



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL SUIT NO. 20 OF 2018**

**CATHERINE KIGASIA KIVAL.....PLAINTIFF**

**VERSUS**

**ERNEST OGESI KIVAL.....1<sup>ST</sup> DEFENDANT**

**PAMELA NJOKI KARANJA.....2<sup>ND</sup> DEFENDANT**

**KAVUCA HOLDINGS LIMITED.....3<sup>RD</sup> DEFENDANT**

**KCB BANK KENYA LIMITED.....4<sup>TH</sup> DEFENDANT**

**BENJAMIN KISOLI SILA**

**T/A LEGACY AUCTIONEERING SERVICES.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. The subject application is the Motion by the plaintiff, dated 12<sup>th</sup> April 2021, seeking reinstatement of the suit, which had been earlier dismissed for want of prosecution, on the 22<sup>nd</sup> day of March, 2021. The only issue for me to determine is whether this suit ought to be reinstated.

2. The constitutional underpinnings on conclusion of matters in a timely manner is contained in Article 159 of the Constitution, which provides as follows:

*“Judicial authority*

*(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.*

*(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

*(a) justice shall be done to all, irrespective of status;*

*(b) justice shall not be delayed;*

*(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*

*(d) justice shall be administered without undue regard to procedural technicalities; and*

*(e) the purpose and principles of this Constitution shall be protected and promoted.*

*(3) Traditional dispute resolution mechanisms shall not be used in a way that—*

*(a) contravenes the Bill of Rights;*

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.”

3. It is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay. Sections 1A and 1B, of the Civil Procedure Act, Cap 21, Laws of Kenya, are relevant, with regard to this and they state as follows:

*“1A. Objective of Act*

*(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*

*(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*

*(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

*1B. Duty of Court*

*(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—*

*(a) the just determination of the proceedings;*

*(b) the efficient disposal of the business of the Court;*

*(c) the efficient use of the available judicial and administrative resources;*

*(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and*

*(e) the use of suitable technology.”*

4. Section 3A of the Civil Procedure Act gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it. Section 3A reads:

*“3A. Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*

5. The factors taken into account or consideration for the purpose of reinstatement of suits are numerous, and were addressed in *Ivita vs. 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.”*

6. *Ivita vs. Kyumbu* [1984] KLR 441 (Chesoni J) was followed in *Jim Rodgers Gitonga Njeru vs. Al-Husnain Motors Limited & 2 others* [2018] eKLR (Muchemi J), where the court said:

*“It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation.”*

7. In *James Mwangi Gathara & another vs. Officer Commanding Station Loitoktok & 2 others* [2018] eKLR (Nyakundi J), the court said:

*“Before I conclude this matter, I need to bring to the attention of the plaintiff the manner in which he is pursuing his rights. In my view the proceedings in this claim seems to be focusing on interlocutory applications without addressing the main dispute which brought the parties to court in the first instance. It is time the plaintiff decides categorically whether he has a claim to be heard on the merits or continuously slumbering only to rise up when he has been stripped of certain rights during the adjudication processes. In*

*my assessment and based on the history of this case the plaintiff is guilty of laches. I think I have said enough on this point.”*

8. 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 *Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another & another* [2018] eKLR ((JN. Mulwa J), which echoed the decision of the court in *Shah vs. 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.”*

9. One of the issues that usually confront the courts with respect to dismissal of suits for delays and the subsequent applications for reinstatement, is the need for expeditious conclusion of suits. In *Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another* [2004] eKLR (Warsame J) where it was held:

*“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”*

10. See also *Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another* [2018] eKLR (JN Mulwa J).

11. I am not entirely convinced by the arguments put forward by the plaintiffs to explain her non-attendance in court as and when required, and generally her failure to have the matter prosecuted since 2018 when it was filed. I will, however, only so as to give her a second chance, allow the application, and reinstate her suit. She shall, however, have to pay throwaway costs of Kshs. 30, 000.00 to the 4<sup>th</sup> defendant, before the suit is fixed for hearing, which shall be done, at any rate, within the next twenty-one days, in default of which the reinstatement order shall lapse. The Deputy Registrar is hereby directed to allocate this matter a date for hearing as a matter of priority. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2021**

**W MUSYOKA**

**JUDGE**