



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO.207 OF 2005

NYAMBURA GICHANGO..... PLAINTIFF/APPLICANT

VERSUS

GILBERT GATHUNGU KAMANDE.....1ST DEFENDANT/RESPONDENT

KAKUZI LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant filed this application dated 29th October 2020 under Article 159 (1) (d) of the Constitution, Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules Act seeking the following orders:

i. THAT the order of Honourable Justice Mabeya made on the 26th of February 2015 dismissing the suit filed herein on 24th February 2005 together with other consequential orders be reviewed, varied and/or set aside.

ii. THAT the suit filed herein on 24th February 2005 be reinstated for hearing.

iii. THAT the costs of this application be provided for.

2. The same is supported by the grounds on its face plus the applicant's supporting affidavit, whose summary is that the applicant is aware that the suit was dismissed on 26th February 2015. That the suit was dismissed owing to the negligence of his then advocates M/s Mwangi Kinuthia and company advocates. She depones that the delay to act after learning of the dismissal is not inordinate. She therefore prays for review of the dismissal order, and an order sustaining the suit be made.

3. A replying affidavit sworn on 31st May 2021 by M/s Njeri Kariuki the defendants'/respondents' advocate was filed. She depones that the suit after lying dormant since 24th February 2005 when it was filed was listed for hearing on 26th February 2015 for a notice to show cause. The suit was dismissed on the same date following the failure by the plaintiff's counsel to attend court.

4. She avers that the delay in taking action after the dismissal is inordinate and Article 159 of the Constitution can't help the plaintiff.

5. The application was argued through written submissions. In his submissions dated 7th June 2021 by Kuyoh and company advocates for the plaintiff/applicant gave the facts of the case, saying the plaintiff/applicant only learnt of the dismissal when the current counsel inquired about the status of the suit.

6. Counsel in arguing the application cited Order 12 Rule 7 of the Civil Procedure Rules which provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

7. He submitted that the principles for reinstatement of suits are set out in the case of **John Nahashon Mwangi Vs Kenya Finance Bank (in Liquidation) {2015} eKLR** which held 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 acts 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."

8. He further submits that the delay in prosecuting the suit is not inexcusable and a re-examination of the circumstances reveals that no grave injustice to the defendant/respondents has resulted. That the defendants have not shown that they have suffered any additional prejudice resulting in an impending fair trial, aggravated costs or specific hardships. Counsel contends that it's not enough just to make a general assertion that one will suffer prejudice. He relied on Articles 50 (1) and 159 of the Constitution to support this argument.

9. On the other hand he reckons that it is the plaintiff/applicant who will suffer prejudice if the suit is dismissed. He urges the court to consider among others the nature of the case, importance of the claim or subject matter, legal capacity of parties, rights of the parties in the suit etc. Counsel submits that the cause of action is quite substantial and raises serious issues of breach of negligence among others. He therefore urges the court to give the parties an opportunity to be heard.

10. M/s Njeri Kariuki filed written submissions dated 21st June 2021. After a brief background, counsel submitted that the issue is whether the plaintiff has met the threshold for reinstating the suit after dismissal on 26th February, 2015. She submits that the court in exercise of discretion should consider whether there shall be any prejudice to the parties if the suit is reinstated.

11. Counsel has submitted that the plaintiff/applicant has not explained why it took her five (5) years after the dismissal to file this application. She argues that the unexplained delay is inordinate and inexcusable and that the plaintiff should not just blame her advocate because she ought to have made a follow up. She contends that Article 159 applies to all parties who are litigants and not just the plaintiff.

12. She placed reliance on the case of **Multipurpose Cooperative Society Ltd vs Lucas Owiti and 3 others {2019} eKLR** where the court, in reliance on the case of **Allan vs MCA 1 Pine and sons (1968) I ALL E.R 543** stated:

"Whereas every case must depend on its own facts but in this particular case the following salient features remain unrebutted.

a) Inordinate delay

b) That this inordinate delay is inexcusable

c) There are no plausible reasons explaining the delay."

13. Counsel submits that the plaintiff has failed the test set out in the above case and that hers is a case of indolence and nothing else. She contends that the defendants will suffer prejudice owing to the period this matter has dragged in court since 2005 when the suit was filed. She raised the issue of unavailable witnesses due to this long period of waiting. She therefore urged the court to disallow the application.

