept on his right and acquiesced for a great length of time. The Appellant slept on his rights even after being offered a warning by the Court.'

21. The respondent thus urged this court not to aid the indolent to awaken an already dead suit, instead the respondents should be allowed to enjoy its fruits and litigation to be brought to an end.

22. The respondent also cited the case of *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR where the court observed *inter alia* that;

> "In determining whether the delay is inordinate the court should look at the Appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed."

Thus it was submitted that filing of the the instant application 4 years after the appeal had been dismissed is a demonstration of unwillingness to prosecute the appeal by the appellants. According to the 1st respondent, this application has been filed after prolonged delay with no reasonable excuse for the long delay.

23. The respondent also argued that the appeal had abated 15 years ago when the appellant passed away and the same would cause injustice if revived. He cited the case of *Musha Chengo Kenga & another v Lenox Kahindi Fakuro (On Behalf of the Fakuro Randu)* [2019] eKLR for the proposition that pursuant to the provisions of Order 24 rule 3 (2) of the *Civil Procedure Rules* abatement is by operation of the law unless substitution of the plaintiff is made within one year of the plaintiff's death and thus there is no requirement that a court should make a declaration to that effect.

24. The respondent then submitted that the matter having abated by operation of law suffered its second death when it was dismissed on 10th December 2018 and should not be revived as the same would cause miseries to the parties involved.

25. With respect to the reasons for delay, the respondent submitted that the applicant's blame on the Appellant's advocates cannot stand. In buttressing this position reliance was placed on the case of *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No. 397 of 2002 where Kimaru, J expressed himself *inter alia* as follows:

> "It is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case"

The respondent also the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2020] eKLR for the proposition that plain indolence and dilatoriness is inexcusable and that sheer inaction by counsel does not constitute an excusable mistake.

26. The respondent also submitted that the status quo cannot be guaranteed due to lapse of time as important parties to the matter are deceased and as such important memories/evidences that would have aided the case have been lost.

27. The respondent thus urged this court to dismiss the Application with costs to him.

**Analysis & Determination**

28. The only issue that arises for determination is whether the Appeal should be reinstated for hearing on merit.

29. 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.

30. 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.)

31. Gikonyo J in the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR stated the principles governing reinstatement of suit as follows:

> "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."

32. In the case of *Philip Chemowolo &another v Augustine Kubende*, [1982-88] 1 KAR 103 the court observed as follows that;

> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.

33. The principles applicable and governing the exercise of discretion in reinstating a suit were also espoused in the case of *Ivita v Kyumba* (*supra*) where the Court stated thus:

> "The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is to both 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 favor 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 discussed, but it will be ordered that it be set down for hearing at the earliest available time."

34. With the above principles in mind, I will now proceed to analyse the merits of the instant application.

35. The record shows that the lower court judgement was entered against the Appellant on 27th July,2000 wherein he was ordered to refund a sum of Ksh. 125,000/= to the 2nd respondent being the purchase price for plot No. Block G 98/1315 that he had sold without capacity, to the said respondent.

36. The appellant was dissatisfied with that judgement and he lodged an appeal before this court vide a memorandum of Appeal dated 24th August, 2000 and filed on the same date. Thereafter, the Appellant did not set down the Appeal for hearing until his time of death on 14th February,2007.

37. After the deceased's demise, the Applicant filed an application dated 26th October,2007 seeking to be substituted with the Appellant herein. That application was allowed by parties consent which was duly filed on 14th May,2008. The consent however was not adopted as an order of the court. From there, the Applicant herein did not take any further steps in prosecuting the Appeal and on 29th October,2018, the court duly issued a notice to show cause why the appeal should not be dismissed under Order 42 Rule 35(2) of the *Civil Procedure Rules* to parties' respective counsel. When the matter came up for hearing on 23rd October,2018 no party was present and the court proceeded to dismiss the Appeal for want of prosecution.

38. The Applicant avers that she was unaware that the appeal was dismissed and attributes the delay in prosecuting the same to confusion caused by spilt of the firm of Kiplenge, Ogola & Mugambi that was representing the deceased. She contends that after the said split it was not clear which advocate took over the conduct of this matter as none of them shared any information with her.

39. Kimaru J in *Savings and Loans Limited v Susan Wanjiru Muritu* (*supra*) expressed himself as follows:

> "Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

40. From the above precedent, it clear that it is not enough for a party to simply blame the advocates but must show tangible steps taken by him/her in following up his/her matter. It behooved the applicant herein to show the efforts she made to ensure that this matter proceeded in court. For the court to exercise its discretion in favor of the Applicant, she must show that she is a diligent litigant who did her best but was failed by the Appellant's former Advocates. The Applicant has not shown akin to the above.

41. The Applicant did not even explain why she took no step to set down the appeal for hearing after the consent substituting her with the deceased was filed on 14th May,2008. The Advocates in question might have failed her but what is lacking in her narrative is her own input towards expeditious conclusion of the Appeal.

42. I therefore find the reasons advanced unconvincing and hold that there has been an inordinate delay in prosecuting the Appeal herein.

43. The 1st Respondent contends that revival of the instant appeal will be prejudicial to it as it has lost important parties to the matter and as such lost important memories/evidences that would have aided the case. The respondent listed the deceased people who have dealt with this matter. However, there was no evidence whether the said people were its witnesses and no death certificates were also annexed in support of its averment.

44. Be that as it may, litigation must come to an end and even if this court was to exercise its discretion and grant the orders sought, there is no appeal to be determined as the same abated one year after the death of the Appellant.

45. In the case of *Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through the Attorney General) & 5 Others* (2015) eKLR, the Court of Appeal explained the provisions of Order 24 of the *Civil Procedure* as follows:

> " There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.
>
> Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.
>
> Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff."

46. The deceased herein passed away on 14th February,2007 and the consent to substitute him filed on 14th May,2008 was never adopted as an order of the court. It is clear therefore the deceased Appellant was not substituted within a year and as such this suit abated.

47. The upshot, in light of the foregoing, is that the applicant has not convinced this court that her application has merit. I therefore proceed to dismiss it.

48. The 1st respondent has been successful herein and I award it costs of this application.

49. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF OCTOBER, 2023.**

**H. M. NYAGA**

**JUDGE**

**In the presence of;**

C/A Jeniffer

Ms Mungai for Orege – Applicant

Mr. Kibuei for Respondent