



Gicheru & another (Suing as the Administrators of the Estate of Henry Gicheru Mwarua) v Kimpiatu & another (Civil Case 351 of 2015) [2023] KEHC 26826 (KLR) (Civ) (22 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26826 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 351 OF 2015**

**AN ONGERI, J
DECEMBER 22, 2023**

BETWEEN

**SARAH NJERI GICHERU 1ST PLAINTIFF
ESTHER WAMBUI MWAURA 2ND PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF HENRY GICHERU
MWARUA**

AND

**DR. PATRICK KIMPIATU 1ST DEFENDANT
PCEA KIKUYU HOSPITAL 2ND DEFENDANT**

RULING

1. The application coming up for consideration is the one dated 22/9/2023 brought under Order 12 Rule 7 and Order 50 rule 6 of the *Civil Procedure Rules*, Article 159 of the *Constitution* of Kenya, Section 1A, 1B and 3A of the *Civil Procedure Act* 2010 and all other enabling provisions of the law seeking the following orders;
 - i. That this honourable court do set aside and/or vary the orders issued on 14th October 2022.
 - ii. That the suit herein be re-instated for hearing on merit.
 - iii. That the costs of this application be in the cause.
2. The application is based on the following grounds;



- i. That during the last scheduled hearing dates on 22nd November 2018 and 27th April 2021 the plaintiffs were physically present in court with their witnesses ready to proceed with the hearing.
 - ii. That since the last court attendance, the plaintiffs have been diligent and keen to prosecute the suit and severally inquired from their previous counsel on record whether fresh dates have been issued as demonstrated in the supporting affidavit attached hereto.
 - iii. That the plaintiffs were never notified by their counsel that the suit was listed for notice to show cause on 14th October 2022 and were not aware of the orders issued on said date until very recently when they got frustrated by the lack of communication and decided to go to court registry and peruse the court file.
 - iv. That upon perusal of the court file and noting that this suit was dismissed for want of prosecution the plaintiffs immediately tried to establish the circumstances that led to the dismissal from their previous counsel on record and no satisfactory explanation was given.
 - v. That the plaintiffs were never informed nor notified that counsel had filed an application dated 25th April 2023 seeking to re-instate the suit consequently the application which is yet to be heard and determined should be withdrawn.
 - vi. That from the foregoing explanation, it is evident that the delay in bringing the current application was not deliberate but inadvertent due to non-disclosure of pertinent and material facts to the plaintiffs by their previous advocates on record.
 - vii. That the plaintiffs being dependants of the deceased have a good claim and have always been very keen to prosecute the suit. The mistake by counsel should not be visited upon the plaintiff.
 - viii. That unless the orders sought herein are granted, the plaintiffs will be realty prejudiced and stand to be condemned unheard and suffer loss.
 - ix. That it would be fair and in the interest of justice that this suit be heard and determined on merit.
3. The application is supported by the affidavit of Sarah Njeri Gicheru the co-administrator to Esther Wambui who is also a co-plaintiff in this suit.
 4. The parties filed written submissions in the application which I have duly considered.
 5. The plaintiff/applicant is seeking reinstatement of the suit which was dismissed on 14/10/2022 for want of prosecution.
 6. The sole issue for determination is whether this suit should be reinstated for hearing.
 7. This court has a discretion to reinstate the dismissed suit under Order 17 of the *Civil Procedure Rules*, 2010 upon certain conditions.
 8. In the case of *Investment Limited v G4s Security Services Limited* (2015) eKLR the court held as follows;

“This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the *Constitution* of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian



act comparable only to the proverbial “Sword of the Damocles”. But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of the *Constitution* of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff.”

9. The plaintiff has demonstrated that she was not aware of the dismissal and that her Advocate did not inform her that the suit had been dismissed hence the delay in filing this application.
10. It is not in the interest of justice to punish the plaintiff for the mistakes or omissions of her Advocate.
11. In the case of *Phillip Chemwolo & another v Augustine Kubede* [1982-88] KLR 103 at 1040 Apaloo J/A (as he then was) stated as follows;

“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”
12. The plaintiff/Applicant deserves to be heard on merit.
13. In the case of *Martha Wangari Karua v IEBC* Nyeri Civil Appeal No 1 of 2017 the Court of Appeal held as follows;

“The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”
14. I reinstate the suit on the following conditions;
 - i. That the plaintiff pays the defendant thrown away costs of Kshs 10,000 before the suit is heard.
 - ii. That the suit be fully prosecuted within 90 days of this date failure to which the suit will stand dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF DECEMBER, 2023.

A. N. ONGERI

JUDGE

