Muita v Wanjiku ((Sued Capacity as Legal Representative of the Estate of John Chege Muita (Deceased) (Civil Case 231 of 2001) [2022] KEHC 3213 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 3213 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE 231 OF 2001

TM MATHEKA, J

MAY 26, 2022

BETWEEN

DAVID MUCHEMI MUITA ..... PLAINTIFF

AND

JANE WANJIKU ..... RESPONDENT

(SUED CAPACITY AS LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN CHEGE MUITA (DECEASED

RULING

1. On 6th July 2001 David Muchemi Muita filed the Plaint in matter suing Jane Wanjiku Chege as the Legal Representative of the estate of John Chege Muita the late brother of the plaintiff. He also sued the Land Registrar Nakuru as the 2nd defendant.

2. At paragraph 4 of that Plaint he averred that on or about the 31st December 1986 he purchased the then plot number 4 Matuiku Elburgon Township from one Benson K. Wathitai and he paid full purchase thereof. That on or about September 1991 the said late brother John Chege Muita fraudulently cause the said plot to be registered in his name and title number Elburgon/Elburgon/3/54 was issued to him. His prayers were inter alia, an order to recall and revoke or cancel the said title deed and re-issue one in his name.

3. On 17th May 2003, the matter was before L. Waithaka J for parties to show cause why the matter could not be dismissed for want of prosecution. It was dismissed for want of prosecution. The record states:

> " Notice to show cause sent to both parties. No response. Suit is dismissed under Order 17 rule 2 of the *Civil Procedure Rules 2010.*"

4. The record shows that by a Plaint dated 5th September 2019 the plaintiff filed Molo Chief Magistrate's Environment and Land Court Number 69 of 2019. The parties are himself, David Muchemi Muita, Jane Wanjiku Chege and Ngatia Kariithi as the defendants.

5. At paragraph 6 of that Plaint he makes the exact same claim that he purchased the then plot number 4 Matuiku at Elburgon Township from one Benson Wathitai and paid the full purchase price thereof. That about September 1991 the late John Chege Muita, his brother and husband to 1st defendant fraudulently caused the said plot number 4 Matuiku to be registered in his name and title number Elburgon/Elburgon Block 3/54 issued to him.

6. The prayers sought in this suit were inter alia, a declaration that the parcel Elburgon/Elburgon 3/54 belongs to him.

7. On 2nd December 2021 he filed a Notice of Motion dated 25th November 2021 brought under Order 51 rule 1 and 2 of the *Civil Procedure Rules*, Section 3A and 18(1) of the *Civil Procedure Act* and all enabling provisions of the law seeking orders inter alia:

   That the orders of 17th May 2013 be set aside and the plaintiff unconditionally be allowed to prosecute; that upon allowing this prayer the suit be transferred to Environment and Land Court for hearing and determination.

8. The application is supported by his Affidavit sworn on 25th November 2021 and the grounds set out on the face of the application. Mainly that his advocate never informed him about the Notice to Show Cause; he was not aware of the existence of the Notice to Show Cause coming for hearing on 17th May 2013, the subject matter of the suit is land, whose jurisdiction is the Environment and Land Court; that the defendants would not be prejudiced by the orders if granted, and he is still interested in pursuing the suit.

9. The application is opposed vide the Affidavit of Jane Wanjiku Chege sworn on 20th April 2022. She brings to the attention of the court the fact of the existence of Molo Chief Magistrate's Environment and Land Court 69 of 2019, a fact the applicant not disclose, in his application, she also disclosed that the applicant was well aware of the dismissal of the suit as indicated in his Replying Affidavit sworn on 4th February 2021 in Molo Chief Magistrate's Environment and Land Court 69 of 2019 are different from those in Nakuru High Court Civil Case Number 231 of 2001.

10. That the applicant is coming eight (8) years after the fact with no explanation, and has even filed another suit.

11. Parties chose to rely on their Affidavits.

12. I have carefully considered the Affidavit evidence the annexures therewith. The only issue for determination is whether the orders made on 17th May, 2013 ought to be set aside and the Plaintiff's suit be reinstated.

13. The first thing to note is that the suit was dismissed under Order 17 rule 2, whereby it was clear that since 26th October 2009, the neither the plaintiff nor the defendant had t taken any action in the suit. After a Notice to Show Cause was issued to both of them, the court proceeded to dismiss the suit.

14. Order 17 rule 2 (1) gives the court the discretion to dismiss the suit.

15. The record will show that the applicant has not taken any action in his suit since 2009, that is thirteen (13) years from the last activity in the file; up to the time of the dismissal it was three (3) years and from the date of dismissal, eight (8) years. These are all prolonged periods of time that the applicant had the

opportunity to do something, including to "kushtua wakili" i.e disturb his advocate to do something. He did nothing.

16. He cannot be heard to blame his advocate for not informing him of the Notice to Show Cause, but all this time, when he was out there with his matter dying in court what did he expect? It was his case, and it was his responsibility to follow it up. Cases are not filed for their sake, that is why the rules for dismissal of cases which have been in the system for certain periods of time, if the owners of those cases do not have satisfactorily reasons for failure to prosecute. To this end I cannot agree more with Justice Kimaru in *Savings and Loans Limited vs Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No. 397 of 2002 where he said;

> " Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates 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... it would be a travesty of justice for the Court to exercise its discretion in favor of such a litigant."

17. And in *Tana & Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR the court said;

> " From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side...Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings."

18. It is also trite that courts exist to do justice, so that with sufficient reasons the application could be tenable. However a look at the background to this application shows that the applicant was well aware of the dismissal of this case, that runs clearly from his own Affidavit, hence he was being less than honest with the truth when he says he was not aware of the status of his case.

19. In addition, he has filed a similar suit to this one in the Chief Magistrate's Court at Molo Law Courts, seeking the same orders over the same property. How can we expect the court to exercise its discretion in his favour when he does not approach the court with the truth? If this court was to allow his application, that would mean that there would be two cases running at the same time both in the Environment and Land Court and in the Molo Chief Magistrate's Environment and Land Court. That is not tenable, as it would fly in the face of Sections 1A, 1B, 3A of the *Civil Procedure Act*.

20. It cannot be true that the applicant has not lost interest in the case, the last action by the applicant was before October 2009, 13 years ago.

21. The applicant has not been forthright with this court, he has not given the court any satisfactory reason for not following up on this case in thirteen (13) years and hence his application is tenable.

22. The application is without merit and is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF MAY 2022.

MUMBUA T. MATHEKA

JUDGE

In the presence of;

CA Edna

Nancy Njoroge & Co. Advocates for the Respondent

David Muchemi Muita (Plaintiff)