Analysis and determination

14. I have considered the application, affidavits, both submissions and the cited authorities, and the issue I find falling for determination is whether the plaintiff/applicant has met the threshold for setting aside the dismissal order of 26th February 2015 and reinstating the suit.

15. Order 12 Rule 7 of the Civil Procedure Rules gives this court discretion to reinstate a suit that has been dismissed, on such terms as are just. The court has to exercise this discretion judiciously. The undisputed facts are that this suit was filed by the plaintiff/applicant on 24th February 2005 by the firm of Mwangi Kinuthia and company advocates. A joint defence was filed by the defendant/respondents on 4th August 2005. A reply by the plaintiff/applicant was filed on 15th August 2005. Joint agreed issues dated 5th May 2006 were filed on an unclear date in May 2006.

16. A notice of motion dated 30th June 2007 was filed by the defendant/respondents on 9th July 2007. It sought to have the plaintiff's suit dismissed for want of prosecution. The plaintiff/applicant filed a replying affidavit through Mr. S.M.W. Kinuthia opposing the same.

17. Thereafter another notice of motion dated 31st December 2006 was filed by the plaintiff/applicant on 21st May 2008 seeking for witness summons to issue to some three (3) witnesses two (2) of whom were police officers. This application was allowed by Justice R. Nambuye (as she then was) on 30th May 2008.

18. On 23rd June 2010 counsel for the defendants wrote to the deputy registrar explaining how she had been severally served by the plaintiff with hearing notices but the case was not listed for hearing. Next is the application dated 26th May 2010 by Mwingi Kinuthia and company advocates seeking to cease acting for the plaintiff/applicant who did not come to court with her son who was her witness. Furthermore, that she was unable to pay the legal fees.

19. The record shows that on 10th November 2011 the firm of M/s Mwikigi Kinuthia and company advocates was allowed to cease acting for

the plaintiff/applicant. Before issuing the order allowing counsel to cease acting the court was satisfied that the plaintiff had been served with the said application and she never opposed it nor attended court. Nothing on record shows what happened to the defendants'/respondents' application dated 9th July 2007.

20. There was no action taken in this file from the 10th November 2011 until the dismissal of the suit on 26th February 2015. From the time of filing suit (24th February 2005) to the date of dismissal (26th February 2015) is exactly ten (10) years + 2 days.

21. After the dismissal of the suit the application seeking reinstatement dated 29th October 2020 was filed. This is exactly after five (5) years + eight (8) months. In total it has taken the plaintiff/applicant fifteen (15) years + eight (8) months to follow up on a case she filed in court. Blame has been placed on the former advocate which I find to be uncalled for. One of the reasons why the former advocates sought leave to cease acting was because of failure by the plaintiff and her witnesses to attend court and her failure to pay legal fees. This had nothing to do with the said advocate's negligence.

22. In the case of **Jim Rodgers Gitonga Njeru v AL-Husain Motors Ltd and 2 others {2018} eKLR** cited by the plaintiff/applicant the suit was dismissed after being idle for about six (6) years. An application seeking reinstatement was filed after three (3) years and was allowed.

23. The next case cited by the plaintiff/applicant is **Gold Lida Ltd v NIC Bank Ltd and 2 others {2018} eKLR**. In the said case the suit was dismissed for failure to comply with an order directing it to serve summons within thirty (30) days. The application seeking reinstatement was filed soon after the expiry of the said period. Also see **Joseph Kinyua v G.O Ombachi {2019} eKLR**.

24. In all the three cited cases the delay was not inordinate and the delay was explained to the satisfaction of the court. In the present case the explanation given in the supporting affidavit at paragraphs 4 and 5 is that the suit was dismissed for failure to appear by his former advocate. That is far from the truth. The former advocates had ceased acting with the plaintiff's knowledge four (4) years before the dismissal of the suit.

25. The plaint shows that the 1st defendant was an employee of the 2nd defendant and the accident occurred in the course of duty on 11th March 2002 which is 19 years ago. To assume that the 1st defendant and his witnesses can still be available/traceable would be too high an imagination. Guided by the case of **John Nahashon Mwangi v Kenya Finance Bank (in liquidation) 2015 eKLR**, I have considered the prejudice to be caused to each party and I find no reasonable grounds to reinstate this suit.

26. For the reasons stated I find no merit in the application dated 29th October 2020 which I dismiss with costs.

DELIVERED ONLINE, SIGNED AND DATED THIS 30TH DAY OF JULY, 2021 NAIROBI.

H. I. ONG'UDI

JUDGE