



**Jamii Telecommunications Limited v Kenya Urban Roads Authority & another (Environment & Land Case 910 of 2012) [2023] KEELC 20350 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20350 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 910 OF 2012  
OA ANGOTE, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**JAMII TELECOMMUNICATIONS LIMITED ..... PLAINTIFF**

**AND**

**KENYA URBAN ROADS AUTHORITY ..... 1<sup>ST</sup> DEFENDANT**

**MATTAN CONTRACTORS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before the court for determination is the plaintiff's notice of motion dated september 26, 2022 and brought under section 3A and section 80 of the [Civil Procedure Act](#), Order 45 Rule 1 and Order 51 of the [Civil Procedure Rules](#). The Plaintiff is seeking for orders that:
  - a. The court be pleased to review, rescind, vary and/or set aside the order by Justice Angote on May 25, 2022 dismissing the suit for want of prosecution pursuant to Order 17 of the [Civil Procedure Rules](#) and re-instate the suit to enable the Plaintiff to prosecute it to its logical conclusion.
  - b. Costs of the application be provided for.
2. The application is supported by an affidavit sworn by Tom Onyambu Ogutu, an advocate at the firm that has the conduct of the matter, who deponed that the matter was dismissed by the court on May 25, 2022, the date when the suit was coming up for hearing.
3. The plaintiff's advocate deponed that the plaintiff was unable to proceed with the hearing on that date because the witness was unavailable and that he sought to have the matter taken off the cause list and communicated the same to the Deputy Registrar and the advocates on record for the 1<sup>st</sup> and 2<sup>nd</sup> defendants.



4. The plaintiff further deponed that the advocates for the defendants did not oppose the adjournment; that the 1<sup>st</sup> defendant had served the plaintiff with their documents that morning at 7:25a.m and that his advocate was therefore not sufficiently instructed to proceed with the matter.
5. In view of the foregoing, the plaintiff deponed, it is in the interest of justice that the order dismissing the suit be reviewed/varied and be granted leave to file documents and to prosecute the suit.
6. The 2<sup>nd</sup> defendant filed a replying affidavit dated November 15, 2022 and sworn by its director, Najib Rashid. In asking that the application be dismissed, the 2<sup>nd</sup> defendant stated that the court has no jurisdiction to grant the orders sought as an order of dismissal for want of prosecution can only be appealed rather than reviewed by the court that issued it.
7. It was deponed by the 2<sup>nd</sup> defendant's Director that the plaintiff's allegation that they were not ready to proceed with the hearing after discovering that their witness was unavailable then was without merit because the plaintiff, having served the 2<sup>nd</sup> defendant with a hearing notice a month prior to the hearing date (on April 22, 2022) was supposed to have put its house in order.
8. In conclusion, the 2<sup>nd</sup> defendant Director deposed that the Plaintiff's desire to include additional documents in a suit that was more than ten years old was against the law and prejudicial to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant did not file a replying affidavit. The parties filed submissions and authorities which I have considered.

#### **Analysis and Determination**

9. Based on the foregoing, the following two issues arise for determination:
  - i. Whether the court has jurisdiction to hear the application.
  - ii. Whether the plaintiff's suit should be reinstated.
10. The plaintiff's suit was dismissed on May 25, 2022 for want of prosecution. The plaintiff has applied for a review or setting aside of the order of dismissal. The 2<sup>nd</sup> defendant has argued that the court has no jurisdiction to entertain the application and that the dismissal order should be retained.
11. Order 17 Rule 2 (6) of the [Civil Procedure Rules](#) provides that a party may apply to court after dismissal of a suit under the Order. While the nature of the orders that can be given pursuant to such an application are not listed, this court can invoke its inherent jurisdiction to make such orders as it deems fit.
12. The inherent jurisdiction of the court is provided for as follows in section 3A of the [Civil Procedure Act](#):

“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.”
13. In view of the foregoing, I find that the court has jurisdiction to determine the current application.
14. Having established that the court has powers to determine the current application, the question now turns to whether it should use the said power to reinstate the plaintiff's suit. The crux of the plaintiff's case is that the suit should be reinstated because the circumstances leading to the application for an adjournment were beyond its control.
15. According to the plaintiff, there has been no delay in prosecuting the case and bringing the application and that no prejudice will be occasioned to the defendant by a reinstatement order.



16. In opposing this position, the 2<sup>nd</sup> defendant stated that the grounds for reinstatement have no merit and that it will be prejudiced by the reinstatement and introduction of evidence in a very old case. In the case of *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others* [2021] eKLR the court stated as follows:

“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.”

17. In the current application, I am not convinced that the discretion of the court should be exercised to reinstate the plaintiff's suit. I am not convinced that the Plaintiff has demonstrated inadvertence or excusable mistake or error on its part or its advocate.

18. I say so because the plaintiff had known of the hearing date for more than a month as per the evidence on record. It has not been demonstrated that the unavailability of the witness came to the attention of the plaintiff within that month or on a date so close to the trial that alternative arrangements could not be made. The plaintiff was seeking to delay the suit without a just cause.

19. Considering that this suit is more than ten years old, the delay on the part of the plaintiff is inexcusable and should not be entertained. The plaintiff was tardy in finding an alternative witness and in bringing this application (which was brought four months after dismissal).

20. For those reasons, the application is dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Ms Nyachera for Nyamweya for 2<sup>nd</sup> Defendant

No appearance for Plaintiff

No appearance for Defendant

