



Passaris v Miguna & 2 others; Independent Electoral & Boundaries Commission & 3 others (Interested Parties) (Civil Case 310 of 2016) [2023] KEHC 26508 (KLR) (Civ) (15 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26508 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 310 OF 2016
AN ONGERI, J
DECEMBER 15, 2023**

BETWEEN

ESTHER PASSARIS PLAINTIFF

AND

MIGUNA MIGUNA 1ST DEFENDANT

JEFF KOINAGE 2ND DEFENDANT

THE STANDARD MEDIA GROUP LTD 3RD DEFENDANT

AND

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION INTERESTED PARTY

LAW SOCIETY OF KENYA INTERESTED PARTY

THE ADVOCATES COMPLAINTS COMMISSION INTERESTED PARTY

THE MEDIA COUNCIL INTERESTED PARTY

RULING

1. The application dated 24/5/2023 is brought under Article 50(1), 159(2) (b) (d) of the Constitution, Sections 1A, 1B and 3A of the Civil Procure Act and Order 51 Rules 1 & 3 of the Civil Procedure Rules seeking restatement of the suit which was dismissed on 21/5/2021 for want of prosecution.
2. The application is based on the grounds on the face of it as follows;



- i. The applicant's counsel appeared before the honourable court on 21st May, 2021 for a notice to show cause.
 - ii. Directions/orders were issued that the applicant prosecute the matter within 120 days or otherwise the matter shall stand dismissed.
 - iii. The applicant's counsel following directives of the court sought for a hearing date before lapse of the 120 days.
 - iv. Unfortunately, and due to unforeseeable circumstances, a date for hearing could not be secured before the lapse of the said 120 days.
 - v. It is not the deliberate doing of the applicant whether by evasion or otherwise to obstruct or delay the cause of justice and the same is excusable seeing that the court's diary could not, regrettably, accommodate an earlier date for hearing.
 - vi. It is for the above reasons that the honourable court is moved by this application to set aside/ vary orders issued by the honourable court on the 21st May 2021 and allow the applicant prosecute the matter to its finality.
 - vii. The respondents will not suffer any prejudice should the application succeed and such favourable orders sought by the applicant are made.
 - viii. The honourable court has discretion as granted under the law, to allow this application.
3. The respondent opposed the application vide replying affidavit of Miguna Miguna dated 27/6/2023. He deponed that the application is an abuse of sections 1A, 1B and 3A of the Civil Procedure Act as the matter has not been prosecuted for many years without justifiable reasons. The plaintiff had abandoned the suit and what is before the court is an afterthought which should not be tolerated. The Plaintiff is a citizen of the Republic of Kenya and has been living in Kenya together with her advocate and as such, there is no reasonable basis whatsoever why she had not prosecuted her matter since 2016.
 4. He deponed that his rights under Article 50 of the Constitution will be violated if the Plaintiff's Application is allowed as the evidence and witnesses may not be available due to the inordinate delay by the Plaintiff in having this matter heard and determined expeditiously or in a timely manner, on its merits.
 5. The parties filed written submissions as follows; the plaintiff submitted that the primary duty of the Court is to do justice and that duty cannot be fettered by procedural technicalities. The Constitution under Article 159 on judicial authority has urged Courts to do justice without undue regard to procedural technicalities. Article 159(2)(d) states that "Justice shall be administered without undue regard to procedural technicalities. "
 6. The Court issued directives that the matter be prosecuted before lapse of 120 days or the same be dismissed for want of prosecution. However, the 120 days lapsed before a hearing date could be secured something that was beyond the plaintiff's control. On 17/6/2021 vide a virtual date fixing session, the matter herein was fixed for hearing on the 18/11/2021, a date which fell past the 120 days' timeline given by Court. The Court's registry communicated that an earlier date could not be secured as the Court's diary was full and that the only dates available for hearing were from November.
 7. The plaintiff submitted that she is ready and willing to prosecute the matter at all times but the constraint and limitation caused by the courts diary could not allow her to secure an earlier hearing date. Section 1A and 1B of the Civil Procedure Act ensures that the ends of any decision or



interpretation a Court may make should have regard to the overriding objectives without regard to any structures imposed by procedural technicalities.

8. The plaintiff submitted that the respondent has not in any way demonstrated to the court how the present application is an abuse of court process. the respondent has not demonstrated how the delay was inordinate and how they would suffer prejudice if the orders sought are granted.
9. The 1st defendant submitted that it was noted by the court that the plaintiff was not keen in prosecuting her case after filing the same on 25/9/2016. The plaintiff failed severally to prosecute her case and the court on 21/5/2021 gave her 120 days to prosecute failure to which the matter would be dismissed. The plaintiff failed to do so and therefore the application herein is an abuse of court process and the same should be dismissed.
10. The 1st defendant submitted further that the matter was dismissed in 2021 and it took the plaintiff 3 years to file the application herein seeking reinstatement of the suit without any cogent reason or lawful excuse justifying her indolence. It was the 1st defendant's argument that equity aids the vigilant and that the plaintiff failed to prosecute her case.
11. The sole issue for determination is whether the suit should be reinstated for hearing.
12. The court has a discretion to reinstate a suit upon considering certain factors.
13. The factors considered for the purpose of reinstatement of suits are numerous, and were addressed in *Ivita v Kyumbu* [1984] KLR 441 (Chesoni J), where the court stated:

“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 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 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.”

14. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilba Ngonyo Isaac v Kembu Farm Ltd & another & another* [2018] eKLR ((JN. Mulwa J), which echoed the decision of the court in *Shah v Mbogo & Another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

15. I find that the respondents cannot suffer prejudice that cannot be compensated by an award of damages.
16. I allow the application dated 24/5/2023 on the following grounds;



- i. That this suit be prosecuted within 90 days of this date and failure to prosecute the same within that period the suit to stand automatically dismissed with costs to the defendants.
- ii. That the applicants pays the respondents thrown away costs of kshs.20,000 before the suit is set down for hearing.
- iii. That the costs of the application to abide the cause.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
15TH DAY OF DECEMBER, 2023.**

A. N. ONGERI

JUDGE

